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THE LAWYERS REPORTS ANNOTATED.

BOOK LXVII.

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE, WITH FULL ANNOTATION.

BURDETT A. RICH AND HENRY P.
FARNHAM, EDITORS.

ROCHESTER, N. Y.

THE LAWYERS' CO-OPERATIVE PUBLISHING COMPANY.

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LAWYERS' REPORTS

ANNOTATED.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Ulysses S. G. CHERRY

v.

Charles H. SPRAGUE.

(.....Mass.....)

1. The character of an instrument as a promissory note is not destroyed by the addition to the promise of payment of clauses providing for additional interest after maturity, and for payment of attorneys' fees in case suit is necessary to collection.
2. A promissory note payable in the state where the payee receives it through the mail is a contract of that state, and not of the one where the maker resides, and where the instrument was executed.
3. A reviewing court cannot consider cases and statutes for the purpose of determining what is the law of another state by which the contract in suit is alleged to be

governed, where they were not mentioned in the bill of exceptions, and it is apparent that they were not considered by the trial court.

4. In the absence of proof of the law of a sister state the presumption is that the common law is the same as the local law, but not that the statute law of the two states is the same.
5. In the absence of proof as to the law of another state by which a contract is to be enforced, the common law, and not the statute law, of the state where the suit is brought will be applied.
6. A third person placing his name on the back of a promissory note before delivery to the payee is an original promisor or maker, not entitled to demand or notice of nonpayment, and, as to him, no consideration need be proved.

(November 29, 1904.)

NOTE.—How case determined when proper foreign law not proved.

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I. Introduction.

Most of the cases cited in this note could have been appropriately introduced under a more restricted title, such as, *The presumption to be indulged with respect to the law of another state or country*. Such a title would, perhaps, have served the practical purposes of the note; but the more comprehensive title has been adopted, partly because the question as to judicial cognizance of the laws of another state or country is distinct from the question as to the presumption with reference to those laws, but mainly because

cause the doctrine toward which the later decisions tend as to the proper course to be pursued by the court when the proper foreign law is not proved does not rest upon any presumption as to the foreign law, though, as subsequently shown, it is equivalent in its practical operation to the doctrine resting upon the presumption that the law of the foreign jurisdiction is the same as the law of the forum, whether the latter be the common law or the statutory law.

II. Judicial cognizance of foreign law.

a. Specific rules of law of other jurisdiction.

1. Law of foreign country.

The general principles under this head are so well settled that, contrary to the rule usually followed in these notes, the annotator has contented himself with stating them, and citing a few of the many authorities in their support, without attempting to exhaust the authorities upon the subject.

It is well established as a general principle that the courts will not take judicial cognizance of the laws of a foreign country. *Armstrong v. Lear*, 8 Pet. 52, 8 L. ed. 863; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469.

An exception has been made to this principle, however, in case of maritime ordinances of foreign countries.

Thus, Chief Justice Marshall, in *Talbot v. Seeman*, 1 Cranch, 1, 38, 2 L. ed. 15, 27, while conceding the general principle as above stated, held, by way of exception, that judicial notice would be taken of French maritime ordinances

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to enforce payment of a promissory note, which resulted in a verdict in plaintiff's favor. *Overruled.*

The facts are stated in the opinion.

Mr. Charles H. Sprague, in propria persona:

The instrument is not a promissory note. If the instrument contains an "additional substantive agreement," or if the amount to be paid cannot be determined from the instrument itself, it is not a note.

Sloan v. McCarty, 134 Mass. 245; *Towne v. Rice*, 122 Mass. 67; *Moore v. Edwards*, 167 Mass. 75, 44 N. E. 1070.

The court erred in directing a verdict for

the plaintiff on the ground that the defendant was maker of the note.

Moies v. Bird, 11 Mass. 436, 6 Am. Dec. 179.

Messrs. Augustine H. Read, Wilfred J. Gaffney, and Charles A. Mendall, for plaintiff:

The note in question was delivered and the contract made in South Dakota.

Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241; *Hill v. Chase*, 143 Mass. 129, 9 N. E. 30; *Kline v. Baker*, 99 Mass. 253; *Nashua Sav. Bank v. Sayles*, 184 Mass. 520, 100 Am. St. Rep. 573, 69 N. E. 309; *M'Intyre v. Parks*, 3 Met. 207.

Contracts are to be governed by the law of the place of performance, although executed in a place where the law is different.

which had been promulgated as such in the United States.

So, the duty to take notice of maritime rules and regulations originally adopted by British orders in council of June 9, 1863, and by Congress in 1864, has been repeatedly recognized by the United States Supreme Court. See *The Scotia* (*Sears v. The Scotia*) 14 Wall. 170, 20 L. ed. 822; *The Belgenland* (*The Belgenland v. Jensen*) 114 U. S. 356, 370, 29 L. ed. 152, 158, 5 Sup. Ct. Rep. 860; *Richelleu & O. Nav. Co. v. Boston Marine Ins. Co.* 136 U. S. 408, 421, 34 L. ed. 398, 403, 10 Sup. Ct. Rep. 934; and numerous cases in the lower Federal courts.

And it was held in *The New York*, 175 U. S. 187, 44 L. ed. 126, 20 Sup. Ct. Rep. 67, that judicial notice would be taken of the Canadian act of 1886 for the regulation of navigation, which is in all material respects like the act of Congress of 1885.

An exception to the general rule that a foreign law must be proved in the courts of Louisiana is made when that law was once the law of Louisiana. The laws of France, however, must be proved, because, having been abrogated as the prevailing general law of the province many years prior to the acquisition of Louisiana by the United States, and never thereafter adopted as such, it is not judicially known what French laws in particular were retained by Spain. *Pecquet v. Pecquet*, 17 La. Ann. 204. It was assumed in this case that the law of Spain would be noticed without proof.

2. Law of other state.

There are also numberless authorities to the effect that the courts of one state will not, in the absence of an express statute of the forum to that effect, take judicial notice of the laws of another state. In other words, the several states of the Union are, for the purposes of the principle now under consideration, foreign to each other. Among other cases that might be cited to this effect, are the following: *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; *Norman v. Norman*, 121 Cal. 620, 42 L. R. A. 343, 66 Am. St. Rep. 74, 54 Pac. 143; *Brackett v. Norton*, 4 Conn. 517, 10 Am. Rep. 179; *Poik v. Butterfield*, 9 Colo. 325, 12 Pac. 216; *Savannah, F. & W. R. Co. v. Evans* (Ga.) 49 S. E. 308; *Washburn Crosby Co. v. Boston & A. R. Co.* 180 Mass. 252, 62 N. E. 590; *Phelps v. American Sav. & L. Asso.* 121 Mich. 343, 80 N. W. 120; *Myers v. Chicago*, St. 67 L. R. A.

P. M. & O. R. Co. 69 Minn. 476, 65 Am. St. Rep. 579, 72 N. W. 694; *Southern Illinois & M. Bridge Co. v. Stone*, 174 Mo. 1, 63 L. R. A. 301, 73 S. W. 453; *People's Bldg. Loan & Sav. Asso. v. Backus*, 2 Herdman (Neb.) 463, 89 N. W. 315; *Taylor v. Slater*, 21 R. I. 104, 41 Atl. 1001; *Gill v. Everman*, 94 Tex. 209, 59 S. W. 531; *Murtey v. Allen*, 71 Vt. 377, 76 Am. St. Rep. 779, 45 Atl. 752; *Eingartner v. Illinois Steel Co.* 94 Wis. 70, 34 L. R. A. 503, 59 Am. St. Rep. 859, 68 N. W. 664; and many other cases.

And the foregoing is true of both written and unwritten laws. *Ennis v. Smith*, 14 How. 400, 14 L. ed. 472; *Eastern Bldg. & L. Asso. v. Williamson*, 189 U. S. 122, 47 L. ed. 735, 23 Sup. Ct. Rep. 527.

The somewhat singular result follows from the last principle, that, while a court of one state may, to aid it in ascertaining and interpreting its own law upon a particular subject, take judicial notice of the decisions of another state upon the same subject, it cannot take judicial notice of those decisions for the purpose of ascertaining the law of the state in which they were rendered, though they may be used for that purpose when introduced in evidence. See *Ferd. Helm Brewing Co. v. Gimber*, 67 Kan. 834, 72 Pac. 859.

So, though the decisions of the courts of another state construing its own statutes are admissible as evidence of the proper construction of such statutes, judicial notice cannot, in the absence of an express statute of the forum to that effect, be taken of those decisions for that purpose, except with the consent or acquiescence of the parties. *Hunter v. Ferguson*, 13 Kan. 462; *Larwell v. Hanover, Sav. Fund Soc.* 40 Ohio St. 274; *Pacific Exp. Co. v. Pitman*, 30 Tex. Civ. App. 626, 71 S. W. 312; *Murtey v. Allen*, 71 Vt. 377, 76 Am. St. Rep. 779, 45 Atl. 752.

The truth of the last statement is also assumed by many cases that hold that the decisions of the other state may be admitted in evidence to prove the construction of its statutes.

It is said in *Hoes v. Van Alstyne*, 20 Ill. 201, and repeated in *McDeed v. McDeed*, 67 Ill. 546, that "courts have uniformly taken notice of the construction given to foreign statutes by the foreign tribunals, and to enable them to do this, they have always been in the habit of looking to the reports of such tribunals." The statement was *obiter* in both cases, however, as the point in question was whether the testimony of

Andrews v. Pond, 13 Pet. 65, 10 L. ed. 61; *Bell v. Bruen*, 1 How. 182, 11 L. ed. 94; *Woodruff v. Hill*, 116 Mass. 310; *Bottomley v. Metropolitan L. Ins. Co.* 170 Mass. 274, 49 N. E. 438.

The law of South Dakota must govern the contract as to its validity, construction, and what the parties are required to do in the performance of it.

Bottomley v. Metropolitan L. Ins. Co. 170 Mass. 274, 49 N. E. 438; *Baxter Nat. Bank v. Talbot*, 154 Mass. 213, 13 L. R. A. 52, 28 N. E. 163; *Fonseca v. Cunard S. S. Co.* 153 Mass. 553, 12 L. R. A. 340, 25 Am. St. Rep. 660, 27 N. E. 865; *Glidden v. Chamberlin*, 167 Mass. 486, 57 Am. St. Rep. 479, 46 N. E. 103; *Lawrence v. Bassett*, 5 Allen, 140;

Nashua Sav. Bank v. Sayles, 184 Mass. 520, 100 Am. St. Rep. 573, 69 N. E. 309.

No proof being offered to the contrary, the law of South Dakota is presumed to be the same as the common law of this commonwealth.

Cribbs v. Adams, 13 Gray, 597; *Kelley v. Kelley*, 161 Mass. 111, 25 L. R. A. 806, 42 Am. St. Rep. 389, 36 N. E. 837.

Under the common law of this commonwealth, the defendant was a joint maker of the note, and was not entitled to have a demand made on the maker and notice of nonpayment given to him.

Brooks v. Stuckpole, 168 Mass. 537, 47 N. E. 419.

Consideration is presumed, no proof being

witnesses was admissible to prove the foreign law. It is doubtful, in view of the question before the court, whether it was speaking technically when it said that judicial notice could be taken of the construction of the foreign statute, or whether it meant any more than that the decisions of the foreign tribunals, if introduced in evidence, might be examined for the purpose of ascertaining the proper construction of the foreign law.

In *Hendryx v. Evans*, 120 Iowa, 310, 94 N. W. 853, also, it was said that, while the courts of one state will not take judicial notice of the laws of another, written or unwritten, the opinions of the courts of last resort of another, in construing its statutes, may properly be referred to, and are entitled to very great weight. The decisions of the other state were not introduced in proof; but counsel on both sides cited and relied upon them; so that this decision is not opposed to the rule above stated, but falls within the exception to the rule.

In *Herschfeld v. Dixel*, 12 Ga. 582, the court said: "I am inclined to think that such will be found to be the practice, that the court on the trial of a cause may proceed on their knowledge of the laws of another state; and it is not necessary in that case to prove them; and their judgment will not be reversed when they proceed on such knowledge, unless it should appear that they decided wrong as to those laws." This position is clearly contrary to the overwhelming weight of authority.

The general principle that the courts of one state will not take judicial notice of the laws of another has been abrogated by a statute in Arkansas. It has been held, however, that such provision does not apply to the private statutes of another state, *e. g.*, a private statute of incorporation. *Miller v. Johnston*, 71 Ark. 174, 72 S. W. 371.

It is also provided by statute in West Virginia that the courts shall take judicial notice of the laws of other states. See *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16; *Wilson v. Phenix Powder Mfg. Co.* 40 W. Va. 413, 52 Am. St. Rep. 890, 21 S. E. 1035. And there is a similar statute in Mississippi.

In *Seaboard Air Line R. Co. v. Phillips*, 117 Ga. 98, 43 S. E. 494, it was intimated, though not decided, that the provision of the Georgia Code, declaring that public laws of the United States and of the several states as published by authority shall be judicially recognized without proof, places the laws of other states upon 67 L. R. A.

the same footing as the laws of Georgia, both public and private, are placed when so published, and they may, therefore, be resorted to by the court, even though not formally offered as evidence on the trial. The court said, in this connection, that, if a book containing the laws as published by authority is not accessible, then, in the absence of a copy of the law under the great seal of the state, the case would generally have to be determined by a presumption that the common law prevails in the other state.

In *Savannah F. & W. R. Co. v. Evans* (Ga.) 49 S. E. 308, the court said that the statute referred to in the last case only means that, where the public laws of a foreign state are published by its authority, the authenticity of its publications need not be shown by the introduction of proof of their genuineness, but will be judicially recognized without proof, and given the same effect as though its public laws were proved by the introduction in evidence of a duly authenticated copy. The court also stated that the court of one state cannot take judicial notice of the laws of a sister state. The question in this case was, however, as to the necessity of pleading, and not of proving, the statute of the state.

Howe v. Ballard, 113 Wis. 375, 89 N. W. 136, holds that judicial notice cannot be taken of the statutes of another state not introduced in evidence, under the Wisconsin statute declaring that printed copies of the statute laws of other states, if purporting to be published under the authority of their respective governments, or if commonly admitted and read as evidence in their courts, shall be admitted as presumptive evidence of such acts. *Hunt v. Johnson*, 44 N. Y. 27, 4 Am. Rep. 631, is to the same effect. And this seems to be the general understanding of the bench and bar upon the subject.

It was also held in *Howe v. Ballard* that judicial notice could not be taken of the reports of decisions of the courts of other states, under a local statute providing that the unwritten or common law of another state may be proved as facts by parol evidence and books of reports.

State v. Morrill, 68 Vt. 60, 54 Am. St. Rep. 870, 33 Atl. 1070, while conceding that the courts do not, without proof, take notice of the foreign laws, says that they will assume that certain general principles consonant to reason and natural justice, and of universal applicability, are recognized by all civilized nations. The court accordingly indulged the presumption

offered to the contrary, and it need not affirmatively appear that there was a consideration for the defendant's placing his name on the back of the note.

Rev. Laws. chap. 73, § 14; *Nashua Sav. Bank v. Sayles*, 184 Mass. 520, 100 Am. St. Rep. 573, 69 N. E. 309.

Under the laws of South Dakota, the note is a promissory note; the clause providing for an attorney's fee being void, the legality of the note is not affected.

Chandler v. Kennedy, 8 S. D. 56, 65 N. W. 439; *National Bank of Commerce v. Feeney*, 9 S. D. 550, 46 L. R. A. 732, 70 N. W. 874.

Barker, J., delivered the opinion of the court:

The instrument declared on as a promissory note is of the following tenor:

that the laws of larceny was the same in Canada as in Vermont.

Foreign laws must be proved like other facts; but where the country, now foreign, once made a part of the same empire with that in which the proof is to be administered, the laws common to both at the time of separation do not require proof in either, and they will be presumed to remain the same, unless the contrary be proved. *Malpica v. McKown*, 1 La. 255, 20 Am. Dec. 279. It was accordingly held in this case that the laws of Spain may be referred to and considered, though not proved as facts. The court said in support of its position: "We have looked into the jurisprudence on this head, and we do not discover that the different states in the Union require proof that the common law prevails in each; or that it has ever been deemed necessary to establish by testimony that the same system governs in England."

Strictly speaking the courts did not in either of the last two cases take judicial cognizance of the law of the foreign jurisdiction, but merely indulged the presumption that it was the same as the law of the forum, or, at least, that it was the same as the law of the forum at the time of and immediately after the separation.

The Federal courts, in the exercise of original jurisdiction, take judicial notice, not only of the laws of the particular state in which the action originates, but also of the laws of any other states, which may properly determine the rights of the parties, whether dependent upon statutes or judicial opinions. *Lamar v. Micou*, 114 U. S. 218, 29 L. ed. 94, 5 Sup. Ct. Rep. 857.

And the United States Supreme Court does the same upon appeal from a lower Federal court. The Supreme Court, however, upon writ of error to a state court, only takes judicial notice of the laws of the state from which the case comes, unless the courts of that state themselves take judicial notice of the laws of the other state. In other words, the Supreme Court, upon error to a state court, only takes judicial notice of the same laws as the court of the state from which the case comes. *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; *Renaud v. Abbott*, 116 U. S. 277, 29 L. ed. 629, 6 Sup. Ct. Rep. 1194; *Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398.

This rule was applied in *Hanley v. Donoghue* 67 L. R. A.

\$218.00. Sioux Falls S. D., April 15, 1895.

Four months after date for value received I promise to pay to the order of U. S. G. Cherry Two Hundred and Eighteen Dollars, with interest at six per cent per annum, at the Union National Bank, Sioux Falls, South Dakota.

Unpaid interest shall bear interest at twelve per cent and, if suit is commenced, the customary attorney's fee shall be added to the amount of the judgment and taxed up as part of the costs in the cause.

Due Aug. 15, '95.

No. 3,682.

[Signed]

Odin Fritz.

[Indorsed]

Charles H. Sprague.

C. Everett Washburn.

U. S. G. Cherry.

upon error to the court of appeals of Maryland in an action upon a judgment recovered in Pennsylvania. And it was there held that the Supreme Court would not take judicial notice of the law of Pennsylvania for the purpose of ascertaining the effect which the judgment had in that state, in order to give it the same effect in Maryland under the Federal Constitution.

Previously to these decisions of the United States Supreme Court there was a misapprehension upon the point which induced some of the state courts to hold that, in a case involving the question as to the effect to be given, under the Federal Constitution, to a judicial record of another state, the court of the state in which the record was presented would take judicial notice of the laws of the latter state bearing upon the effect to which the record was entitled in that state. *Hull v. Webb*, 78 Ill. App. 617; *Kopperl v. Nagy*, 37 Ill. App. 23; *Ohio v. Hinchman*, 27 Pa. 479; *Paine v. Schenectady Ins. Co.* 11 R. I. 411; *Coffee v. Neely*, 2 Helsk. 304; *Hobbs v. Memphis & C. R. Co.* 9 Helsk. 873; *Anderson v. May*, 10 Helsk. 84; *Trowbridge v. Spinning*, 23 Wash. 48, 54 L. R. A. 204, 83 Am. St. Rep. 806, 62 Pac. 125.

This position, as pointed out in *Hanley v. Donoghue*, was based upon the misapprehension that the United States Supreme Court, on a writ of error to review a decision of a court of one state upon the faith and credit to be allowed to a judgment rendered in another, always takes notice of the laws of the latter state, and upon the consequent misapplication of the postulate that the same rule must prevail in the court of original jurisdiction and in the court of last resort. In *Ohio v. Hinchman* the court said, in support of its position, that it would be a very imperfect and discordant administration for the court of original jurisdiction to adopt one rule of decision, while the court of final resort was governed by another. The foregoing decisions of the United States Supreme Court do not, of course, necessarily require the abandonment of this doctrine by the state courts, though they destroy the foundation upon which it rests. If a particular state court adheres to the doctrine notwithstanding these decisions, the Supreme Court will, doubtless, upon writ of error to that state court, take notice of the laws of the other state, just as do the courts of the state from which the case comes.

The instrument contains an unconditional promise to pay at a day certain the definite sum of \$218, with interest at 6 per cent per annum from August 15, 1895, to the order of the plaintiff. If this were all, it would, of course, be a promissory note. But the additional stipulations do not change the promise into a conditional one in any respect, and they relate solely to the manner in which the unconditional promise to pay the definite sum may be enforced if broken. This distinguishes the case from *Haskell v. Lambert*, 16 Gray, 592; *Costello v. Crowell*, 127 Mass. 293, 34 Am. Rep. 367; *Sloan v. McCarty*, 134 Mass. 245; and *Moore v. Edwards*, 167 Mass. 75, 44 N. E. 1070. In each of those cases the added stipulations made the contract conditional, or the promise one to pay an indefinite amount, or not to pay the sum named absolutely and at all events.

It is settled that the incorporation into an instrument which contains an unconditional promise to pay a definite sum of money of additional stipulations does not of itself necessarily deprive the instrument of the character of a promissory note. A recital that an additional rate of interest will be paid after maturity, and that the maker deposited certain collateral, and a statement of the terms upon which the collateral has been deposited, and on which it may be sold upon nonpayment of the note, does not have that effect. *Towne v. Rice*, 122 Mass. 67, 73-75, and cases cited. The test is that intimated by Mr. Justice Field in *Sloan v. McCarty*, 134 Mass. 245. If the additional stipulation relates to the manner in which the unconditional promise to pay a definite sum may be enforced, and does not change the promise from one to pay that sum absolutely and at

b. *General system of law upon which foreign jurisprudence based.*

The general principle that the courts of one state or country will not take judicial cognizance of the laws of another merely means that they will not take judicial notice of the specific law of the foreign jurisdiction upon a particular subject. It does not preclude the court of one jurisdiction from taking judicial notice of the system of law that is the basis of the jurisprudence of another jurisdiction. Thus, the presumption, discussed in a subsequent section, that the common law prevails in another state which was settled by citizens coming from states where the common law prevailed, rests upon the judicial knowledge that the common law is the basis of the jurisprudence of the states so settled. It will be observed, however, that the courts in such cases do not take judicial notice of the particular rule of common law as held in the other state, but merely indulge the presumption that the common-law rule on the subject in the other state is the same as the rule at the forum. This may or may not be true as a matter of fact; and it is apparent that this presumption will not always produce the same result that would follow from taking judicial cognizance of the specific common-law rule of the other state upon the subject in question.

The right to take judicial notice of the system of law upon which the jurisprudence of a foreign jurisdiction is based, is not limited to foreign jurisdictions which have the same system as the forum.

Thus, a court of Iowa may take judicial notice that the civil law is the basis of the jurisprudence of Mexico, though it may not take judicial notice that, under the law of Mexico, a male infant becomes an adult at the age of fourteen as under the civil law. *Banco De Sonora v. Bankers' Mut. Casualty Co. (Iowa)* 95 N. W. 232.

So, conversely, the courts of Louisiana, whose jurisprudence is based upon the civil law, may take judicial cognizance of the prevalence of the common law in Indiana. *Copley v. Sanford*, 2 La. Ann. 835, 46 Am. Dec. 548; *Rush v. Landers*, 107 La. 549, 57 L. R. A. 353, 32 So. 95. In the last case the court went further and held that it would take judicial notice of the

rule of the common law upon the particular point in question, though it would not take cognizance of the statutory modifications of that rule. It accordingly took judicial notice of the common-law rule that a married woman cannot possess personal property independently of her husband, except where a trust has been created for her separate benefit. It will be observed that the rule of which the court took judicial notice in this case was a well-settled rule of the general system of common law, and was not in any sense peculiar to the common law prevailing in Indiana. It is obvious that if, as a matter of fact, the common-law rule on the subject as held in Indiana had differed from the rule as generally accepted elsewhere in common-law jurisdictions, even if that difference had been the result of judicial decisions in Indiana, and not of statutory enactments, judicial notice would not have been taken of it; but the rule as generally held would have been applied. It will be observed that the courts of Louisiana, or of other states or countries whose jurisprudence is not based upon the common law, stand in a somewhat different relation to this question than the courts of states whose jurisprudence is based on that system. The latter, after taking judicial notice that the jurisprudence of another state is based upon the common law, may arrive at the particular rule to be applied to the specific subject by indulging the presumption that the common-law rule in the other state upon the particular subject in question is the same as the common-law rule as held at the forum, or, if the common-law rule has been abrogated by statute at the forum, by indulging the presumption that the rule of the other state is the same as the common-law rule as formerly held at the forum. A court of Louisiana, however, cannot arrive at the true rule of common law to be applied to the subject by indulging any presumption of similarity between the law of the foreign state and the law of the forum. It must, therefore, if it is to apply any common-law rule, take judicial notice of what the common-law rule on the particular subject in question is. As already intimated, however, the court in such case takes judicial notice of the rules of the common law as a general system of jurisprudence prevailing in states of common-law origin, and not of the distinctive rules of the common law of any particular state. See,

all events, or change the general nature of the whole contract, the instrument is a promissory note, notwithstanding the additional stipulations relating to the manner of enforcement of the promise if it shall be broken.

In the present instance, as the suit is brought by the original promisee, it is of no importance whether the instrument is negotiable or non-negotiable, and we do not consider or decide that question.

As the instrument was a promissory note, and as it was payable in South Dakota, and was sent to the payee by mail, and received by him in that state, it was a South Dakota, and not a Massachusetts, contract. *Nashua Sav. Bank v. Sayles*, 184 Mass. 520, 522, 100 Am. St. Rep. 573, 69 N. E. 309, and cases cited.

It is contended upon the plaintiff's brief that by the law of South Dakota the stipulation as to an attorney's fee was void, and

the instrument a negotiable promissory note; and, further, that under the statute of that state the 18th day of August, 1895, being a Sunday, the note matured on August 19, 1895, the day on which it was protested for nonpayment. The brief cites in support of these contentions the cases of *Chandler v. Kennedy*, 8 S. D. 56, 65 N. W. 439, and *National Bank of Commerce v. Feeney*, 9 S. D. 550, 46 L. R. A. 732, 70 N. W. 874, and S. D. Rev. Civ. Code, 1903, § 2236, p. 844. But the bill of exceptions upon which the case is here contains no statement of these citations, nor of any evidence of the law of South Dakota; and it is apparent that the decision of the court below was made without taking into consideration the cases and the statute mentioned, and that we cannot consider them.

No proof as to the law in South Dakota having been offered, the court below was right in ruling that the common law of that

further, as to the *Rush Case*, 107 La. 549, 57 L. R. A. 383, 32 So. 95, *infra*, III. c.

III. Different theories as to proper practice.

a. In general.

If a party desires to avail himself of rights or defenses conferred by a law of a foreign jurisdiction that is peculiar to that jurisdiction and differs from the common law and the law of the forum upon the particular subject in question, it is clear that he must prove the foreign law; for the court cannot take judicial notice thereof, and the utmost extent of any presumption that can be indulged, in the absence of proof, is that the common law prevails in the foreign jurisdiction, or that the law of the foreign jurisdiction is the same as the law of the forum, neither of which presumptions meets the exigencies of the hypothetical case.

Again, if a party desires to avail himself of a common-law rule prevailing in the foreign jurisdiction that differs from the common-law rule on the subject prevailing at the forum, he must prove the rule as held in the foreign jurisdiction; since the presumption in favor of the common law, if it be indulged at all, is that the common law of the foreign jurisdiction upon the subject in question is the same as the common law as interpreted at the forum.

The distinction between taking judicial notice of the common-law rule of a sister state and indulging the presumption that the common-law rule in that state is the same as at the forum is obvious. It is illustrated in *Crandall v. Great Northern R. Co.* 83 Minn. 190, 85 Am. St. Rep. 458, 86 N. W. 10, where the court said that it could not take judicial notice of a rule in another state, but, in the absence of proof to the contrary, would presume that it was the same as the rule at the forum.

The last proposition, *i. e.*, that it is the common law on the subject as interpreted at the forum that is presumed to prevail in the other jurisdiction, is assumed by most of the cases that indulge the presumption in favor of the common law at all (but see *Rush v. Landers*, 107 La. 549, 57 L. R. A. 353, 32 So. 95), and is expressly declared in *CHERRY V. SPRAGUE* and

the following among other cases that might be cited: *Scaling v. Knollin*, 94 Ill. App. 443; *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 408; *Crandall v. Great Northern R. Co.* 83 Minn. 190, 85 Am. St. Rep. 458, 86 N. W. 10; *Kelley v. Kelley*, 161 Mass. 111, 25 L. R. A. 806, 42 Am. St. Rep. 389, 36 N. E. 837; *Callender, McA. & T. Co. v. Flint (Mass.)* 72 N. E. 345; *Houghtaling v. Ball*, 19 Mo. 84, 59 Am. Dec. 331. But see, *contra*, *Rush v. Landers*, 107 La. 549, 57 L. R. A. 353, 32 So. 95, *supra*, II. b.

It is to be observed that the presumption is indulged in this form even by the courts that take the view, supported by the great weight of authority, that the common-law rule as held in the other jurisdiction, if proved, will prevail over a different rule prevailing at the forum. The latter subject does not come within the scope of the note, and is merely alluded to in passing. It may be observed here, however, that the Federal courts, in the exercise of original jurisdiction generally determine the common-law rule applicable to a particular subject by reference to the Federal precedents and without reference to the precedents established by the courts of the state which is the situs of the transaction, and the law of which, if statutory, would concededly govern. See, among the many cases upon the subject, *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580; *Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61; *Farmers' Nat. Bank v. Sutton Mfg. Co.* 17 L. R. A. 595, 3 C. C. A. 1, 6 U. S. App. 312, 52 Fed. 191.

Some of the state courts also, assert the same right to apply the common-law rule as declared at the forum, rather than the common-law rule as declared by the courts of the other state, which is the situs of the transaction, and the law of which, if statutory, would concededly govern. See, among other cases to this effect, *National Bank v. Green*, 33 Iowa, 140; *Roads v. Webb*, 91 Me. 406, 64 Am. St. Rep. 246, 40 Atl. 128; *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. Rep. 574; *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26, 13 L. R. A. 241, 27 N. E. 849.

This view, however, is opposed to the general

state is to be presumed to be the same as that of this commonwealth, and that there is no presumption that the statutory law of the two states is the same. *Kelley v. Kelley*, 161 Mass. 111, 25 L. R. A. 806, 42 Am. St. Rep. 389, 36 N. E. 837. Therefore we are to determine whether the rulings of the court below should be set aside as contrary to the common law of this state. Examining them with this view, we are of opinion that the defendant has no just ground of exception. His requests that there was no evidence of due presentment, or of due notice to the defendant of nonpayment, and that the instrument became due on August 16, 1895, were given, and he has no exception on those points. His contentions that the validity of the instrument and the question whether he is liable thereon are to be determined by Massachusetts laws are disposed of by the doctrine of *Nashua Sav. Bank v. Sayles*, 184 Mass. 520, 522, 100 Am. St. Rep. 573, 69 N.

E. 309. His other requests, and his exception to their refusal and to the ruling that under the common law of this state the defendant was a joint maker of the note, and not entitled to demand and notice of nonpayment, are disposed of by our decisions, which show that by the law of this state, aside from statutory enactments, a third person placing his name on the back of a promissory note before delivery to the payee is an original promisor or maker, not entitled to have demand or notice of nonpayment, and that as to him no consideration need be proved. *Sumner v. Gay*, 4 Pick. 311; *Woods v. Woods*, 127 Mass. 141; *Spaulding v. Putnam*, 128 Mass. 363. The same considerations which require the overruling of the exceptions dispose of the questions raised by the demurrer.

Exceptions overruled. Order overruling demurrer affirmed.

understanding and practice of the state courts in this respect, as is apparent from the many cases (e. g., *Milwaukee & St. P. R. Co. v. Smith*, 74 Ill. 197), that apply the common-law rule as held in another state, though differing from that held at the forum. Some of the cases have expressly repudiated this view. See, especially, *Forepaugh v. Delaware, L. & W. R. Co.* 128 Pa. 217, 5 L. R. A. 508, 15 Am. St. Rep. 672, 18 Atl. 503; *Limerick Nat. Bank v. Howard*, 71 N. H. 13, 93 Am. St. Rep. 489, 51 Atl. 641; *Alexander v. Pennsylvania Co.* 48 Ohio St. 623, 30 N. E. 69.

Support may be found in the cases for four different theories as to the proper course to be pursued by the court when the proper foreign law of a case is not proved or conceded: (1) That the court should indulge the presumption that the common law on the subject prevails in the foreign jurisdiction; (2) that the court should indulge the presumption that the law of the foreign jurisdiction is the same as that of the forum; (3) that, irrespective of any presumption, the law of the forum should be applied as the only law upon the subject before the court; (4) that a party who asserts a right or defense which is properly governed by the law of a foreign jurisdiction should be denied all relief in that respect, unless he proves the foreign law.

As shown in subsequent subdivisions, the first and fourth of the foregoing theories are partial in their operation, and, even when adopted, are not necessarily, nor under all circumstances, exclusive of the second and third theories.

It will be observed that the third theory, though it does not rest upon any presumption as to the law of the foreign jurisdiction, is in practical effect the same as the second theory, which rests upon the presumption that the law of the foreign jurisdiction is the same as that of the forum whether the latter be statutory or common law. With the exception, therefore, of the special class of cases falling within the operation of the fourth theory, the conflict of authority upon this subject is, for practical purposes, represented, upon one hand, by courts which indulge the presumption in favor of the common law whether the law of the forum upon

the subject in question be common law or statutory, and, upon the other hand, by the courts which indulge the presumption that the law of the other jurisdiction is the same as the law of the forum whether the latter be statutory or common law. In order to present this conflict as sharply as possible, an attempt has been made, in citing the cases in the next subdivision, to indicate whether the law of the forum upon the particular subject in question was statutory or common law, since it is apparent that the practical results of the two presumptions are the same when the law of the forum is the common law, and that, in order to present an irreconcilable conflict upon this point between a case which formally indulges the presumption in favor of the common law and one which formally indulges the presumption that the law of the other jurisdiction is the same as the law of the forum, it must appear in both cases that the law of the forum upon the subject is statutory and opposed to the common-law rule. As this distinction is rarely, if ever, brought out in the opinions, it is frequently impossible to determine with absolute accuracy from the report of a case whether the law on the subject at the forum was common law or statutory law; but it is believed that the classification of the decisions rendered in the respective states is, at least, sufficiently accurate to show whether the courts of a particular state are committed to the presumption in favor of the common law, even when the law of the forum on the subject is statutory, or in that case indulge the presumption that the law of the other jurisdiction is the same as the law of the forum.

As shown in the next subdivision, the presumption in favor of the common law is in any event limited relatively to the foreign jurisdiction with respect to which it may be indulged: and in some cases the presumption that the law of the foreign jurisdiction is the same as the statutory law of the forum is indulged, even by those courts which ordinarily indulge the presumption in favor of the common law, because the foreign jurisdiction is not one with respect to which the latter presumption may properly be indulged.

While, as already stated, the third theory pro-

duces the same practical results as the second, it will be observed that it rests upon a different foundation, and does not involve any presumption at all with respect to the law of the foreign jurisdiction. Some reasons are presented in *infra*, III. d, why this theory is to be preferred to the second.

The fourth theory has sometimes been stated in terms broad enough to indicate that it is co-ordinate with, and therefore exclusive of, the other theories; but an examination of the cases in which it has been applied discloses that it really operates as an exception to the first or second theory (or the third theory as a substitute for the second) whichever is adopted as the general rule in the particular jurisdiction in which the question arises.

b. *Jurisdictions with respect to which the presumption in favor of common law may be indulged.*

As shown in the next subdivision, the courts very frequently indulge the presumption, in the absence of proof to the contrary, that the common law prevails in another state. It is obvious, however, that this presumption cannot be indulged—even by the courts which are in general committed to it—with respect to all foreign states and countries. Thus, the presumption cannot be indulged with respect to the law of France, since it is judicially known that the civil law is the basis of the jurisprudence of that country. *Ré Hall*, 61 App. Div. 266, 70 N. Y. Supp. 406.

Nor with respect to the law of Mexico. *Banco De Sonora v. Bankers' Mut. Casualty Co.* (Iowa) 100 N. W. 532.

Nor with respect to the law of Asiatic Turkey. *Aslanian v. Dostumian*, 174 Mass. 328, 47 L. R. A. 496, 75 Am. St. Rep. 348, 54 N. E. 845.

Nor with respect to the law of Russia. *Savage v. O'Neill*, 44 N. Y. 298.

Upon the other hand, the presumption may be indulged with respect to the law of England. *Ibid.*

So, the presumption may be undoubtedly indulged with respect to the law of the provinces of Canada whose jurisprudence is judicially known to be based upon the common law.

But in *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143, the court refused to indulge the presumption that the common law of England prevailed in the province of New Brunswick.

The presumption may, of course, be indulged with respect to all the states of the Union which were originally colonies of England. *Norris v. Harris*, 15 Cal. 226.

And with respect to states which were carved out of territory belonging to such colonies. *Ibid.*

The truth of the last two statements is assumed by all of the cases which, under any circumstances, indulge the presumption in favor of the common law, and there is no conflict among them with respect to states belonging to either of these two classes; but there is a considerable difference of opinion, or, at least, of statement, as to the other states or territories with respect to which the presumption may be indulged.

According to the statement in some of the cases, a "common origin" of the other state with the state of the forum is apparently adopted as the criterion. *Miller v. McIntyre*, 9 Ala. 638; *McAnally v. O'Neal*, 56 Ala. 299 (indulging the presumption with respect to Georgia); 67 L. R. A.

Bush v. Garner, 78 Ala. 162, and *Gluck v. Cox*, 75 Ala. 310 (indulging the presumption with respect to Mississippi); *Castleman v. Jeffries*, 60 Ala. 380 (denying presumption with respect to Texas).

Peet v. Hatcher, 112 Ala. 514, 57 Am. St. Rep. 45, 21 So. 711 (denying presumption with respect to Louisiana), assumes that the presumption may be indulged with respect to states having a common origin, or populated by citizens from states having a common origin, with Alabama.

In Missouri it is held that the presumption can be indulged only with respect to those states which, prior to becoming members of the Union, were subject to the laws of England. *Flato v. Mulhall*, 72 Mo. 522 (denying presumption with respect to Texas); *Sloan v. Torrey*, 78 Mo. 623 (denying presumption with respect to Louisiana); *Silver v. Kansas City, St. L. & C. R. Co.* 21 Mo. App. 5 (denying presumption with respect to Kansas); *Witascheck v. Glass*, 46 Mo. App. 209; and *Bain v. Arnold*, 33 Mo. App. 631 (denying presumption with respect to Kansas); *Barhydt v. Alexander*, 59 Mo. App. 188 (denying presumption with respect to Iowa); *Wyeth Hardware & Mfg. Co. v. Lang*, 54 Mo. App. 147 (denying presumption with respect to Kansas); *Clark v. Barnes*, 58 Mo. App. 667 (denying presumption with respect to Arkansas); *Searles v. Lum*, 81 Mo. App. 607 (indulging presumption with respect to Mississippi).

The limitation of the doctrine in Missouri will, if rigidly adhered to, result in the denial of the presumption with respect to all states and territories formed from the territory included in the Louisiana Purchase of 1803, the Florida Purchase of 1819, and the Mexican Cession of 1848. This limitation, however, is contrary to the weight of authority of the cases which indulge the presumption in favor of the common law at all. The criterion adopted by Judge Field (afterwards associate justice of the United States Supreme Court), while a member of the California supreme court, in the case of *Norris v. Harris*, 15 Cal. 226, has been generally accepted. After stating that the presumption would be indulged with respect to those states of the Union which were originally colonies of England or were carved out of such colonies, he said: "A similar presumption must prevail as to the existence of the common law in those states which have been established in territory acquired since the Revolution, where such territory was not at the time of its acquisition occupied by an organized and civilized community; where in fact the population of the new state upon the establishment of government was formed by emigration from the original states."

This criterion is, in substance, repeated in *Cressey v. Tatom*, 9 Or. 541 (indulging presumption with respect to law of Illinois); *Miller v. MacVeagh*, 40 Ill. App. 532 (indulging presumption with respect to South Dakota); *Buchanan v. Hubbard*, 119 Ind. 187, 191, 21 N. E. 538 (indulging presumption with respect to Kansas); *Crouch v. Hall*, 15 Ill. 263 (indulging presumption with respect to Missouri).

So, the presumption that the common law prevails is not indulged as to those states in which there were established civil governments or systems of domestic law prior to their becoming territories or states of the Union, and in such a case, in the absence of anything to the

contrary being shown, the court will presume that the foreign law is the same as that which prevails at the forum. The state of Kansas, although territorially a part of the Louisiana Purchase, is not one of the states in which the civil law ever prevailed, and the presumption in favor of the common law may, therefore, be indulged with respect to that state. Buchanan v. Hubbard, 119 Ind. 187, 21 N. E. 538.

It will not be presumed that the English common law is in force in any state not settled by English colonists; and no such presumption will be indulged with respect to the law of the Creek nation of Indians. Davison v. Gibson, 5 C. C. A. 543, 12 U. S. App. 382, 56 Fed. 443.

The usual presumption that the common law prevails in another state does not apply to the Creek nation of Indians; but the usages and customs that constitute their laws must be proved. Du Val v. Marshall, 30 Ark. 230.

And the same is true with respect to the laws of Indian territory. Garner v. Wright, 52 Ark. 385, 6 L. R. A. 715, 12 S. W. 785.

Judge Field, applying the criterion adopted in Norris v. Harris, *supra*, refused to indulge the presumption with respect to Texas, and also said that it could not be indulged with respect to Florida or Louisiana.

As the jurisprudence of Texas is not founded upon, or derived from, the common law, it cannot be presumed that that law is in force there. Brown v. Wright, 58 Ark. 20, 21 L. R. A. 467, 22 S. W. 1022; Garner v. Wright, 52 Ark. 385, 6 L. R. A. 715, 12 S. W. 785.

In Donegan v. Wood, 49 Ala. 242, 20 Am. Rep. 275, however, the court held that a bill, being payable in Louisiana, must be governed by the law of that state as to the manner of making the demand and protest, and said that the law merchant, which is a part of the common law, would be presumed to be in force in Louisiana.

The court takes judicial notice of the ordinance of Congress for the government of the Northwest Territory as the supreme law of that territory. Bush v. White, 3 T. B. Mon. 104; Holmes v. Mallett, Morris (Iowa) 82.

The names of the states with respect to the law of which the presumption was indulged have been inserted in parentheses after the cases cited in subdivision III. c, which support the presumption in favor of the common law. It will be observed that, with the exception of Missouri, most of the cases which indulge the presumption in favor of the common law at all follow the criterion suggested in the foregoing quotation from Judge Field's opinion. In other words, such courts, with the exception of the courts of Missouri, indulge the presumption with respect to all other states of the Union except Louisiana and Texas and possibly Florida, those states at the time of their acquisition by the United States having been occupied by an organized and civilized community whose jurisprudence was not based upon the common law.

c. *Conflict between presumption in favor of common law and presumption that law of other jurisdiction is same as that of forum.*

Within the limits discussed in the last section relatively to the states with respect to which the presumption may be indulged, and with the exception of certain classes of cases discussed in subdivision III. e, *infra*, it may, perhaps, be said that it is more usual for the courts of a state in which the common law pre-

vails upon the particular subject in question to indulge, in form at least, the presumption that the common law also prevails upon the subject in another state if the contrary be not shown, than to indulge the presumption that the law of the other state is the same as that of the forum: though the result is, of course, the same in that class of cases, whichever presumption be indulged. For the reasons explained in subdivision III. a, *supra*, an attempt has been made, in citing the cases which indulge the presumption in favor of the common law, to point out whether the law of the forum on the subject was statutory or common law, in order to show whether the courts of a particular state indulge that presumption, whether the law of the forum is statutory or common law, or only when the law of the forum is the common law. As the courts themselves rarely allude to the distinction,—though it is frequently necessary to refer to it in order to reconcile the decisions in the same state,—it is often difficult to determine with absolute certainty, from the report of a case, whether the law of the forum on the subject was statutory or common law; but it is believed that the classification of the cases from the respective states is sufficiently accurate and complete for the purposes indicated.

As shown in subdivision III. b, *supra*, the presumption in favor of the common law is restricted, relatively, to the foreign jurisdictions with respect to which it may be indulged, even by the courts which are in general committed to that presumption.

In some cases, also the presumption is stated in a form which limits its operation to "common-law questions." See, especially, Schlee v. Guckenheimer, 179 Ill. 593, 54 N. E. 302; Dalton v. Talliaferro, 101 Ill. App. 592. It is difficult to determine to what extent the general presumption is qualified by its formal restriction to "common-law questions." Whether a particular subject is governed by the common law or by statute at the forum is obviously not the criterion by which the character of a question as a "common-law question" within this qualification of the rule, is to be determined. In the cases just cited, for instance, the presumption in favor of the common law was indulged, though the common-law rule had been changed by statute at the forum. Nor does the mere fact that a particular question never came before the courts until after the passage of statutes upon the subject to which it relates, suffice to withdraw it from the class of "common-law questions." For example, even assuming that the question as to the right to sell oleomargarine without distinguishing marks or labels had never arisen in the courts of any of the common-law states until statutes had been enacted upon the subject, there would seem to be no reason why a court which is, in general, committed to the presumption in favor of the common law whether the law of the forum is statutory or common law should decline to indulge that presumption with respect to the question referred to.

The qualification suggested by this formal restriction of the presumption to "common-law questions" seems to have been applied to the question as to the rate of interest to be allowed, in case the law of another jurisdiction which should properly govern is not proved.

Thus, Wright v. Delasfield, 23 Barb. 498, while holding generally that no presumption will be indulged that the law of another state is the

same as the statutory law of New York, said, although the remark was *obiter*, that it is an assumption most compatible with truth that interest at some rate is allowed in every state, and that, although the rate of interest is fixed by statute, yet, as some rate is universal, the courts of New York must allow some rate, and, if the parties furnish no better guide to the truth, will assume ours to be the legal interest in computing the amount to be recovered.

And, speaking generally, the courts, whether they ordinarily indulge the presumption in favor of the common law or the presumption that the law of another state is the same as the law of the forum, seem to agree that, in the absence of evidence as to the rate of interest prescribed by a foreign law, the rate allowed at the forum governs. *Murphy v. Murphy* (Cal.) 78 Pac. 1053; *Martin v. Hazzard Powder Co.* 2 Colo. 596; *Deem v. Crume*, 46 Ill. 69; *Hall v. Kimball*, 58 Ill. 58; *Crafts v. Clark*, 38 Iowa, 237; *Thomas v. Beckman*, 1 B. Mon. 29; *Cooper v. Reaney*, 4 Minn. 528, Gil. 413; *Desnoyer v. McDonald*, 4 Minn. 515, Gil. 402 (see, however, the further reference to the last two cases, under the heading *Minnesota*, in this subdivision); *Lougee v. Washburn*, 16 N. H. 184; *National German American Bank v. Lang*, 2 N. D. 66, 49 N. W. 414. See, *contra*, *Ingraham v. Arnold*, 1 J. J. Marsh. 408; *Kermott v. Ayer*, 11 Mich. 181, *infra*, III. c. See, as to the defense of usury, *infra*, III. e.

It might be supposed that, even among common-law questions, there would be distinctions affecting the propriety of indulging the presumption in favor of the common law. It is, for instance, a matter of common knowledge, if not of judicial knowledge, that most of the states have passed statutes modifying the common-law rule regulating the rights of a husband with respect to the personal property of his wife. And it might be supposed that even courts which ordinarily, and with respect to the most "common-law" questions, indulge the presumption in favor of the common law, would refuse to indulge it with respect to the respective property rights of husband and wife. As a matter of fact, however, very little, if any, authority is found in the cases for making any distinction in this respect between different questions that may be regarded as common-law questions. Many of the cases subsequently cited in this subdivision, for instance, indulge the presumption that the common law prevails in another state with respect to property rights of husband and wife, even though the rule on the subject has been changed by statute at the forum.

Owing to the difference of opinion, discussed in subdivision III. b, *supra*, even among the courts which are in general committed to the presumption in favor of the common law, as to the states with respect to which that presumption may be indulged, courts of this class, notably the courts of Missouri, frequently render decisions that in effect oppose the decisions of other courts of the same class, and agree with the decisions rendered in similar instances by the courts that are committed to the presumption that the law of another state is the same as the law of the forum, whether the latter is statutory or common law. The explanation of this apparent anomaly is, of course, found in the fact that the particular state whose law was involved, was not one of the states with respect to which, according to the local criterion, the presumption in favor of the common law 67 L. R. A.

could be indulged and the court was therefore driven to the necessity of indulging the presumption that the law of the other state is the same as the law of the forum, or of applying the law of the forum without indulging any presumption whatever. In order to prevent confusion upon this point, the name of the other state or country with respect to which the presumption was indulged, has been inclosed in parentheses following the citation of the respective cases bearing upon the question which of the two presumptions is to be indulged. *Alabama*.

The courts of Alabama, within the limits discussed in the subdivision III. b, indulge the presumption that the common law prevails in another state when the common law on the subject prevails in Alabama. *Goodman v. Griffin*, 3 Stew. (Ala.) 160 (S. C.); *Dunn v. Adams*, 1 Ala. 527 (Ga.); *Mims v. Central Bank*, 2 Ala. 294 (Ga.); *Shepherd v. Nabors*, 6 Ala. 631 (Tenn.); *Miller v. McIntyre*, 9 Ala. 638 (Miss.); *Beall v. Williamson*, 14 Ala. 55 (Ga.); *Averett v. Thompson*, 15 Ala. 678 (N. C.); *Hinson v. Wall*, 20 Ala. 298 (N. C.); *Ellis v. White*, 25 Ala. 540 (Tenn.); *Reese v. Harris*, 27 Ala. 301 (Va.); *Foster v. Glazener*, 27 Ala. 391 (Ga.); *Connor v. Trawick*, 37 Ala. 289 (Miss.); *Borum v. King*, 37 Ala. 606 (Ga.); *Rutledge v. Townsend*, 38 Ala. 706 (Ga.); *Howard v. Gilbert*, 39 Ala. 726 (Ga.); *Haden v. Ivey*, 51 Ala. 381 (S. C.); *Snow v. Schomacker Mfg. Co.* 69 Ala. 111, 44 Am. Rep. 509 (Pa.); *Cahalan v. Monroe*, 70 Ala. 271 (S. C.); *Bradley v. Harden*, 73 Ala. 70 (Ga.); *Wilkinson v. Buster*, 124 Ala. 574, 26 So. 940 (Tenn.).

And the courts of this state also indulge the presumption in favor of the common law when the law of the forum upon the subject is statutory and opposed to the common law, and when, therefore, this presumption is practically, as well as theoretically, opposed to the presumption that the law of the other state is the same as that of the forum. *McDougald v. Carrey*, 38 Ala. 320 (Ga.); *Walker v. Walker*, 41 Ala. 353 (Ga.); *McAnally v. O'Neal*, 56 Ala. 299 (Ga.); *Hawley v. Bibb*, 69 Ala. 52 (N. Y.); *Danner v. Brewer*, 69 Ala. 191 (Miss.); *Evans v. Covington*, 70 Ala. 440 (S. C.); *Irwin v. Bailey*, 72 Ala. 469 (Ill.; Pa.); *Jaffrey v. McGough*, 83 Ala. 202, 3 So. 594 (Ga.); *Bangs v. Edwards*, 88 Ala. 382, 6 So. 764 (Ga.); *Roach v. Privett*, 90 Ala. 391, 24 Am. St. Rep. 819, 7 So. 808 (Tenn.); *Louisville & N. R. Co. v. Williams*, 113 Ala. 402, 21 So. 938 (Tenn.); *Hubbard v. Sayre*, 105 Ala. 440, 17 So. 17 (N. Y.); *Birmingham Waterworks Co. v. Hume*, 121 Ala. 168, 77 Am. St. Rep. 43, 25 So. 806 (Tenn.).

The last group of cases necessarily negatives the presumption that the law of another state (i. e., of another state which has a common origin, or was settled by people having a common origin, with Alabama) is the same as the statutory law of Alabama, and such presumption is expressly and in terms denied in *Downs v. Minchew*, 30 Ala. 86.

In *Seay v. Palmer*, 93 Ala. 381, 30 Am. St. Rep. 57, 9 So. 601, however (an action in Alabama upon a promissory note made in Georgia, and containing a waiver of all rights of exemption and homestead), the court said that, no statute of Georgia in reference to exemptions having been put in evidence, ordinarily the presumption would be that the common law prevails, which allows the debtor no exemptions of property from sale under execution; but, as

the rigorous rule of the common law is now the exception, the court would indulge the presumption in favor of the validity of the agreement of waiver arising from its inclusion in the note.

When the other state is not one as to which the presumption in favor of the common law may be indulged conformably to the local criterion, the courts of Alabama either indulge the presumption that the law of the other state is the same as that of Alabama—as in *Kennebrew v. Southern Automatic Electric Shock Mach. Co.* 106 Ala. 377, 17 So. 545, where the court indulged the presumption that there was a rule in Louisiana like that in Alabama to the effect that there is an implied warranty of fitness in a contract for the sale of machines,—or apply the law of Alabama without indulging any presumption—as in case of *Peet v. Hatcher*, 112 Ala. 514, 57 Am. St. Rep. 45, 21 So. 711, *infra*, subd. III. d.

In *Donegan v. Wood*, 49 Ala. 242, 20 Am. Rep. 275, however, the court indulged the presumption that the rule of the law merchant as to the manner of making demand and protest was in force in Louisiana.

Arkansas.

By an act of the legislature of Arkansas passed in 1899 the courts of that state are required to take judicial notice of the laws of other states of the Union without proof; so that no question can now arise in that state as to the presumption to be indulged with respect to the law of another state, though it may still arise with respect to the law of another country.

Prior to the enactment of that statute, the courts of Arkansas within the limits pointed out in III. b, *supra*, indulged the presumption that the common law prevailed in another state when the common law on the particular subject in question prevailed in Arkansas. *Newton v. Cocke*, 10 Ark. 169 (Ky.); *Peel v. January*, 35 Ark. 331, 37 Am. Rep. 27 (Mo.); *Eureka Springs R. Co. v. Timmons*, 51 Ark. 459, 11 S. W. 690 (Mo.); *St. Louis, I. M. & S. R. Co. v. Brown*, 67 Ark. 295, 54 S. W. 865 (Kansas).

And some of the cases in that state indulge the presumption in favor of the common law even when the law of Arkansas on the subject was statutory. *Hydrick v. Burke*, 30 Ark. 124 (Tenn.); *Galvus v. Cannon*, 42 Ark. 503 (Miss.); the common law on the subject had been changed by statute in Arkansas at the time of the action though not at the time of the transactions involved); *Thorn v. Weatherly*, 50 Ark. 237, 7 S. W. 33 (Tenn.).

Tatum v. Hines, 15 Ark. 180, assumed that the existence of a separate estate in the wife depended upon the law of the place of the matrimonial domicile at the time the property was acquired, but held that, if the common law on that subject did not obtain at such domicile, the statute changing it must be proved.

In *Cox v. Morrow*, 14 Ark. 603 (N. C.; Tenn.; Tex.); *Hall v. Pillow*, 31 Ark. 32 (Miss.); *Grider v. Driver*, 46 Ark. 50 (Tenn.); and *Louisiana & N. W. R. Co. v. Phelps*, 70 Ark. 17, 65 S. W. 709 (La.),—the court apparently takes the position that the law of the other state is presumed to be the same as the law of Arkansas, whether the latter be common law or statutory, if it be not penal.

But such presumption does not prevail as to a penal law of the forum. *Grider v. Driver*, 46 Ark. 50 (Tenn.); *Louisiana & N. W. R. Co. v. Phelps*, 70 Ark. 17, 65 S. W. 709 (La.).
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-In *Johnson v. State*, 60 Ark. 308, 30 S. W. 31, the court indulged the presumption that the law of Indian territory, like the statute of Arkansas, made marriages between first cousins invalid; but the laws of Arkansas had been extended by act of Congress over Indian territory.

See also Arkansas cases, cited in III. d, *infra*, which, without indulging any presumption as to the law of the other jurisdiction, applied the *lex fori* as the only law before the court.
California.

In California the presumption that the common law prevails in another state has been indulged when the common law on the subject prevailed in California. *Thompson v. Monrow*, 2 Cal. 99, 56 Am. Dec. 318 (N. Y.); *Cavender v. Guild*, 4 Cal. 250 (Mo.).

In *Brown v. San Francisco Gaslight Co.* 58 Cal. 426, and *Hill v. Grigsby*, 32 Cal. 55, 60, however, the court indulged the presumption that the law of New York with reference to the issuance of letters to, and the powers of, one of two executors named in a will was the same as the law of California, which seems to have been the common law. The latter presumption though it produced the same result as the former, assuming that the law of California was the common law, is more in accord with the general rule upon the subject as adopted in California; for, when the law of that state upon the subject is statutory, whether the statutory rule is the same as the common-law rule or not, the courts indulge the presumption that the law of the other state is the same as the law of California, thus negating the presumption that the common-law rule on the subject prevails in the other state, when that presumption would conflict with the presumption that the law of the other state is the same as the law of California. *Hickman v. Alpaugh*, 21 Cal. 225 (Or.); *Marsters v. Lash*, 61 Cal. 622 (Ind.; Minn.); *Shumway v. Leakey*, 67 Cal. 458, 8 Pac. 12 (Nev.); *Mortimer v. Marder*, 93 Cal. 172, 28 Pac. 814 (Eng.; Neb.; Or.); *Palmer v. Atchison*, T. & S. F. R. Co. 101 Cal. 187, 195, 35 Pac. 630 (Mo.); *Bovard v. Dickenson*, 131 Cal. 162, 63 Pac. 162 (Mo.); *Re Richards*, 133 Cal. 524, 65 Pac. 1034 (Mo.); *Pierce v. Southern P. Co.* 120 Cal. 158, 40 L. R. A. 350, 47 Pac. 874, 52 Pac. 302 (Fla.); *Re Harrington*, 140 Cal. 244, 98 Am. St. Rep. 51, 73 Pac. 1000 (Mich.).

It will be observed that the presumption that the law of another jurisdiction is the same as the law of the forum is not, like the presumption in favor of the common law, restricted with respect to the foreign jurisdictions as to which it may be indulged. Thus, it was indulged in *Loalza v. Superior Court*, 85 Cal. 11, 30, 9 L. R. A. 376, 20 Am. St. Rep. 197, 24 Pac. 707, with respect to the law of Mexico; and in *Cavallaro v. Texas & P. R. Co.* 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918, with respect to the law of Louisiana, although, as shown in III. b, *supra*, the presumption in favor of the common law could not in any view have been indulged with respect to those jurisdictions.

In *Montague v. The Henry B. Hyde*, 82 Fed. 681 (an action brought in a Federal court sitting in California), it was expressly held that it should be presumed that the general or commercial law had not been so changed by the legislature of New York as to require bills of lading to be signed by the shipper as a condition precedent to his being bound by special stipulations therein limiting the general liability of the carrier; and that there is no presumption

that that state has enacted a statute similar to Cal. Civil Code, § 2176, which declares, in substance, that the acceptance by the shipper of a bill of lading or written contract for the carriage of his goods, containing modifications of the general liability of the carrier, is not binding upon the shipper unless signed by him. The court said that it may be that the later decisions of the supreme court of California, commencing with *Brown v. San Francisco Gaslight Co.* 58 Cal. 426, announce the rule to the effect that, in every case in which there is absence of proof to the contrary, the law of another country or state will be presumed to be the same as that of the forum; but declined to follow such rule.

Colorado.

In Colorado the presumption in favor of the common law is indulged, even when the law of Colorado on the subject is statutory. *Wolf v. Burke*, 18 Colo. 264, 19 L. R. A. 792, 32 Pac. 427 (Idaho); *Wells v. Schuster-Hax Nat. Bank*, 23 Colo. 534, 48 Pac. 809 (Mo.).

Sullivan v. German Nat. Bank, 18 Colo. App. 99, 70 Pac. 162, seems to have indulged the presumption in favor of the common law, even with respect to Texas; though this, as shown in III. b, *supra*, is against the weight of authority, even of those cases which in general indulge that presumption with respect to the law of other states.

In *Wolf v. Burke* the court quotes with approval from *Whitford v. Panama R. Co.* 23 N. Y. 465, to the effect that it will be presumed that the common law prevails in another state, but that no such presumption obtains that the other state has passed a statute similar to that of the forum.

And in *Atchison, T. & S. F. R. Co. v. Betts*, 10 Colo. 431, 15 Pac. 821, the court expressly refused to indulge the presumption that there was a statute in New Mexico similar to that of Colorado, making railroad companies liable for killing live stock irrespective of negligence.

The only case in Colorado that at all conflicts with the foregoing decisions is *Martin v. Hazard Powder Co.* 2 Colo. 596, where it was said that, in the absence of evidence to the contrary, it would be presumed that the rate of interest allowed in Wyoming was the same as that allowed in Colorado; but in this case the result of the decision was to uphold the rate of interest specified in a note, and the presumption as to similarity of laws was, therefore, aided by the presumption in favor of the validity of stipulation for interest. See more especially, as to interest and usury, III. e, *infra*.

Connecticut.

In *Bay v. Church*, 15 Conn. 15, the court said that in the absence of to any averment as to the law of New York it is presumed to be the same as that of Connecticut; but the question in this case arose under the law merchant, and it was therefore immaterial which of the two presumptions was adopted.

In *Adams v. Way*, 33 Conn. 419, it was held that it could not be presumed that, under the law of Wisconsin, a debt was merged in a decree of foreclosure,—especially as similar decrees in Connecticut do not have that effect.

Florida.

In the absence of any express allegation or proof to the contrary, it is always held that the law of another state in reference to commercial transactions is deemed to be the same as in the state where the court which hears the matter 67 L. R. A.

is sitting. *Bemis v. McKenzie*, 13 Fla. 558 (Ga.). The law on the subject was the common law,—law merchant,—so that it was a matter of practical indifference which presumption was indulged.

In *Equitable Bldg. & L. Asso. v. King* (Fla.) 37 So. 181, however, the court, after holding that judicial notice could not be taken of the law of Georgia, which by express stipulation in the contract was to determine the rights of the parties, applied a statute of Florida which requires that the husband shall join in the execution of a note or bond and mortgage given by a married woman to a building and loan association.

Georgia.

In Georgia the presumption that the common law prevails in another state is indulged when the common law on the subject prevails in Georgia. *Eubanks v. Banks*, 34 Ga. 407 (N. C.); *Woodruff v. Saul*, 70 Ga. 271 (Tenn.); *Pattillo v. Alexander*, 96 Ga. 60, 29 L. R. A. 616, 22 S. E. 646 (Tenn.); *Massachusetts Ben. Life Asso. v. Robinson*, 104 Ga. 256, 42 L. R. A. 261, 30 S. E. 918 (Mass.); *Charleston & W. C. R. Co. v. Miller*, 113 Ga. 15, 38 S. E. 338.

In *Jones v. Rice*, 92 Ga. 236, 18 S. E. 348, the court indulged the presumption that the common-law rule that a married woman may charge her separate estate to secure a debt of her husband prevailed in North Carolina, although the rule had been changed by statute in Georgia.

In *Selma, R. & D. R. Co. v. Lacy*, 43 Ga. 461 (Ala.), the court said that no presumption could be indulged that positive statutes of the forum opposed to the common law prevailed in another state.

And in *Flournoy v. First Nat. Bank*, 79 Ga. 810, 2 S. E. 547, the court indulged the presumption that the common law, according to which usury was not a defense, prevailed in Indiana, although the rule had been changed by statute in Georgia. As shown in III. e, *infra*, however, even the courts which ordinarily indulge the presumption that the law of another state is the same as the statutory law of the forum make an exception in the case of usury.

Notes made and payable in Tennessee will not be presumed to be void for usury although bearing on their face a greater rate of interest than 6 per cent, which appears by admission in open court to be the legal rate of interest in Tennessee, it not being proved that, by the law of Tennessee, the reservation of a rate in excess of the legal rate renders the contract usurious. *Craven v. Bates*, 96 Ga. 78, 23 S. E. 202.

Illinois.

In Illinois the presumption in favor of the common law is indulged when the common law on the subject in question prevails in Illinois. *Crouch v. Hall*, 15 Ill. 263 (Mo.); *Belford v. Bangs*, 15 Ill. App. 76 (Mich.); *Western Transit Co. v. Hosking*, 19 Ill. App. 607 (Mass.); *David Bradley & Co. v. Peabody Coal Co.* 99 Ill. App. 427 (Iowa).

And the presumption in favor of the common law is also indulged, even when the law of Illinois on the subject is statutory. *Tinkler v. Cox*, 68 Ill. 119 (Ind.); *Studebaker Bros. Mfg. Co.* 86 Ill. 234 (Mo.); *Schlee v. Guckenheimer*, 179 Ill. 593, 54 N. E. 302 (Ohio); *Hanchett v. Rice*, 22 Ill. App. 442 (Wis.); *Van Ingen v. Brabrook*, 27 Ill. App. 401 (Mo.); *Miller v. MacVeagh*, 40 Ill. App. 532 (S. D.); *Lipe v. McCleavy*, 41 Ill. App. 59 (Colo.); *Selz v. Guth-*

man, 62 Ill. App. 624 (Wis.); Dempster v. Stephen, 63 Ill. App. 126 (Canada); Dalton v. Tallaferro, 101 Ill. App. 592 (Iowa); Jo Davless County v. Staples, 108 Ill. App. 539 (Iowa).

In Juilliard v. May, 130 Ill. 87, 22 N. E. 477, the question as to which of the two presumptions is to be indulged when the law of Illinois on the subject is statutory was referred to as though it were an open one. The court said that, in the absence of any allegation or proof of a statute of New York forbidding preferences in assignments for creditors, it must be presumed either that the common law, which allows preferences, obtains in that state, or else that the law of that state is similar to the statute of Illinois which forbids preferences. A decision upon the point, however, was not necessary.

In Strauss v. American Exch. Nat. Bank, 72 Ill. App. 314, the court said: "In the absence of any proof as to what the law of New York is, we must presume it is the same as the law of Illinois." The law of Illinois on the subject, however, was the common law, so that the case, in its result, is not opposed to the cases above cited which indulge the presumption in favor of the common law.

In Shannon v. Wolf, 173 Ill. 253, 50 N. E. 682, the court indulged the presumption that the law of Iowa was the same as the law of Illinois, or, at least, proceeded upon the theory that, the law of Iowa not being proved, the law of Illinois would be applied; but the law of Illinois on the subject was not statutory.

In Leathe v. Thomas, 109 Ill. App. 434, the court, in the absence of proof that the law of Missouri forbade pleas of set-off in an action upon a judgment, applied the rule in Illinois—apparently a non-statutory rule—permitting such set-offs in an action in Illinois upon a judgment recovered in Missouri.

Wood v. Supreme Ruling, F. M. C. 212 Ill. 532, 72 N. E. 783, held that it would not be presumed that the statutes of New Jersey fix any limitation as to the age of persons who may be insured by fraternal beneficial associations. It does not appear whether such a limitation is imposed by the statute of Illinois.

Indiana.

In Indiana the presumption in favor of the common law is indulged when the common law on the subject prevails in that state. Trimble v. Trimble, 2 Ind. 76 (Va.); Titus v. Scantling, 4 Blackf. 89 (Ohio); Gates v. Newman, 18 Ind. App. 392, 46 N. E. 654 (Ill.); Midland Steel Co. v. Citizens' Nat. Bank (Ind. App.) 72 N. E. 290 (Pa.); Penn Mut. L. Ins. Co. v. Nolecross (Ind.) 72 N. E. 132.

And the presumption in favor of the common law is also indulged, even when the law of Indiana on the subject is statutory. Johnson v. Chambers, 12 Ind. 102 (Pa.); Butler v. Myer, 17 Ind. 77 (Ohio); Mendenhall v. Gately, 18 Ind. 149 (Miss.); Crake v. Crake, 18 Ind. 156 (Ohio); Buckingham v. Gregg, 19 Ind. 401; Baltimore & O. S. W. R. Co. v. Reed, 158 Ind. 25, 56 L. R. A. 468, 92 Am. St. Rep. 293, 62 N. E. 488 (Ill.); Smith v. Muncie Nat. Bank, 29 Ind. 158 (Ohio); Schurman v. Marley, 29 Ind. 458 (N. C.); Lichtenberger v. Graham, 50 Ind. 288 (Ky.); Alford v. Baker, 53 Ind. 279 (Ky.); Patterson v. Carrell, 60 Ind. 128 (Ohio); Smith v. Peterson, 63 Ind. 243 (Ky.); Roberts v. Marley, 80 Ind. 185 (Kan.); Rogers v. Zook, 86 Ind. 237 (W. Va.); Supreme Council, O. of C. F. v. Garrigus, 104 Ind. 133, 54 Am. Rep. 298, 3 N. E. 818 (Ky.); Baltimore & O. S. W. R. Co. v. 67 L. R. A.

Jones, 158 Ind. 87, 62 N. E. 994 (Ohio); Baltimore & O. S. W. R. Co. v. Hollenbeck, 161 Ind. 452, 69 N. E. 136 (Ky.).

Some of the earlier cases in this state—Shaw v. Wood, 8 Ind. 518 (Ohio); Blystone v. Burgett, 10 Ind. 28, 68 Am. Dec. 658 (Ill.); Farhni v. Ramsee, 19 Ind. 400; Bierhaus v. Western U. Teleg. Co. 8 Ind. App. 246, 34 N. E. 581 (Ill.)—imply that, in case the law of Indiana on the subject is statutory, it should be presumed that the law of the other state is the same, or, what is practically equivalent thereto, that the law of Indiana should be applied. This position, however, was reluctantly abandoned in Smith v. Muncie Nat. Bank, 29 Ind. 158, though this case involved the defense of usury, which, as shown in III. e. *infra*, is generally treated as an exception, even by those courts which are in general thoroughly committed to the presumption that the law of another state is the same as the statutory law of the forum.

Cunningham v. Jacobs, 120 Ind. 306, 22 N. E. 335, was an action in Indiana upon an attachment bond given in Illinois. The court said that, in the absence of any showing to the contrary, it must presume that the common law prevailed in Illinois; but nevertheless, while admitting that attachment is the creature of statutory law, indulged the presumption that the court of Illinois had jurisdiction to issue the writ of attachment. It then held, however, that it could not presume the existence of a statute authorizing the bond, but that the bond must be treated as having been executed without statutory authority, and the question was, therefore, whether it was good as a common-law bond.

Several statements are made in Buchanan v. Hubbard, 119 Ind. 187, 21 N. E. 538 (Kan.), which are difficult to reconcile. Thus, the court says: "It is sufficient to say that the laws of a state to whose courts a party appeals for redress furnish in all cases *prima facie* the rule of decision, and, if either party claims the benefit of a different rule, since the courts are presumed to be acquainted only with their own laws, he who asserts the existence of a different rule as applicable to his case must aver and prove it like other facts of which the courts do not take judicial notice. Following this is a quotation from Crake v. Crake, 18 Ind. 156: "Where a right is sought to be enforced in one state in relation to a subject-matter existing in a foreign state, and no foreign law is proved, and no common-law rule ever prescribed, and no contract exists. . . . The court will apply the law of the state in which it is sitting." Again the court says: "In respect to general principles, the common law is presumed to be in force in most of the states, subject to such modifications as may have resulted from legislation or judicial construction. If these latter are not shown, the court applies the principles of the common law as those principles are interpreted in the state where the trial is proceeding." The question in this case was whether a resulting trust arose in favor of a wife in land in Kansas purchased by her husband with her money. The common-law rule has been modified by statute in Indiana, so that no trust arises in that state except as against the creditors of the wife. The court said, in effect, that the conclusion that a resulting trust must be deemed to have arisen in favor of the wife must follow whether it applied the rules of common law, or assumed that the common law had been modified by statute in Kansas, since, in the absence of any proof show-

ing what modifications had been made, it must be assumed that the common law, as modified and interpreted in that state, is like "our" own. It is not clear whether the court assumed that this would be the result under the Indiana statute, or not.

In *Baltimore & O. S. W. R. Co. v. Hollenbeck*, 161 Ind. 452, 69 N. E. 136, the court held that the Indiana exemption law had no operation in Kentucky where a debt was garnished, and that, in the absence of evidence to show that there was a similar statute in Kentucky, it must be presumed that the common-law rule on the subject prevailed there.

Iowa.

In *Holmes v. Mallett, Morris* (Iowa) 82 (Ill.), the presumption in favor of the common law was indulged, the law of Iowa on the subject being the common law; and in *Bernard v. Barry*, 1 G. Greene, 388, the court said that it would presume that the *lex mercatoria* prevails in Missouri (where the note in question was made), and in Maryland (where it was indorsed) and, therefore, the indorsers were liable on demand and notice without suit against the maker as required by the Iowa statute.

Most of the Iowa cases, however, have consistently indulged the presumption that the law of another state is the same as the law of the forum, not only when the law of Iowa on the subject was the common law (and the presumption was, therefore, the same in effect as the presumption in favor of the common law); (*Crafts v. Clark*, 31 Iowa, 77 [Pa.]; *Leiber v. Union P. R. Co.* 40 Iowa, 688 [Neb.]; *Tolman v. Janson*, 106 Iowa, 455, 76 N. W. 732 [Ill.]; *State v. Nadal*, 69 Iowa, 478, 29 N. W. 451 [Mo.]); but also when the law of Iowa on the subject was statutory (and the presumption was, therefore, in some cases at least, practically, as well as theoretically, opposed to the presumption in favor of the common law) (*Bean v. Briggs*, 4 Iowa, 464 [Ill.]; *Sayre v. Wheeler*, 31 Iowa, 112 [Mo.]; *Sayre v. Wheeler*, 32 Iowa, 559 [Mo.]; *Stephens v. Williams*, 46 Iowa, 540 [Mich.]; *Church v. Crossman*, 49 Iowa, 444 [N. Y.]; *Webster v. Hunter*, 50 Iowa, 215 [Ill.]; *Peck v. Parchen*, 52 Iowa, 46, 2 N. W. 597 [Mont.]; *Neese v. Farmer's Ins. Co.* 55 Iowa, 604, 8 N. W. 450 [Neb.]; *Hadley v. Gregory*, 57 Iowa, 157, 10 N. W. 319 [Ind.]; *Goodnow v. Litchfield*, 67 Iowa, 691, 25 N. W. 882 [N. Y.]; *Davis v. Chicago, R. I. & P. R. Co.* 83 Iowa, 744, 49 N. W. 77 [Ohio]; *Bresser v. Saarman*, 112 Iowa, 720, 84 N. W. 920 [Neb.]; *Spinney v. Miller*, 114 Iowa, 210, 89 Am. St. Rep. 351, 86 N. W. 317 [Ill.]; *Hewitt v. Morgan*, 88 Iowa, 468, 55 N. W. 478 [Ohio]; *Barringer v. Ryder*, 119 Iowa, 121, 93 N. W. 56 [Wis.]; *Sleverts v. National Benev. Assn.* 95 Iowa, 710, 64 N. W. 671 [Minn.]; *Goodwin v. Provident Sav. Life Assur. Assn.* 97 Iowa, 226, 32 L. R. A. 473, 59 Am. St. Rep. 411, 66 N. W. 157 [N. Y.]; *McMillan v. American Exp. Co.* 123 Iowa, 236, 98 N. W. 629 [Ind.]; *German Bank v. American F. Ins. Co.* 83 Iowa, 491, 32 Am. St. Rep. 316, 50 N. W. 53 [Ill.]; *Re Capper*, 85 Iowa, 82, 52 N. W. 6 [Ind.]).

In *Hudson v. Northern P. R. Co.* 92 Iowa, 231, 54 Am. St. Rep. 550, 60 N. W. 608, the court said that, as there was no statute in Idaho regulating carrier's contracts which limit the carrier's liability, it would be presumed that the common-law rule by which a carrier may stipulate against liability for loss not due to negligence prevailed there, although such a

stipulation is ineffectual under the Iowa statute. It will be observed in this case, however, that the court starts with the statement that there is no statute in Idaho on the subject. How that fact was shown in the case does not appear, but it is obvious that, with such fact before the court, it could not indulge the usual presumption that the law of Idaho on the subject was the same as the law of Iowa. Besides, the common-law rule that was applied in this case was the one which prevents a carrier from contracting against liability for negligence, and that was the statutory rule in Iowa. The decision would, therefore, have been the same, even if the court had indulged the usual presumption that the law of Idaho was the same as the law of Iowa. Kansas.

The courts of Kansas consistently indulge the presumption that the law of another state is the same as that of Kansas, even when the latter is statutory. *Kansas P. R. Co. v. Cutter*, 16 Kan. 568 (Colo.); *Holthaus v. Farris*, 24 Kan. 784 (Mo.); *Rogers v. Coates*, 38 Kan. 232, 16 Pac. 463 (Mo.); *Shattuck v. Chandler*, 40 Kan. 516, 10 Am. St. Rep. 227, 20 Pac. 225 (Ill.); *Missouri P. R. Co. v. Sharitt*, 43 Kan. 375, 8 L. R. A. 385, 19 Am. St. Rep. 143, 23 Pac. 430 (Mo.); *Heery v. J. L. Mott Iron Works Co.* 10 Kan. App. 579, Appx., 62 Pac. 904 (Colo.); *Scott v. Beard*, 5 Kan. App. 560, 47 Pac. 986 (Mo.); *Re Hess*, 5 Kan. App. 763, 48 Pac. 596 (Okla.); *Thomen v. Sullivan*, 9 Kan. App. 887 Appx. 60 Pac. 755 (Ill.); *Woolcott v. Case*, 63 Kan. 35, 64 Pac. 965 (Cal.); *Poll v. Hicks*, 67 Kan. 191, 72 Pac. 847 (Ohio); *Mutual Home & Sav. Assn. v. Worz*, 67 Kan. 506, 73 Pac. 116 (Mo.).

In *First Nat. Bank v. Nordstrom* (Kan.) 78 Pac. 804, also, the court said that it would be presumed, in the absence of evidence to the contrary, that the law of Iowa as to the negotiability of notes is the same as that of Kansas. So far as appears, however, the common-law rule on the subject prevails in Kansas.

In *Roe v. Roe*, 52 Kan. 724, 39 Am. St. Rep. 367, 35 Pac. 888, the court indulged the presumption that the law of Colorado with reference to the granting of divorce and alimony is the same as the law of Kansas, there being no evidence on the point.

The general rule is that the laws of a foreign country, or of a sister state, are unknown to the courts in which they may be drawn in question, but, if required to be known, must be proved as facts in the case, except that, in some instances, in the lack of proof of what they are, they may be presumed to be the same as the laws of the forum where drawn in question. Such, also, is the statute of this state (Civil Code, § 370; Gen. Stat. 1897, chap. 97, § 1718; Gen. Stat. 1899, 4633). *Alexandria, A. & Ft. S. R. Co. v. Johnson*, 61 Kan. 417, 59 Pac. 1063.

In *Furrow v. Chaplin*, 13 Kan. 107, it was urged that, as the purchase of property by a married woman was made outside of Kansas, it must be presumed that the common law prevailed at the place where the purchase was made; but the court held that it would be presumed that the law of that state was the same as the law of Kansas; and intimated that this presumption would be indulged, even though it had appeared that the purchase was made in another state, though as a matter of fact it did not appear where the purchase was made. By the law of Kansas the property purchased would be the separate property of the wife, and would

not become the property of the husband as at common law.

In *Shed v. Augustine*, 14 Kan. 282, it was held that the courts could not take judicial notice of the usury laws of another state, and that it was error to instruct a jury as to the meaning and effect of those laws in the absence of any evidence concerning them.

Kentucky.

The courts of Kentucky have frequently indulged the presumption in favor of the common law when the common law on the subject prevailed in that state. *Johnson v. Bank of United States*, 2 B. Mon. 310 (D. C.); *Honore v. Hutchings*, 8 Bush, 692 (Ill.); *Miles v. Collins*, 1 Met. (Ky.) 311 (Pa.); *Stern v. Freeman*, 4 Met. (Ky.) 311 (Pa.); *Cope v. Daniel*, 9 Dana, 415 (Pa.); *Forepaugh v. Appold*, 17 B. Mon. 630 (Pa.); *Chesapeake & N. R. Co. v. Hanmer*, 23 Ky. L. Rep. 1846, 66 S. W. 375.

And the presumption in favor of the common law has also been indulged in this state when the law of Kentucky on the subject was statutory. *Moss v. Rowland*, 3 Bush, 506 (Mo.); *Klenke v. Noonan*, 26 Ky. L. Rep. 305, 81 S. W. 241 (Ohio).

The rate of interest in a foreign state, or in any of the sister states, is a fact which, like all others, must be proved and ascertained by the jury. *Ingraham v. Arnold*, 1 J. J. Marsh. 408.

In *Turner v. Johnson*, 106 Ky. 460, 50 S. W. 675, the court said that, as there was no allegation that the laws of Missouri assigned to the bond in suit a different effect than the laws of Kentucky, its legal effect must be determined by the law of Kentucky. The latter, however, does not appear to have been statutory.

The opinion in *Chesapeake & N. R. Co. v. Venable*, 111 Ky. 41, 63 S. W. 35, illustrates the tendency of the courts to ignore the distinction between the presumption that the common law prevails in another state, and the presumption that the law of another state is the same as the law of the forum. The question was as to the measure of damages for personal injuries sustained in another state. The law of the forum on the subject was evidently the common law, and not statutory. The court said: "Whatever may be the rule as to statutory rights, it is well settled that it is unnecessary to plead or prove the law of a foreign state unless it differs from the *lex fori*. Where a party seeks to recover or defend under a foreign law, such law must be pleaded and proved like any other fact; but, in the absence of averment and proof, the rule is that foreign states, whose system of jurisprudence is derived from the same source as our own, are presumed to be governed by the same law."

Louisiana.

In Louisiana the courts generally either indulge the presumption that the law of another state or country is the same as that of Louisiana, even though the latter be statutory (*Patterson v. Garrison*, 16 La. 557 [Md.]; *Pagett v. Curtis*, 15 La. Ann. 451 [S. C.]; *Nalle v. Ventres*, 19 La. Ann. 373 [Miss.]; *Randall's Succession*, 26 La. Ann. 163 [Miss.]; *McLear v. Hunsicker*, 29 La. Ann. 539 [Del.]; *Sandidge v. Hunt*, 40 La. Ann. 706, 5 So. 55 [Tenn.]; *Roehl v. Porteous*, 47 La. Ann. 1583, 18 So. 645 [Ala.]); or, without indulging any presumption, apply the law of Louisiana as the only law before the court (*Bonneau v. Poydras*, 2 Rob. [La.] 1 [France]; *Van Wyck v. Hills*, 4 Rob. 67 L. R. A.

[La.] 140 [Tenn.]; *Stone v. Minor*, 6 Rob. [La.] 29 [Miss.]; *Allen v. Allen*, 6 Rob. [La.] 104, 39 Am. Dec. 553 [Miss.]; *Harris v. Alexander*, 9 Rob. [La.] 151 [Miss.]; *Spears v. Turpin*, 9 Rob. [La.] 293 [Miss.]; *Campbell v. Miller*, 3 Mart. N. S. 149 [Miss.]; *Hernandez v. Garetagé*, 4 Mart. N. S. 419 [Miss.]; *Marshall v. Watrigant*, 13 La. Ann. 619 [Ky.]; *Kuenzi v. Elvers*, 14 La. Ann. 392 [Brazil]; *Atkinson v. Atkinson*, 15 La. Ann. 491 [Tex.]; *Syme v. Stewart*, 17 La. Ann. 73 [Miss.]; *Crozler v. Hodge*, 3 La. 357 [Pa.]; *Harris v. Allnutt*, 12 La. 465 [Miss.]; *Smoot v. Russell*, 1 Mart. N. S. 522 [Ala.]; *Peabody v. Carrol*, 9 Mart. [La.] 295, 13 Am. Dec. 305 [Tenn.]).

In *Rush v. Landers*, 107 La. 549, 57 L. R. A. 383, 32 So. 95, *supra*, II. b, however, the court held that, even in the absence of proof, it would take judicial notice that the common law had been adopted in Indiana, though it would not take such notice of statutory modification of that law; and then proceeded to apply the general common-law rule, of which it also took judicial notice, to the property rights of husband and wife. Practically the same course was followed in *Martin v. Boler*, 13 La. Ann. 369, with respect to the property rights of husband and wife under the laws of another state. There is no reference in the *Rush* Cases to the Louisiana cases above cited, which have, in the absence of proof of the law of the other state, applied the law of Louisiana, and no suggestion that the decision changes the previous rule, or that any distinction is necessary. Perhaps the rule apparently declared in the earlier cases was assumed to apply only to subjects as to which there was no specific, positive, common-law rule declared by the courts, and not to subjects which, like the property rights of husband and wife, are covered by definite, specific rules announced by repeated decisions of the courts. This distinction, however, or any distinction which rests upon a classification of questions as common-law and non-common-law questions, is exceedingly difficult of application, and will not reconcile the decision in the *Rush* Case with the earlier decisions. For instance, in *Crozler v. Hodge*, 3 La. 357, where the law of Louisiana was applied in the absence of proof of the law of Pennsylvania, the question was as to the rights of a surviving partner,—in any view, a common-law question. In *Marshall v. Watrigant*, 13 La. Ann. 619, in the absence of proof of the law of Kentucky, a statute of Louisiana, forbidding or restricting the emancipation of slaves was applied.

Maine.

The courts of Maine have declared that the law of another jurisdiction would be presumed to be the same as the law of Maine, without suggesting any distinction between subjects as to which the common law prevails in Maine and those as to which the law of Maine is statutory. *McKenzie v. Wardwell*, 61 Me. 136 (Mass.); *Peabody v. Maguire*, 79 Me. 572, 12 Atl. 630 (Canada).

In neither of these cases, however, did it appear that the law of Maine on the subject was statutory, and the result, therefore, would, apparently, have been the same even if the presumption in favor of the common law had been indulged.

And in *Tillexan v. Wilson*, 43 Me. 186 (N. Y.), where the law of Maine on the subject was statutory, the presumption in favor of the common law was indulged.

In *Carpenter v. Grand Trunk R. Co.* 72 Me. 388, 39 Am. Rep. 840, it was expressly held that the presumption should be indulged that the common law with respect to a passenger's right of "stop over" prevailed in New Hampshire, Vermont, and Canada, and that there was no presumption that the rule had been changed by statute in those jurisdictions, as it had been in Maine.

In *Emerson Co. v. Proctor*, 97 Me. 360, 54 Atl. 840, however, the presumption was indulged that the law of Maryland, like the statute of Maine, requires the reservation of title by a seller of personal property to be in writing. **Maryland.**

In *State use of Allen v. Pittsburgh & C. R. Co.* 45 Md. 41 (an action in Maryland for death occasioned by negligence in Pennsylvania), the court said that, in the absence of anything to the contrary, the presumption is that the common law prevails in the state where the alleged wrong was done, and that the courts of Maryland, acting upon that presumption, afford the common-law remedy for the injury complained of; but that there was no such presumption respecting the positive statute law of Maryland. It was accordingly held that the action would not lie in Maryland, without proof of a statute of the other state giving a right of action in such cases, although there was such a statute in Maryland.

So, in *Dickey v. Pocomoke City Nat. Bank*, 89 Md. 280, 296, 43 Atl. 83, the court said that the authorities are not uniform as to whether the courts of one state will presume, in the absence of anything to the contrary, that a foreign state has adopted the same statute that is in force where the case is pending; but that it would be carrying such presumption to an unreasonable extent to presume, without proof to that effect, that there is a statute in the District of Columbia, like the statute of Maryland, which makes a complete change of the common-law rule by providing that, after the maturity of a note secured by a mortgage, the title to the note shall be conclusively presumed to be vested in the record holder of the title to the mortgage. Again, the court says: "When a statute thus radically changes the common law of one state, there is no good reason to presume that the legislature of another state has done likewise."

National Bank v. Baltimore & O. R. Co. (Md.) 59 Atl. 134, indulged the presumption that the common-law rule as to the negotiability of bills of lading obtained in Virginia. So far as appears, however, the common-law rule on the subject also prevails in Maryland. **Massachusetts.**

In Massachusetts the presumption in favor of the common law is ordinarily indulged when the common law on the subject prevails in Massachusetts. *Wood v. Corl*, 4 Met. 203 (Ohio); *Cribbs v. Adams*, 13 Gray, 597 (La.; law merchant); *Richards v. Barlow*, 140 Mass. 218, 6 N. E. 68 (Ill.); *Thurston v. Percival*, 1 Pick. 415 (N. Y.); *Callender, McA. & T. Co. v. Flint* (Mass.) 72 N. E. 345 (R. I.).

In a few cases in this state, when the common law on the subject in question prevailed in Massachusetts, and it was, therefore, immaterial for practical purposes which presumption was indulged, the courts have formally indulged the presumption that the law of the other state was the same as the law of the forum. *Legg v. Legg*, 8 Mass. 99 (Vt.); *Dubois v. Mason*, 127 67 L. R. A.

Mass. 37, 84 Am. Rep. 335 (R. I.); *Hazen v. Mathews*, 184 Mass. 388, 68 N. E. 838 (N. Y.).

When, however, the law of Massachusetts on the subject is statutory, so that the presumption that the law of the other state is the same as the law of Massachusetts would produce a result opposed to that which follows from the presumption in favor of the common law, the courts have consistently indulged the presumption that the common law is in force in the other state. *Com. v. Graham*, 157 Mass. 73, 16 L. R. A. 578, 34 Am. St. Rep. 255, 31 N. E. 706 (Maine); *Murphy v. Collins*, 121 Mass. 6 (N. Y.); *Daniels v. Pratt*, 143 Mass. 216, 10 N. E. 166 (N. Y.); *Kelley v. Kelley*, 161 Mass. 111, 25 L. R. A. 806, 42 Am. St. Rep. 389, 36 N. E. 837 (N. Y.).

In the last three cases it is expressly stated that there is no presumption that the statutes of another state are like those of Massachusetts; and that is also true of *CHERRY v. SPRAGUE, Michigan*.

In *Re High*, 2 Dougl. (Mich.) 515, the court indulged the presumption that the common law prevailed in Uruguay, where a will was made.

But it was said in *Gordon v. Ward*, 16 Mich. 360, that the presumption in favor of the common law cannot be indulged with reference to things which are usually matters of statutory regulation.

The presumption in favor of the common law has also been indulged in this state, even when the law of Michigan on the subject was statutory. *Crane v. Hardy*, 1 Mich. 56 (N. Y.); *Knapp v. Knapp*, 95 Mich. 474, 55 N. W. 353 (Wis.); *Schroeder v. Boyce*, 127 Mich. 33, 86 N. W. 387 (Ind.).

Kermott v. Ayer, 11 Mich. 181, declined to indulge the presumption that the rate of interest in Canada was the same as in Michigan. And *O'Rourke v. O'Rourke*, 43 Mich. 58, 4 N. W. 531, refused to indulge the presumption that there was a statute in New York like that of Michigan, invalidating contracts made on Sunday.

In *Ellis v. Maxson*, 19 Mich. 186, 2 Am. Rep. 81, involving the validity of a parol contract for the sale of lands in Illinois, the court said that, if it could make any presumption as to the laws of Illinois, it would be that they conform in substance to the general principles of the common law. The court further said that it was not necessary to consider how universally such a presumption may be indulged, but that it certainly would not presume that the legislature of another state has adopted all of the statutes of the forum.

In *Worthington v. Hanna*, 23 Mich. 535, however, the court declined to indulge the presumption that the common-law rule as to property rights of husband and wife prevailed in New York, when that presumption would operate to invalidate a mortgage given by a husband to his wife which would be valid by the law of Michigan.

So in *Millard v. Truax*, 73 Mich. 381, 43 N. W. 328, the court said that it would not presume that a contract valid by the law of Michigan was invalid by the law of Ohio, where it was made.

In *Hutchins v. Kimmell*, 31 Mich. 126, 18 Am. Rep. 164, Cooley, J., said that it had been held in Michigan that the common law will be presumed to prevail in a foreign country in the absence of proof to the contrary; and, while he thought that it was questionable whether the

doctrine was to be applied universally, he said it could not be disputed that the reason of it was applicable to all marriages celebrated in Christian countries in which it may properly be assumed that a general common law on the subject of marriage still prevails.

In *Russell v. Pierce*, 121 Mich. 208, 80 N. W. 118, the court said that some authorities hold that the presumption is to be indulged, in the absence of proof, that there is no law in a sister state against usury, while others hold that the presumption should obtain that the law of the sister state is the same as that of the forum. The question, however, was not decided in this case.

In *Phelps v. American Sav. & L. Asso.* 121 Mich. 348, 80 N. W. 120, the court expressly said it could not take judicial notice that there is any usury law in Minnesota.

In Minnesota the presumption in favor of the common law is usually indulged when the common law on the subject prevails in Minnesota. *Engstrand v. Kleffman*, 86 Minn. 408, 91 Am. St. Rep. 359, 90 N. W. 1054 (Wis.).

In *Mohr v. Miesen*, 47 Minn. 228, 49 N. W. 862, however, the court formally indulged the presumption that the law of Wisconsin was the same as the law of Minnesota, the law of the latter state upon the subject in question being the common law.

The presumption in favor of the common law has also been indulged in Minnesota even when the law of Minnesota on the subject was statutory. *Reiff v. Bakken*, 36 Minn. 333, 31 N. W. 348 (Dak.); *Pardoe v. Merritt*, 75 Minn. 12, 77 N. W. 552 (Neb.).

In *Desnoyer v. McDonald*, 4 Minn. 515, Gil. 402, and *Cooper v. Reaney*, 4 Minn. 528, Gil. 413, the court apparently indulged the presumption that the rate of interest in another state was the same as in Minnesota; and in *Brimhall v. Van Campen*, 8 Minn. 13, Gil. 1, 82 Am. Dec. 118, the court apparently indulged the presumption that there was a law in New York similar to the statute of Minnesota invalidating contracts made on Sunday. These cases, however, so far as they lay down the general rule that the law of the place of the contract will, in the absence of proof, be presumed to be the same as that of the forum, were impliedly overruled by *Hoyt v. McNeil*, 13 Minn. 390, Gil. 362, which refused to indulge the presumption that there was a statute of limitations in New York and Michigan like that of Minnesota, and were expressly overruled by *Myers v. Chicago*, St. P. M. & O. R. Co. 69 Minn. 476, 65 Am. St. Rep. 579, 72 N. W. 694,—which refused to indulge the presumption that there was a statute in Wisconsin similar to that of Minnesota creating a cause of action for negligent homicide.

Hoyt v. McNeil, however, seems, in turn, to have been impliedly overruled—at least with respect to the law of limitation of another state—by *Mowry v. McQueen*, 80 Minn. 385, 83 N. W. 348, which says: "Statutes of limitations are matters of procedure, pleading, and proof; and, in the absence of any allegation to the contrary, we may assume in an action brought in this state that they are the same in Wisconsin as in Minnesota on this particular subject."

Mississippi.

Parties whose rights depend upon the peculiar law of another jurisdiction must fail unless that law be proved. *McDonald v. Myles*, 12 Smedes & M. 279.

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It is now, however, expressly provided by statute in this state that the courts shall take judicial notice of the laws of sister states and foreign countries.

Missouri.

As shown in subdivision III. b, *supra*, the courts of Missouri only indulge the presumption in favor of the common law with respect to those states which, prior to becoming members of the Union, were subject to the law and jurisdiction of England. Within these limits, the courts of that state consistently indulge the presumption in favor of the common law when the common law on the subject prevails in Missouri. *Roll v. St. Louis & C. Smelting & Min. Co.* 52 Mo. App. 60 (Ill.); *Kratz v. Preston*, 52 Mo. App. 251 (Pa.); *American Oak Leather Co. v. Wyeth Hardware & Mfg. Co.* 57 Mo. App. 297 (Ill.); *Davis v. Cohn*, 85 Mo. App. 530 (Ill.).

It can only be assumed that an act is criminal in another state or country when it is so by the common law; and, if words charge an act to be done in another state which is not a crime by the common law, in order to make them actionable, the petition must show, and the evidence establish, its criminality by the laws of such other state. *Bundy v. Hart*, 46 Mo. 463, 2 Am. Rep. 525 (Ind.).

The burden of proving the law of another state rests upon the party claiming rights under it, and, in the absence of such proof, the trial court is authorized to presume that the same rule of law which obtains at the forum obtains in the other state, being founded in the principles of the common law, and not the necessary outgrowth of a local and peculiar statute. *Conrad v. Fisher*, 37 Mo. App. 352, 8 L. R. A. 147 (Ky.).

In an equity proceeding, until the contrary is shown, it will be presumed that the equity doctrine of a sister state is the same as that of the forum where both have an equity jurisprudence. *Johnston v. Gawtry*, 11 Mo. App. 322, Affirmed in 88 Mo. 339 (N. Y.).

This presumption in favor of the common law was also indulged in *Burdick v. Missouri P. R. Co.* 123 Mo. 221, 26 L. R. A. 384, 45 Am. St. Rep. 528, 27 S. W. 453, with respect to the law of Kansas, which, according to the Missouri criterion, though not according to the criterion generally adopted, is excluded from the class of states with respect to which the presumption in favor of the common law may properly be indulged. As the common law on the subject in question prevailed in Missouri, however, it was immaterial for practical purposes whether the presumption in favor of the common law, or the presumption that the law of Kansas was the same as the law of Missouri, was indulged. The latter form of presumption was observed in *Haworth v. Kansas City Southern R. Co.* 94 Mo. App. 215, 68 S. W. 111, with respect to the law of Arkansas, though the common law on the subject prevailed in Missouri. And this form of presumption was also indulged in *Bergner v. Chicago & A. R. Co.* 13 Mo. App. 499, *Warren v. Lusk*, 18 Mo. 102, and *Law v. Crawford*, 67 Mo. App. 150, with respect to the law of Illinois. As Illinois was formed from the Northwest Territory, it is not apparent why, even according to the strict Missouri criterion, the presumption in favor of the common law could not have been indulged in these cases; but, since the law of Missouri upon the subject in question was the common law, it was immaterial for practical purposes which form the presumption took.

In *Selking v. Hebel*, 1 Mo. App. 340, the same form of presumption was indulged with respect to the law of Illinois, notwithstanding that the law of Missouri on the subject was statutory, and the form of presumption was, therefore, practically important. But see *Crouch v. Louisville & N. R. Co.* 42 Mo. App. 248, *infra*.

With the exception of the *Selking* Case, the courts of Missouri have consistently indulged the presumption in favor of the common law, even when the law of Missouri upon the subject in question was statutory, if the other state prior to its becoming a member of the Union was subject to the law of England. *Houghtaling v. Ball*, 19 Mo. 84, 59 Am. Dec. 331 (Ill.); *Lucas v. Ladew*, 28 Mo. 842 (N. Y.); *Meyer v. McCabe*, 73 Mo. 236 (Ind.); *Morrissey v. Wiggins Ferry Co.* 47 Mo. 521 (N. Y.); *Benne v. Schnecko*, 100 Mo. 250, 13 S. W. 82 (Ky.; Tenn.); *State v. Clay*, 100 Mo. 571, 13 S. W. 827 (Kan.); *McPike v. McPike*, 111 Mo. 216, 20 S. W. 12 (Ill.); *A. G. Edwards Brokerage Co. v. Stevenson*, 160 Mo. 516, 61 S. W. 617 (N. Y.); *Goldsmith v. Chicago & A. R. Co.* 12 Mo. App. 479 (Ill.); *White v. Chaney*, 20 Mo. App. 389 (Ky.); *Kerwin v. Doran*, 29 Mo. App. 397 (Ill.); *Cooper v. Standley*, 40 Mo. App. 138 (Ill.); *Crouch v. Louisville & N. R. Co.* 42 Mo. App. 248 (Ill.); *Gaylord v. Duryea*, 95 Mo. App. 574, 69 S. W. 607 (N. Y.); *Price v. Clevenger*, 99 Mo. App. 536, 74 S. W. 894 (Ill.).

Kollock v. Emmert, 43 Mo. App. 566 (Kan.); *Wyeth Hardware & Mfg. Co. v. Lang*, 54 Mo. App. 147, and *Brinkman v. Luhrs*, 60 Mo. App. 512 (Kan.), which indulged the presumption that the law of Kansas was the same as the statutory law of Missouri, are not opposed to the cases above cited, since Kansas, according to the criterion established in Missouri, is not one of those states with respect to which the presumption in favor of the common law may be indulged. A similar explanation may be made of *Barhydt v. Alexander*, 59 Mo. App. 188, indulging the presumption that the statute of Iowa with reference to the powers of notaries is the same as that of Missouri, and of *Hurley v. Missouri P. R. Co.* 57 Mo. App. 676, indulging the presumption that the law of Texas as to the duty of a railroad company to fence its tracks is the same as the statutory law of Missouri. It is clear from the opinions in these cases that the presumption in favor of the similarity of laws was indulged because the usual presumption in favor of the common law could not, according to the strict criterion in Missouri, be indulged with respect to the law of Iowa or Texas, because neither of these states was subject to the law of England before it became a member of the Union.

When the common law on the subject prevails in Missouri, it is immaterial for the practical purposes of the case, whether the foreign state is one with respect to which the presumption in favor of the common law may be indulged or not, since, even if that presumption may not be indulged, the presumption that the law of the other state is the same as the law of Missouri prevails. Thus, it was held in *Philpot v. Missouri P. R. Co.* 85 Mo. 164, that, in the absence of any evidence as to the age of majority in Texas, it must be presumed to be the same as that fixed by the common law of Missouri.

The cases above cited which have indulged the presumption in favor of the common law when the law of Missouri upon the subject was statutory necessarily negative the presumption 67 L. R. A.

that the law of the other state is the same as the statutory law of Missouri, when the other state was subject to the law of England prior to its admission into the Union. And the latter presumption has been expressly denied in such case. *Goldsmith v. Chicago & A. R. Co.* 12 Mo. App. 479 (Ill.); *Rohan Bros. Boiler Mfg. Co. v. Richmond*, 14 Mo. App. 595, Appx.; *White v. Chaney*, 20 Mo. App. 395 (Ky.); *Crouch v. Louisville & N. R. Co.* 42 Mo. App. 248 (Ill.); *Nenno v. Chicago, R. I. & P. R. Co.* 105 Mo. App. 540, 80 S. W. 24 (Ill.); *Hazelett v. Woodruff*, 150 Mo. 534, 51 S. W. 1048 (Ind.).

In *Walte v. Bartlett*, 53 Mo. App. 378, the court, assuming, in the absence of proof, on the subject that the rule in Dakota as to the effect of a criminal statute upon a civil liability was the same as in Missouri, held that a statute of Dakota—introduced in evidence—declaring that the reservation of usury should operate as a forfeiture of the entire interest, and declaring the exaction of usury a misdemeanor, did not operate to prevent a recovery of the principal. *Nebraska*.

In Nebraska the courts indulge the presumption that the law of another state is the same as the law of Nebraska when the common law on the subject prevails in Nebraska. *Ruth v. Lowrey*, 10 Neb. 260, 4 N. W. 977 (Wyo.); *Lord v. State*, 17 Neb. 526, 23 N. W. 507 (Pa.); *Haggin v. Haggin*, 35 Neb. 375, 53 N. W. 209 (Kan.); *Bailey v. State*, 36 Neb. 808, 55 N. W. 241 (Iowa); *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37 (Iowa); *East Omaha Street R. Co. v. Godola*, 50 Neb. 906, 70 N. W. 491 (Iowa); *Staunfield v. Jeutter* (Neb.) 96 N. W. 642.

And the presumption that the law of the other state is the same as the law of Nebraska is also indulged, even when the law of Nebraska upon the subject is statutory; and the form of the presumption is, therefore, material. *Scroggin v. McClelland*, 37 Neb. 644, 22 L. R. A. 110, 40 Am. St. Rep. 520, 56 N. W. 208 (statute of limitations; Ill.); *Fitzgerald v. Fitzgerald & M. Constr. Co.* 41 Neb. 374, 59 N. W. 838 (Neb.); *Chapman v. Brewer*, 43 Neb. 890, 47 Am. St. Rep. 779, 62 N. W. 320 (Iowa); *Smith v. Mason*, 44 Neb. 610, 63 N. W. 41 (Ill.); *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37 (by implication; Kan.); *Welton v. Atkinson*, 55 Neb. 674, 70 Am. St. Rep. 416, 76 N. W. 473 (Ark.); *Fisher v. Donovan*, 57 Neb. 361, 44 L. R. A. 383, 77 N. W. 778; *Pennsylvania Co. v. Kennard Glass & Paint Co.* 59 Neb. 435, 81 N. W. 372 (Pa.); *Schlitt & Bro. Co. v. Mahoney*, 60 Neb. 20, 82 N. W. 99 (Ohio); *People's Bldg. Loan & Sav. Assn. v. Backus*, 2 Herdman (Neb.) 403, 89 N. W. 315 (N. Y.).

In *Council Bluffs Sav. Bank v. Griswold*, 50 Neb. 753, 70 N. W. 376, however, the court said: It is true, as a general proposition, that the laws of a sister state will, in the absence of proof, be presumed to be the same as those in force in Nebraska; but that proposition is not without exceptions; and it will be presumed, in the absence of proof to the contrary, that courts of general jurisdiction of other state possess the authority they presume to exercise, and that the methods of procedure pursued by them, although differing from the established practice in Nebraska, are authorized by the laws of the other state.

New Hampshire.

In *Ela v. Ela*, 70 N. H. 163, 47 Atl. 414, the presumption was indulged that, under the law of Alabama, as under the law of New Hamp-

shire, real property does not pass to the administrator, but descends to the heirs.

In *Leach v. Pillsbury*, 15 N. H. 137, however, the court refused to indulge the presumption that the law of Louisiana with respect to the distribution of an intestate's estate was the same as the statute of New Hampshire. See further, as to this case, III. *c. infra*. *New Jersey*.

In New Jersey the presumption in favor of the common law is generally indulged when the common law on the subject prevails in New Jersey. *Reed v. Wilson*, 41 N. J. L. 29 (Pa.); *Seyfert v. Edison*, 45 N. J. L. 393 (Pa.).

In *Dittman v. Distilling Co.* 64 N. J. Eq. 537, 54 Atl. 570 (W. Va.), however, the court formally indulged the presumption that the law of the other state was the same as that of New Jersey; but the common law on the subject prevailed in New Jersey, and the form of the presumption was therefore immaterial.

The presumption in favor of the common law is also indulged in this state, even when the law of New Jersey on the subject is statutory. *Wain v. Wain*, 53 N. J. L. 429, 22 Atl. 203 (Pa.); *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308 (N. Y.); *Bradley v. Johnson*, 46 N. J. L. 271 (N. Y.).

In *Fred v. Fred* (N. J. Eq.) 58 Atl. 611, the court, in the absence of proof of the law of the other state upon the subject, interpreted a decree rendered in Dakota granting alimony, in the light of the practice in New Jersey not to award a gross amount for future support, but to grant an allowance in periodical instalments.

In *Leake v. Bergen*, 27 N. J. Eq. 360, the plea of usury was defeated, although the contract would apparently have been usurious tested by the law of New Jersey, because the law of the other state upon the subject was not proved.

Dolman v. Cook, 14 N. J. Eq. 56; *Campion v. Kille*, 14 N. J. Eq. 229; and *Andrews v. Torrey*, 14 N. J. Eq. 355,—are to same effect as last case.

New York.

In New York the presumption in favor of the common law is indulged when the common law on the subject prevails in New York. *Ruse v. Mutual Ben. L. Ins. Co.* 23 N. Y. 516 (N. J.); *Jennings v. Grand Trunk R. Co.* 52 Hun, 227, 5 N. Y. Supp. 140 (Canada); *Re Hamilton*, 76 Hun, 200, 27 N. Y. Supp. 818 (Pa.); *Abell v. Douglass*, 4 Denio, 305 (Pa.); *Palne v. Noelke*, 11 Jones & S. 176 (N. J.); *Goodman v. Mercantile Credit Guarantee Co.* 17 App. Div. 474, 45 N. Y. Supp. 508 (Tenn.); *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618 (Pa.).

And the presumption is also indulged in favor of the common law, even when the law of New York on the subject is statutory. *Zeltner v. Irwin*, 25 App. Div. 228, 49 N. Y. Supp. 337 (Pa.); *Deyo v. Morss*, 30 App. Div. 56, 51 N. Y. Supp. 785 (Pa.); *Re Hulbert Bros. & Co.* 38 App. Div. 323, 57 N. Y. Supp. 38 (Mo.); *Stokes v. Macken*, 62 Barb. 145 (Eng.); *Sullivan v. Babcock*, 63 How. Pr. 120 (N. J.); *Throop v. Hatch*, 3 Abb. Pr. 23 (Mich.; Ohio); *Waldron v. Ritchings*, 9 Abb. Pr. N. S. 359 (Pa.); *Graves v. Cameron*, 9 Daly, 152 (N. J.); *Vanderpoel v. Gorman*, 140 N. Y. 563, 24 L. R. A. 548, 37 Am. St. Rep. 601, 35 N. E. 932 (N. J.); *First Nat. Bank v. National Broadway Bank*, 156 N. Y. 450, 42 L. R. A. 189, 51 N. E. 398 (Conn.); *Franzen v. Zimmer*, 90 Hun, 103, 35 N. Y. Supp. 6; L. R. A.

612 (Minu.); *Waters v. Spencer*, 44 Misc. 13, 89 N. Y. Supp. 693 (Ill.).

In the absence of proof to the contrary, it is to be presumed that the laws of another state are the same as the laws of New York in respect to contracts relating to personal estate, and as to commercial matters particularly; and that when the common law is known to prevail it is construed there as it is in New York, whether relating to lands or personal property. But no such presumption can be entertained in respect to statute law of New York. *Wright v. Delafield*, 23 Barb. 408. The court accordingly refused to indulge the presumption that there was a statute in Florida similar to the New York statute respecting trusts.

In *Casola v. Kugelman*, 33 App. Div. 428, 54 N. Y. Supp. 89, Affirmed in 104 N. Y. 608, 58 N. E. 1085, the court said that it was not at liberty to presume that there is a statutory provision in Maryland similar to that of New York respecting the rights of a special partner as a creditor; and that, if the court were authorized to indulge and presumption, it would be that the special partner's right of recourse against the general partners for his claim is the same as that of any partner at common law.

In the absence of evidence of the law of another state, the common law, as interpreted by the courts of the forum, will be presumed to be in force in that state. The presumption, in the absence of proof to the contrary, that the law of a foreign state is like our own, does not extend to positive statutory law. *Waters v. Spencer*, 44 Misc. 15, 89 N. Y. Supp. 693.

In *Harris v. White*, 81 N. Y. 532, the court said: "As a general rule, the courts of one state, in the absence of proof and allegations otherwise, will presume that the laws of another state are like those of their own state. It is doubted, however, whether this presumption will be made of statute law. *McCulloch v. Norwood*, 58 N. Y. 567; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17. It will not be made of statutes imposing a penalty or forfeiture. *Cutler v. Wright*, 22 N. Y. 472. And it has been declared that a court cannot take notice judicially of any laws of other states not according to the common law. *Holmes v. Broughton*, 10 Wend. 75, 25 Am. Dec. 536."

But where a statute of another state governing the particular subject has been proved, it cannot be presumed that the common-law rule is in force there. *Moore v. Hegeman*, 92 N. Y. 521, 44 Am. Rep. 408.

In *Stewart v. Union Mut. L. Ins. Co.* 155 N. Y. 237, 42 L. R. A. 147, 49 N. E. 876, it is said that, in the absence of evidence to the contrary, it may properly be assumed that the law of another state is the same as the law of the forum. The law of New York upon the subject in question, however, was the common law, so that this decision does not conflict with the other New York cases, which hold that it will be presumed that the common law prevails in another state.

In *Pratt v. Roman Catholic Orphan Asylum*, 20 App. Div. 352, 46 N. Y. Supp. 1035,—where the court, speaking of the law of England, said that either no presumption would be indulged as to the law, or that it would be presumed to be the same as the law of New York,—the law of New York on the subject was the common law.

Where the law of a foreign country or another state is a subject of inquiry, the law of

the state where the question arises, other than statute law, will be presumed to be the law existing in such state or foreign country, unless evidence is shown as to what the law actually is. *Bradley v. Mutual Ben. L. Ins. Co.* 3 Lans. 341.

The rule was applied in this case to the law of Louisiana. Query, whether it would not be better to apply the law of the forum in such a case, without indulging any presumption with reference to the foreign law.

North Carolina.

In North Carolina the presumption in favor of the common law is indulged when the common law on the subject prevails in North Carolina. *Benbow v. Moore*, 114 N. C. 263, 19 S. E. 156 (Tenn.); *Griffin v. Carter*, 40 N. C. (5 Ired. Eq.) 413 (Va.); *Brown v. Pratt*, 56 N. C. (3 Jones, Eq.) 202 (Tenn.).

And the presumption in favor of the common law is also indulged in this state, even when the law of North Carolina on the subject is statutory. *Cade v. Davis*, 96 N. C. 139, 2 S. E. 225 (S. C.); *Terry v. Robbins*, 128 N. C. 140, 83 Am. St. Rep. 663, 38 S. E. 470 (N. J.); *Gooch v. Faucett*, 122 N. C. 270, 39 L. R. A. 835, 29 S. E. 362 (Va.).

The majority opinion in *Lassitter v. Norfolk & C. R. Co.* (N. C.), 48 S. E. 642, treats the question, whether it will be presumed that there is a statute in another state (Virginia) similar to the statute of North Carolina, as though it were an open one in that state; but *Walker, J.*, with whom *Connor, J.*, concurred, dissented from this view, and declared it had been settled by the authorities above cited that there was no such presumption, but that, upon the other hand, the presumption is in favor of the common law.

A marriage celebrated in another state, and solemnized in the manner prescribed by the laws of North Carolina, will be presumed to be valid until the contrary is shown. *State v. Patterson*, 24 N. C. (2 Ired. L.) 346, 38 Am. Dec. 690.

North Dakota.

In *National German American Bank v. Lang*, 2 N. D. 60, 49 N. W. 414, the presumption was indulged that the rate of interest in Minnesota was the same as that in North Dakota.

But in *Dows v. Glaspel*, 4 N. D. 251, 60 N. W. 60, the common law as to the right of a broker to recover for commissions and advances on account of sales and purchases on the board of trade was presumed to prevail in Minnesota. So far as appears to the contrary, however, the common-law rule prevailed in North Dakota.

Oklahoma.

Where it is necessary to plead and prove the statutes of another state or territory, and such statutes are not pleaded and proved, the court will presume that the laws of such other state or territory are the same as the laws of Oklahoma. *Greenville Nat. Bank v. Evans-Snyder-Buel Co.* 9 Okla. 353, 60 Pac. 249 (Ind. Terr.).

Mansur-Tebbetts Implement Co. v. Willet, 10 Okla. 383, 61 Pac. 1066 (Mo.), is to the same effect.

In *Richardson v. Mackay*, 4 Okla. 328, 46 Pac. 546, a debtor sought to avail himself of the Oklahoma statute, which admits the completed bar of a statute of another state or territory in which the defendant has previously resided. He did not, however, prove the statute of limitations of the other state, claiming that the presumption of the law is that the statutes of other states upon a particular question are the same 67 L. R. A.

as those of Oklahoma. The court said that the proposition of law asserted as an abstract proposition was correct, but was not applicable to the present case, and it was therefore necessary to prove the statute of the other state.

In the syllabus to *Keagy v. Wellington Nat. Bank*, 12 Okla. 33, 69 Pac. 811 (Kan.), it is stated that, where a note is executed in Kansas, and suit brought to recover thereon in Oklahoma, and the statute of limitations of Kansas is neither pleaded nor proved, the court will presume that the laws of that state are the same as the laws of Oklahoma. The contrary, however, seems to be held in the opinion, which cites and approves *Richardson v. Mackay*, 4 Okla. 328, 46 Pac. 546.

Oregon.

The presumption in favor of the common law is indulged in Oregon, even when the law of Oregon on the subject is statutory. *Goodwin v. Morris*, 9 Or. 322 (Wash. Terr.); *Cressey v. Tatom*, 9 Or. 541 (Cal.).

Pennsylvania.

In Pennsylvania the courts indulge the presumption that the law of the other state is the same as the law of Pennsylvania, not only when the common law on the subject in question prevails in Pennsylvania (*Musser v. Stauffer*, 178 Pa. 99, 35 Atl. 709 [Va.]), but also when the law of Pennsylvania on the subject is statutory (*Evans v. Cleary*, 125 Pa. 204, 11 Am. St. Rep. 886, 17 Atl. 440 [Ill.]).

So, in the absence of proof to the contrary it will be presumed that the law of England is the same as the law of Pennsylvania. *Linton v. Moorhead*, 209 Pa. 646, 59 Atl. 264.

The law of another state upon a subject coming under notice in the trial of a cause will be presumed to be the same as the law of Pennsylvania upon the same subject. It is incumbent upon him who alleges that it is different to show just what it is to the court, who will judge of the sufficiency of the evidence and its effect, and instruct the jury thereon. *Bollinger v. Gallagher*, 170 Pa. 84, 32 Atl. 569.

It will not be presumed that the common-law rule, by which a judgment against one or more of the several partners on a partnership note bars a suit against the remaining partners who were not served, prevails in Wisconsin, but rather that the law of Wisconsin upon that subject is like the law of Pennsylvania, which is not the common-law rule. *Bennett v. Cadwell*, 70 Pa. 253.

In *Peter Adams Paper Co. v. Cassard*, 206 Pa. 179, 55 Atl. 949, the court, in the absence of evidence to the contrary, indulged the presumption that the law of New York, where the contract in question was made, was the same as that of Pennsylvania, and rendered a married woman incapable of becoming surety for her husband's debt.

The presumption is that, under the law of New York, as under the law of Pennsylvania, a contract in case of usury is to be treated as void only for the excess of interest. *Van Auker v. Dunning*, 81 Pa. 464.

South Carolina.

In South Carolina the presumption in favor of the common law is indulged when the common law on the subject prevails in South Carolina. *Roseman v. Southern R. Co.* 66 S. C. 91, 44 S. E. 547 (Ga.).

And *Columbian Bldg. & L. Asso. v. Rice*, 68 S. C. 236, 47 S. E. 63, after holding that there was no presumption that the law of usury in

Virginia is the same as in South Carolina, indulged the presumption that the common law prevailed in Virginia, and, therefore, that there was no legal limitation of the rate of interest in that state, notwithstanding that the common law in that respect had been changed in South Carolina.

South Dakota.

In *Sandmeyer v. Dakota F. & M. Ins. Co.* 2 S. D. 346, 50 N. W. 353, the court indulged the presumption that the law of Texas was the same as that of South Dakota upon the question whether an instrument which does not purport to be made by an insolvent debtor, nor to include all the property and debts of the assignor, is to be treated as a general assignment for creditors.

In the absence of evidence to the contrary, a court of South Dakota will presume that the law of Illinois is the same as its own as to the liability of married women on their contracts. *Commercial Bank v. Jackson*, 7 S. D. 135, 63 N. W. 548.

In the absence of any allegation or proof on the subject, it will be presumed that the laws of Pennsylvania are the same as the laws of South Dakota. *Thomas v. Pendleton*, 1 S. D. 150, 36 Am. St. Rep. 726, 46 N. W. 180. It was accordingly held in this case that a judgment rendered in Pennsylvania upon confession, under a warrant of attorney before the maturity of the note, is insufficient to sustain an attachment in the absence of evidence that the entry of the judgment before maturity was authorized by the law of Pennsylvania.

So, in *Morris v. Hubbard*, 10 S. D. 259, 72 N. W. 894 (Kan.), and *Baird v. Vines* (S. D.) 99 N. W. 89 (Mont.), the presumption was indulged that the law of the other state was the same as that of South Dakota, although the latter was statutory.

Upon the first appeal in *Meuer v. Chicago, M. & St. P. R. Co.* 5 S. D. 568, 25 L. R. A. 81, 49 Am. St. Rep. 898, 59 N. W. 945, the court applied the South Dakota statute, authorizing a common carrier to limit its liability for the ordinary negligence of its employees, to a contract made in Wisconsin, the law of the latter state not being proved. Upon a new trial two decisions of the supreme court of Wisconsin, denying the right of a common carrier so to limit its liability, were introduced in evidence; and, upon a second appeal (11 S. D. 94, 74 Am. St. Rep. 774, 75 N. W. 823), counsel for the carrier contended that the evidence was insufficient as proof of a law of Wisconsin upon the subject, because it was insufficient to overcome the presumption that the law of Wisconsin is the same as the law of South Dakota. The court said, in effect, however, that that contention was based upon the erroneous assumption that the court on the former appeal decided that it would presume that the statute law of Wisconsin was the same as the statute law of South Dakota; whereas, in fact, the court simply held on that appeal that it would presume that the law of Wisconsin was the same as the law of South Dakota, not that it had a statute similar to that of South Dakota. Again, the court said: "We are inclined to the opinion that it would be more technically accurate to say that the appellate court will not presume that the law of another state is different from the law of the state in which the contract is sought to be enforced. The party asserting or claiming that it is different assumes the burden

of proving that such is the fact. But in no event will the court presume that the statute law of another state is the same as the statute law of this state. The contention of appellant that the plaintiff was required to show that Wisconsin had a different statute upon the subject is therefore not tenable." And, again: "There was no presumption that there was any statute in force in the state of Wisconsin like the statute in force in this state. While a court trying the case in this state, in the absence of proof that the law of Wisconsin was different from that of this state, would not presume it was different, or, as generally stated, would presume the law of Wisconsin was the same, yet it will not presume that the state of Wisconsin has any statute upon the subject." It will be observed that the distinction with respect to the form of the presumption simply bears upon the "burden of proof" in the sense of the weight of proof. In other words, the distinction is only important when evidence of the foreign law has been introduced, and the court or jury is to pass upon the sufficiency of that evidence.

Tennessee.

In Tennessee the courts indulge the presumption that the law of another state is the same as that of Tennessee, not only when the common law on the subject in question prevails in Tennessee (*Lewis v. Woodfolk*, 2 Baxt. 25 [La.]; *Loud v. Hamilton* [Tenn.] 45 L. R. A. 400, 51 S. W. 140 [Ala.]), but also when the law of Tennessee on the subject is statutory (*Bagwell v. McTighe*, 85 Tenn. 616, 4 S. W. 46 [Mo.]; *Pennsylvania R. Co. v. Naive* [Tenn.] 64 L. R. A. 443, 79 S. W. 124 [Pa.]).

There is, however, no presumption that the statutes of other states respecting penalties and forfeitures are similar to those of Tennessee. *Hubble v. Morristown Land & Improv. Co.* 95 Tenn. 585, 32 S. W. 965 (N. J.); *Allen-West Commission Co. v. Carroll*, 104 Tenn. 489, 58 S. W. 314 (Mo.; usury). See also *infra*, III. e.

Texas.

In Texas the courts sometimes formally indulge the presumption that the common law, or, at least, that the law merchant, prevails in another state when the subject is governed by that law in Texas. *Locke v. Huling*, 24 Tex. 311 (La.; law merchant); *Green v. Rugely*, 23 Tex. 539 (La.; law merchant).

But more frequently, even when the law of Texas is the same as the common law, the presumption takes the form of a presumption that the law of the other jurisdiction is the same as the law of Texas. *Stevenson v. Pullman Palace-Car Co.* (Tex. Civ. App.) 26 S. W. 112 (Mexico); *Southern P. Co. v. Graham*, 12 Tex. Civ. App. 565, 34 S. W. 135 (N. Mex.); *Paul v. Chenault* (Tex. Civ. App.) 44 S. W. 682 (Tenn.); *Herndon v. Vick*, 18 Tex. Civ. App. 583, 45 S. W. 852 (Me.); *Southern P. R. Co. v. d'Arcals*, 27 Tex. Civ. App. 57, 64 S. W. 813 (Cal.); *National Bank of Commerce v. Kenney* (Tex.) 83 S. W. 368 (Mo.).

And there are no cases in Texas which indulge the presumption that the common law prevails in another state when the law of Texas is statutory or written law.

Usually when the law of Texas on the subject is statutory, the court formally indulges the presumption that the law of the other state is the same as that of Texas. *Pauska v. Daus*, 31 Tex. 67 (Mexico); *Houston & T. C. R. Co. v. Baker*, 57 Tex. 422 (Ga.); *James v. James*, 81

Tex. 373, 16 S. W. 1087 (Ind. Terr.); *Burgess v. Western U. Tele. Co.* 92 Tex. 125, 71 Am. St. Rep. 833, 46 S. W. 794 (Va.); *Missouri, K. & T. R. Co. v. Cooreham*, 10 Tex. Civ. App. 186, 30 S. W. 1118 (Mo.); *Silliman v. Thornton*, 10 Tex. Civ. App. 303, 30 S. W. 700 (Miss.); *Franks v. Hancock*, 1 Posey Unrep. Cas. (Tex.) 554 (Mo.); *Southern Ins. Co. v. Wolvorton Hardware Co.* (Tex.) 19 S. W. 615 (Ind. Terr.); *Blethen v. Bonner* (Tex. Civ. App.) 52 S. W. 571 (Mass.); *Thurmond v. Bank of Georgia* (Tex. Civ. App.) 27 S. W. 317 (Ga.); *Goddard v. Reagan*, 8 Tex. Civ. App. 272, 28 S. W. 352 (Tenn.); *Caledonia Ins. Co. v. Wenar* (Tex. Civ. App.) 34 S. W. 385 (N. Y.); *Ft. Dearborn Nat. Bank v. Berrott*, 23 Tex. Civ. App. 662, 57 S. W. 340; *Clardy v. Wilson*, 24 Tex. Civ. App. 196, 58 S. W. 52 (Tenn.); *Texarkana & Ft. S. R. Co. v. Gray* (Tex. Civ. App.) 65 S. W. 85 (Ark.); *Boyd v. Boyd* (Tex. Civ. App.) 78 S. W. 39 (Ark.); *Hilburn v. Harris*, 2 Tex. Civ. App. 395, 21 S. W. 572 (Tenn.).

In *Bradshaw v. Mayfield*, 18 Tex. 21 (Tenn.), the court said that in some of the states it is presumed that the common law prevails in certain other states, and that on a common-law question such law should be assumed to be the same as that of the forum; but that in Texas the fact that the common law prevails in another state must be conceded or established by proof,—especially where marital rights are in question. The court said, in this connection: "Where one state presumes the common law is in force in another on the subject of marital rights, it presumes further that the law is the same as in the state where the court tries the cause. But the common law is not, and never has been, in force in this state on the subject of marital rights. If the common law were admitted to be in force in Tennessee, we could not presume it to be the same there as here; for here on that subject it never was of force."

In *Tempel v. Dodge*, 89 Tex. 71, 32 S. W. 514, 33 S. W. 222 (Conn.), the court expressly says that, in the absence of proof, it will be presumed that the law of another state is the same as the law of Texas, and not that the common law prevails in the other state.

A court of Texas will not take judicial notice of the laws of another state with respect to the appointment of guardians, and, in the absence of evidence as to the laws of that state, must presume that they are the same as the laws of Texas. *Gill v. Everman*, 94 Tex. 209, 59 S. W. 531 (Ky.).

It will be presumed, in the absence of proof to the contrary, that the law of Mexico is the same as that of Texas with respect to the liability of an employer for negligence resulting in injuries to an employee, the civil law having originally prevailed in both jurisdictions. *Mexican C. R. Co. v. Marshall*, 34 C. C. A. 138, 91 Fed. 938; *Mexican C. R. Co. v. Glover*, 46 C. C. A. 334, 107 Fed. 356.

Utah.

Rudy v. Rio Grande Western R. Co. 8 Utah, 165, 30 Pac. 366, held that it could not be presumed that the Utah statute, or one similar to it, had been adopted in Colorado. The statute in this case provided that a passenger refusing to prepay his fare may be ejected at any stopping place the conductor of the company may elect. The decision in this case was, however, expressly overruled by *American Oak Leather Co. v. Union Bank*, 9 Utah, 87, 33 Pac. 246 67 L. R. A.

(Mich.), where the court adopted the rule that, in the absence of proof to the contrary, the laws of another state are presumed to be the same as the laws of the forum on the same subject. The presumption was accordingly indulged in this case that there was a statute in Michigan like the Utah statute prescribing the manner of the execution of chattel mortgages. The court quotes the statement in *Sutherland on Statutory Construction*, § 184, to the effect that the law of another state in certain cases is applied by comity when proved, and, if not proved, there is no comity invoked, and the *lex fort* governs. It said that this was simply another statement of the rule above stated.

So, in *Dignan v. Nelson*, 26 Utah, 186, 72 Pac. 936, the presumption was indulged that the law of the other state was the same as that of Utah, although the latter was statutory.

Vermont.

In this state the presumption is indulged in favor of the common law, even when the law of Vermont on the subject is statutory. *State v. Shattuck*, 99 Vt. 403, 40 L. R. A. 428, 60 Am. St. Rep. 936, 38 Atl. 81 (N. H.).

In *Woodrow v. O'Conner*, 28 Vt. 776, the court said that in the absence of evidence to the contrary, it will be presumed that there is no distinction between the law of Vermont and the law of Canada. The law of Vermont, however, was nonstatutory.

The presumption is that upon a common-law question, the common law of a sister state is the same as our own, and the courts cannot take judicial notice of any law of a sister state at variance with our own. *Ward v. Morrison*, 25 Vt. 593 (N. Y.).

In *Piedmont & A. Life Ins. Co. v. Ray*, 75 Va. 821, the court said that, in the absence of proof of a difference between the law of Texas and that of Virginia, as to the effect of a writ of error as a supersedeas, it will be presumed that they are the same.

Washington.

In *Yeaton v. Eagle Oil & Ref. Co.* 4 Wash. 183, 29 Pac. 1051 (Cal.), it was said that the courts of one state will presume that the common law of a sister state is the same as its own, but that that is the extent to which such presumption can extend; and that as to purely statutory regulations unknown to the common law no such presumption can arise; and that it will not be presumed that the statute law of another state, purely as such, is the same as our own. Upon a rehearing, however, the court said that a decision on that point was unnecessary, and that the question whether or not a statute law of a sister state will be presumed to be the same as the statute law of Washington would be considered as an open question.

In *Dormitzer v. German Sav. & L. Soc.* 23 Wash. 132, 62 Pac. 862 (Kan.), the court said that, in the absence of proof of the law of another state in relation to the property rights of husband and wife as to property acquired during the marriage, it has been held to be the same as that of the state where the proceeds of such property has been reinvested.

In the absence of proof to the contrary, the law of another state will be presumed to be the same as that of Washington; and, since there is no law in the latter state authorizing the sale of stock of stockholders of a foreign corporation doing business in the state upon execution on a judgment in the state against such stockholders, the presumption is that there is no law

on the subject in the foreign country. *Daniel v. Gold Hill Min. Co.* 28 Wash. 411, 68 N. W. 884. It was accordingly held in this case that the sale under execution in the foreign country was invalid.

But where a special act of incorporation enacted in another state is proved by a duly authenticated copy, it will not be presumed that the Constitution of the other state contains a provision similar to that of Washington, which prohibits the legislature from creating corporations by special acts. *Fidelity Ins. Trust & S. D. Co. v. Nelson*, 30 Wash. 340, 70 Pac. 961.

West Virginia.

It is expressly provided by statute in this state that the courts shall take judicial notice of the laws of another state. See *supra*, II. a, 2. The question as to the presumption to be indulged with respect to the law of another state, therefore, does not arise in this state.

Wisconsin.

In Wisconsin the courts indulge the presumption that the law of another state is the same as the law of the forum, not only when the common law on the subject prevails in Wisconsin (*Slaughter v. Bernards*, 88 Wis. 111, 59 N. W. 576 [Md.]), but also when the law of Wisconsin on the subject is statutory (*Walsh v. Dart*, 12 Wis. 635 [N. Y.]; *Second Nat. Bank v. Smith*, 118 Wis. 18, 94 N. W. 664 [Ind.]).

In *MacCarthy v. Whitcomb*, 110 Wis. 113, 85 N. W. 707, an action brought in Wisconsin for personal injuries sustained by a railroad employee in Illinois, the court indulged the presumption that the law of Illinois was similar to that of the statute of Wisconsin abolishing the fellow-servant rule in certain cases of injury to railroad employees. The court pointed out that the action was not based upon the statute of another state, but upon a cause of action cognizable at common law.

In *Schoenberg v. Adler*, 105 Wis. 645, 81 N. W. 1055, however, the court said that, with reference to certain classes of statutes, the presumption may be indulged that the statute of another state is the same as that of the forum, but that such presumption is not to be indulged as to penal statutes; and it was held that the presumption was not to be indulged with reference to a statute of Wisconsin which declares that all contracts resting, in whole or in part, upon gambling transactions shall be void. See also *infra*, III. e.

And a similar exception is made in *Hull v. Augustine*, 23 Wis. 383, with reference to usury statutes. See *infra*, III. e.

Canada.

In *Black v. Moore*, 36 Can. L. J. 724, the court indulged the presumption that the statute of Elizabeth with reference to fraudulent transfers, which was in force at the forum, was also in force in Massachusetts.

In *Canadian F. Ins. Co. v. Robinson*, 31 Can. S. C. 488, the court said that the law governing the contract must be presumed to be that of the *lex fori*, unless the *lex loci* was proved to be different; and accordingly applied a statutory law of the forum to the point in question.

Effect of presumption in favor of validity of contract or judicial record.

The presumption in favor of the common law, or the presumption to the effect that the law of the other state is the same as the law of the forum, as the case may be, sometimes encounters

an opposing presumption in favor of the validity of a contract; and, while it is impossible to trace the distinction suggested through the cases, the choice between the first two presumptions has in some cases been influenced by the fact that one of them would coincide with, and the other would antagonize, the presumption in favor of the validity of the contract. Thus, while the courts of Iowa generally indulge the presumption that the law of the other state is the same as the law of Iowa, whether the latter be statutory or common law, it was held in *Fred Miller Brewing Co. v. De France*, 90 Iowa, 395, 57 N. W. 959, that it could not be presumed that the law of Wisconsin, like the law of Iowa, forbids the sale of intoxicating liquors, and prevents recovery of the purchase price thereof.

So in *Worthington v. Hanna*, 23 Mich. 530, the court said that there was no principle which would justify it in holding anything void under the foreign law which is lawful at the forum until the variance is shown; and that to that extent a conformity between the laws of the forum and the laws of the other state may be presumed. The court accordingly declined to indulge the presumption that the common-law rule, giving a husband all his wife's personal property, prevailed in New York, since the indulgence of such presumption would have operated to invalidate a mortgage given by the husband to the wife. See also *Millard v. Truax*, 73 Mich. 381, 41 N. W. 328, *supra*, III. c.

A court of Michigan cannot presume that there is anything in the law of Indiana incapacitating a married woman to make notes which she might make according to the law of Michigan. *Wheeler v. Constantine*, 39 Mich. 62, 33 Am. Rep. 355.

Upon the same ground, courts have refused to indulge the presumption that there was a statute of frauds in another state where a contract was made like that at the forum, where the result of indulging such presumption would have been to defeat a contract. *Miller v. Wilson*, 146 Ill. 523, 37 Am. St. Rep. 186, 34 N. E. 1111; *Raphael v. Hartman*, 87 Ill. App. 634; *Kling v. Fries*, 83 Mich. 275; *Roethke v. Philip Best Brewing Co.* 83 Mich. 340; *White v. Knapp*, 47 Barb. 549; *Wilcox Silver Plate Co. v. Green*, 9 Hun. 347, Affirmed in 72 N. Y. 17.

In *Shannon v. Wolf*, 173 Ill. 253, 50 N. E. 682, however, the court said that it could not be presumed that an instrument which was fraudulent and void by the law of Illinois is valid and enforceable by the law of Iowa. The law of Illinois was the common-law rule, which renders a chattel mortgage void if possession be retained by the mortgagee after maturity.

The following cases refer the decisions adverse to the plea of usury to the presumption in favor of the validity of the contract: *Martin v. Martin*, 1 Smedes & M. 176; *Cutler v. Wright*, 22 N. Y. 472; *Pomeroy v. Ainsworth*, 22 Barb. 118; *City Sav. Bank v. Bidwell*, 29 Barb. 325; *Rooney v. Southern Bldg. & L. Asso.* 119 Ga. 941, 47 S. E. 345.

Other decisions upon this subject, however, are referred to an exception, in the case of statutes creating a penalty or forfeiture, to the general rule that the law of another state is presumed to be the same as the law of the forum. See *infra*, III. e.

A court of Kentucky cannot take judicial notice of a statute of Louisiana, where the contract in suit was made and was to be per-

formed, whereby attorneys are prohibited from purchasing litigious rights; and, if the defendant intends to invoke the protection of such statute, he must allege and prove it. *Labatt v. Smith*, 4 Ky. L. Rep. 422.

Where the laws of another state or country are unknown, it cannot be presumed that they are restrictive or prohibitory of the exercise of the natural right of a man to give that which is his own in any manner in which he can make his intention intelligible. *Crozier v. Bryant*, 4 Bibb, 174. The question in this case was as to the validity of a parol gift of property, made in New Jersey. It does not appear whether or not a parol gift would be valid by the law of Kentucky.

If the defendant in an action in England upon a note made in Scotland seeks to avail himself of a defense which would not be available by the law of England, he must show that the law of Scotland differs in that respect from the law of England. *Brown v. Gracey*, Dowl. & R. N. P. 41.

In *Male v. Roberts*, 3 Esp. 163, Lord Eldon said that he was not warranted in saying that a contract of an infant is void by the law of Scotland because it is void by the law of England; that the law of the country where the contract arose must govern the contract, and what that law is should be given in evidence as a fact. *Thompson v. Ketcham*, 8 Johns. 189, 5 Am. Dec. 332, is to the same effect as the last case.

In *Thatcher v. Morris*, 11 N. Y. 437, however, it was said generally that, where a party seeks to enforce in the courts of New York a contract which is forbidden and declared void by its laws, he must aver and prove where it was made, and that by the laws of that place it was authorized and valid. This was an action to recover prize money drawn on lottery tickets. The complaint did not state where the tickets were sold, or purchased by the plaintiff, and, therefore, did not negative their purchase in New York.

Where a title is claimed to be valid under the laws of another state, where it was acquired, those laws must be produced in evidence, or proved; otherwise, the validity of the title will be made to depend upon our own laws. *Atkinson v. Atkinson*, 15 La. Ann. 491.

In *Harvey v. Merrill*, 150 Mass. 1, 5 L. R. A. 200, 15 Am. St. Rep. 159, 22 N. E. 49, a contract made in Illinois for the purchase and sale of commodities for future delivery was held illegal and void in accordance with the common law of Massachusetts, there being no evidence of the law of Illinois on the subject, except proof of one statutory provision of that state, which did not apply to the particular contract in question.

But see *infra*, III. e.

Where property is seized the burden rests upon him who makes the seizure to show proper legal process; and the courts will presume that a wanton seizure of property in another state, unauthorized by the order of any tribunal, was contrary to the laws of that state. *Hall v. Younts*, 87 N. C. 285.

In some cases the presumption in favor of the validity and regularity of a judgment rendered by a court of general jurisdiction in another state has been allowed to prevail over the presumption in favor of the common law, or the presumption that the law of the other state is the same as the law of the forum. *Dodge v. 67 L. R. A.*

Coffin, 15 Kan. 277 (see, especially, the dissenting opinion, which, upon this point, concurred with the majority), *Kansas P. R. Co. v. Cutter*, 16 Kan. 568; *Council Bluffs Sav. Bank v. Griswold*, 50 Neb. 753, 70 N. W. 376. But see, *contra*, *Dainese v. Hale*, 91 U. S. 13, 23 L. ed. 190, holding that defendant in an action to recover the value of goods, who defends upon the ground that he acted by virtue of jurisdiction conferred by the law of Turkey upon the Counsel General of Egypt, must prove the law of Turkey in that respect; *Re Capper*, 85 Iowa, 82, 52 N. W. 6, applying the usual presumption that the law of another state is the same as the law of Iowa, notwithstanding that it negated the jurisdiction of a court of Indiana to grant probate of a will; *Kelley v. Kelley*, 161 Mass. 111, 25 L. R. A. 806, 42 Am. St. Rep. 389, 36 N. E. 837, applying the usual presumption in favor of the common law, notwithstanding that it negated the jurisdiction of a court of chancery of New York to annul a marriage, and notwithstanding that such jurisdiction had been conferred by statute upon the courts of Massachusetts; *Angle v. Manchester*, 3 Herdman (Neb.) 252, 91 N. W. 501, holding that a party who relies upon a judgment procured in another state in a manner unknown to the laws and rules of proof of the courts of Nebraska must allege and prove the laws of the other state, which authorizes and validates the judgment; and *Rape v. Heaton*, 9 Wis. 328, 76 Am. Dec. 269, indulging the presumption that the law of another state in which a judgment was rendered, was the same as the law of Wisconsin with reference to service of process, although such presumption operated to defeat an action upon the judgment. And see also *Thomas v. Pendleton*, 1 S. D. 150, 36 Am. St. Rep. 726, 46 N. W. 180 *supra*, III. c.

An order granted in North Carolina, *ex parte* and without notice to wards, authorizing a sale of personal property by a guardian, does not, in the absence of proof of the law of North Carolina authorizing such order, protect the guardian from personal liability for the value of the property in an action in South Carolina. *Moore v. Hood*, 9 Rich. Eq. 311, 70 Am. Dec. 210.

Whether a warrant of attorney is sufficient, under the laws of another state, to authorize the appearance entered thereunder, is a question to be determined from the evidence as to the laws of that state. *Snyder v. Critchfield*, 44 Neb. 66, 62 N. W. 806.

The question whether a court of one state will take judicial notice of the laws of another state, in which a judgment was rendered, has already been discussed. See *supra*, II. a, 2.

d. Application of *lex fori* without indulging any presumption.

As shown in III. b, *supra*, there is considerable difference of opinion, even among the courts which in general indulge the presumption in favor of the common law, with respect to the states as to which the presumption may be indulged. Thus, as already seen, the courts of Missouri, which in case of another state formed from territory previously subject to the law of England, consistently indulge that presumption, whether the law of Missouri on the point in question is statutory or common law, refuse to indulge it with respect to some states, *e. g.*, Iowa and Kansas, that are generally regarded as

within its scope. None of the courts, however, apply the presumption universally with respect to all foreign jurisdictions, nor even with respect to all states of the Union; and therefore cases frequently arise, even before courts which are in general thoroughly committed to the presumption in favor of the common law, in which that presumption cannot be indulged. In such cases, assuming that the particular question involved is not of the exceptional kind, discussed in III. e, *infra*, to which the courts will refuse to apply any substantive law, these courts, generally indulge the presumption that the law of the other jurisdiction is the same as the law of the forum, whether the law of the forum be statutory or common law. In other words, they apply, by way of exception in cases in which the usual presumption in favor of the common law cannot be indulged, the same presumption which other courts apply uniformly to the exclusion of the presumption in favor of the common law. The cases of this class are shown in III. c, *supra*, under the particular state heading to which they belong.

It will be observed that in its practical operation the presumption that the law of another jurisdiction is the same as that of the forum, is equivalent to the doctrine which, in the absence of proof of the proper foreign law, applies the law of the forum as the only possible applicable law, without indulging any presumption as to the law of the other jurisdiction. There is a decided tendency to substitute this doctrine for the presumption that the law of the other jurisdiction is the same as the law of the forum, both upon the part of the courts that have hitherto adopted the latter presumption as the general rule, and upon the part of the courts that have hitherto adopted that presumption by way of exception in cases in which the presumption in favor of the common law could not be indulged because the other state was not a common-law state.

It will be observed by referring to III. c, *supra*, that the courts of Alabama ordinarily indulge the presumption in favor of the common law, whether the law of Alabama on the subject is common law or statutory law. In Peet v. Hatcher, 112 Ala. 514, 57 Am. St. Rep. 45, 21 So. 711, however, the court, after declining to indulge such presumption with respect to Louisiana because that state did not have a common origin with Alabama, and was not populated by people coming from states having such common origin, said: "It may be well said that, as we judicially know no other law of the case than our own, the parties litigant, by failing to produce the *lex loci contractus* [Louisiana], impliedly agree that it is the same as the *lex fori*, be the latter common law or statute. Thus, it may be regarded as settled in this state that, when a contract made in a state or country wherein we cannot presume the existence of the common law is sought to be enforced in the courts of this state, and the *lex loci* is not produced, we will apply to it our own law." There are other parts of opinion that apparently refer the decision to the presumption that the law of Louisiana is the same as the law of the forum; but it is apparent from the foregoing quotation that the presumption is not a necessary part of the doctrine applied in this case.

Judge Field in Norris v. Harris, 15 Cal. 226, said that, since the court could not take judicial notice of the laws of Texas, and could not 67 L. R. A.

indulge the usual presumption in favor of the common law, it must, as a matter of necessity, look to its own laws as furnishing the rule of decision upon which it may act.

So, in Monroe v. Douglass, 5 N. Y. 447, the courts said that it is a well-settled rule, founded on reason and authority, that the *lex fori*, or, in other words, the laws of the country to whose courts a party applies for redress, furnish in all cases, *prima facie*, the rule of decision; and, if either party wants the benefit of a different rule or law, as, for instance, the *lex domicilii*, *lex loci contractus*, or *lex loci rei sitæ*, he must aver and prove it.

The courts of New York cannot take notice of the laws of Russia unless they are proved; and, in the absence of proof, the law of New York must of necessity furnish the rule for the guidance of its courts. Savage v. O'Neil, 44 N. Y. 298.

In the absence of proof of the law of marriage in France, it will not be presumed that it is different from that of New York, which recognizes the validity of a marriage *per verba de presenti*. Hynes v. McDermott, 82 N. Y. 41, 37 Am. Rep. 538.

In Bath Gaslight Co. v. Claffy, 151 N. Y. 24, 36 L. R. A. 664, 45 N. E. 390, which was an action in New York for rent upon a lease made and performable in Maine between Maine corporations, the court said that, as the law of Maine on the subject did not appear in the record, it was the duty of the court to determine the case according to the law of New York as established, or, in the absence of controlling authority, as justice, having regard to all interests, may seem to the court to require.

Prima facie, the law of a neighboring state is like our own, and when it is not proved to be otherwise, our courts act on their own laws. Robinson v. Dauchy, 3 Barb. 20. The law of New York on this subject was evidently the common law.

In Huth v. New York Mut. Ins. Co. 8 Bosw. 538, it was said that, if the contract in question could be regarded as a Chinese contract, the court, since it was without information as to the law which would govern it in China, must interpret and decide upon it in accordance with the law of New York.

In Scottish Commercial Ins. Co. v. Plummer, 70 Me. 540, the court said that a stipulation in a bond that it should be controlled by the law of New York was of no practical value, since no points of difference are shown between the law of Maine and the law of New York, and, therefore, the court, in construing the bond, must proceed according to the law of Maine.

The *lex fori* is to be applied in determining the right of a married woman to property and her right to sue therefor, in the absence of proof of the foreign law which should properly govern the case. Bollinger v. Gallagher, 144 Pa. 205, 22 Atl. 815.

In Sibley v. Young, 26 S. C. 415, 2 S. E. 814, the court, in the absence of proof of the laws of Georgia where the contract was made, applied the common-law rule that a note under seal is not negotiable.

It is incumbent upon a party who would avail himself of the law of another state to show what that law is, and, until that is done, the court will decide the question according to the law of the forum. Gist v. Western U. Teleg. Co. 45 S. C. 344, 55 Am. St. Rep. 763, 23 S. E.

143. The question in this case was as to the validity of a contract for the sale of "futures," made and to be performed in New York. Such contracts are expressly forbidden by the South Carolina statute; and it was held that, in the absence of proof of the law of New York on the subject, the question must be determined by the law of South Carolina.

As shown in III. c. *supra*, the courts of Texas decline to indulge the presumption in favor of the common law with respect to any of the other states; and generally adopt the presumption that the law of the other state is the same as the law of Texas, whether the latter is statutory or unwritten law.

Blethen v. Bonner, 93 Tex. 141, 53 S. W. 1016, however, clearly adopts the doctrine that, in the absence of evidence of the law of another state, the courts of Texas must apply the law of Texas (*lex fori*), as distinguished from the doctrine based upon the presumption that the law of the other state is the same as the law of the forum. The court said: "If one seeks in our courts to support a claim to property different from that secured by the laws of Texas, it is reasonable that he should be required to inform the court what the law is that he seeks to have enforced in this jurisdiction. It is true that in many of the states,—perhaps in the greater number,—in the absence of evidence, the courts will presume the common law to be in force in a sister state; but the rule stated above is established in this state by an unbroken line of decisions, and we believe it furnishes a safer guide than the indulgence in presumption, for we know that frequent, radical changes have been made by the legislatures of most of the American states in the rules of the common law, especially those which govern the rights of married women." In this case the court applied the community laws of Texas to the question as to the respective rights of husband and wife in property acquired while they were domiciled in Massachusetts, the law of the latter state not being proved.

In Crosby v. Huston, 1 Tex. 203, the court said that where the foreign law, or the law of another state, is not established by proof, the rights of the parties must be determined by the laws of the forum, for the plain reason that they present the only known rule of decision.

In the absence of allegation of the facts of a foreign law governing a contract, and what that law is, the court cannot judicially know of them, and the *lex fori* governs the case from necessity, for no other law can be presumed. Armendlaz v. De La Serna, 40 Tex. 291.

In Davison v. Gibson, 4 C. C. A. 543, 12 U. S. App. 362, 56 Fed. 443, an action brought in the United States courts in the Indian territory, involving the respective property rights of a husband and wife who were citizens of the Creek Indian nation, the court, having held that it could not be presumed that the common law prevailed in that nation, said that the court, having no means of ascertaining what the law or custom of the Creek nation was on the question, should have applied the law of the forum, which was embodied in Mansfield's Digest, put in force in the Indian territory by the act of Congress of May 2, 1891. It was so held, notwithstanding that the marriage took place before the act of Congress above referred to. The court said it would undoubtedly be more rational to presume that the law or custom of the nation on this subject was in har-

mony with the statute adopted by Congress, and that the act of Congress was merely declaratory of the previously existing law, than to presume that the English law, utterly at variance with the habits and known customs of Indians, was in force there. By the statute which was applied in this case, all property acquired by the wife, either before or after marriage, is her separate estate and property, and descends and is distributed to her children in equal parts.

See also American Oak Leather Co. v. Union Bank, 9 Utah, 87, 33 Pac. 246, *supra*, III. c.

When reliance is placed by any party upon a difference between the law of England and the law of a foreign state with reference to a matter of commercial law, *e. g.*, the right to a lien upon a vessel for damage to cargo, he is bound, by witnesses or books of authority, to show that there is such a difference; otherwise the law of England will be applied. Smith v. Gould, 4 Moore, P. C. C. 21.

In Lloyd v. Guilbert, L. R. 1 Q. B. 115, 129, Mr. Justice Willes said that a party who relies upon a right or an exemption by foreign law is bound to bring such law properly before the court, and to establish it in proof. Otherwise, the court, not being entitled to notice such law without judicial proof, must proceed according to the law of England.

The following cases also illustrate the tendency upon the part of the courts to adopt this doctrine, without indulging any presumption as to the law of the other jurisdiction. Garner v. Wright, 52 Ark. 381, 6 L. R. A. 715, 12 S. W. 785 (Ind. Terr.); Brown v. Wright, 58 Ark. 20, 21 L. R. A. 467, 22 S. W. 1022 (Tex.); Champlon v. Wilson, 64 Ga. 184; Chumaseo v. Gilbert, 24 Ill. 293; Shannon v. Wolf, 173 Ill. 253, 50 N. E. 682 (Iowa); Bean v. Briggs, 4 Iowa, 464 (Ill.); Roots v. Merriwether, 8 Bush, 401 (Ill.); Peabody v. Maguire, 79 Me. 572, 12 Atl. 630 (Canada); Dakin v. Pomeroy, 9 Gill, 1; Jones v. Palmer, 1 Dougl. (Mich.) 379 (N. Y.); Flato v. Mulhall, 72 Mo. 522 (Tex.); White v. Chaney, 20 Mo. App. 389 (Ky.); Clark v. Barnes, 58 Mo. App. 667 (Ark.); Latham v. de Loisel, 3 App. Div. 525, 38 N. Y. Supp. 270.

Thus far the doctrine seems to have been applied only as a substitute for the presumption that the law of the other jurisdiction is the same as the law of the forum, and only when that presumption would otherwise have prevailed over the presumption in favor of the common law, either because the courts of the forum do not indulge the latter presumption with respect to *any* of the states, or because they do not indulge it with respect to the *particular* state in question. It does not seem improbable, however, that this doctrine will eventually displace the presumption in favor of the common law, even with respect to states of common-law origin as to which that presumption has been hitherto indulged by many of the courts. It will be observed that this doctrine is in practical harmony with all those cases which indulge the presumption that the law of the other jurisdiction is the same as the law of the forum even when the latter is statutory and opposed to the common law. It is not inharmonious with the decisions in those cases in which the common law on the subject prevailed at the forum, whether the presumption indulged was in favor of the common law or to the effect

that the law of the other jurisdiction was the same as the law of the forum, though, on the other hand, cases of this class are not inharmonious with the presumption in favor of the common law. The only cases that are squarely opposed to the doctrine now under consideration are those that indulge the presumption in favor of the common law when the law of the forum upon the particular subject in question is statutory, and opposed to the common law.

As shown in III. c, *supra*, cases of the latter class are numerous, and, excluding the cases that indulge the presumption that the law of the other state is the same as the law of the forum because the other state is not a common-law state, probably outnumber the cases that indulge the presumption in favor of the similarity of laws and those that apply the *lex fori* without indulging any presumption.

This doctrine, which applies the *lex fori* without indulging any presumption as to the foreign law, may be applied without reference to the character or history of the jurisprudence of the other state or country whose law, if proved, would concededly govern, and—with the exception of the class of questions considered in the next subdivision, which are exceptions to any general rule that may be formulated on the subject—may be applied without reference to the nature of the question involved. Upon the other hand, the presumption in favor of the common law is, at best, of limited scope relatively to the other jurisdictions, if not with respect to the nature of the questions, as to which it may be indulged; and its limits in this respect are shifting and uncertain. Moreover, this presumption, even when confined, as in Missouri, to states previously subject to the law of England, is often a very violent one, and contrary to the actual, if not the judicial, knowledge of the courts by which it is indulged. For example, the presumption indulged by the courts of Missouri, that the common law prevails in New York with respect to the property rights of husband and wife, is certainly a very violent one. In this particular instance it would be more in accordance with the actual facts to indulge the presumption that the law of New York is the same as the statutory law of Missouri on the subject. The latter presumption, however, is also a violent one in many instances; and for that reason many of the courts prefer the presumption in favor of the common law, even when the law of the forum is statutory. If the doctrine under discussion be adopted, no presumption is necessary. According to this doctrine, if the law of the foreign jurisdiction is not proved, the law of the forum is applied, simply because it is the only law before the court bearing upon the subject. The only alternative—assuming that judicial notice cannot be taken of the foreign law, and that no presumption can properly be indulged with respect to the same—is to deny all relief to the parties whose rights would have been determined by the foreign law if that had been proved; and this course, as shown in III. e, *infra*, is taken in exceptional cases and with respect to some classes of questions. As a general rule, however, the courts, while not undertaking to guarantee to the parties the same relief to which they would be entitled under the proper foreign law, if proved in the case, prefer to grant some relief rather than turn the parties out of court. As already shown, the only relief which it can grant is that to 67 L. R. A.

which the parties would be entitled under the rules of the common law, or under the law of the forum. The effect of the doctrine now under discussion is to grant the same relief to which the parties would be entitled by the law of the forum, whether that law is the common law, or a statutory law opposed to the common law; and this, too, without indulging any presumption whatever as to the foreign law, or making any distinction as between foreign jurisdictions; in other words, it furnishes a general and almost universal rule, which is only subject to certain exceptions, discussed in the next subdivision, based upon the distinctive or peculiar nature of the local law of the forum.

This doctrine has been discussed independently of the practically equivalent doctrine, which rests upon the presumption that the law of the other jurisdiction is the same as that of the forum whether the latter be common law or statutory, in order to bring out the fact that a court, which regards as insuperable the objections to the presumption that the law of another jurisdiction is the same as the law of the forum when the latter is statutory and opposed to the common-law rule, is not necessarily driven to the alternative of indulging the equally objectionable presumption that the common law prevails in the other jurisdiction; or of refusing to apply any substantive law at all; but may, without indulging any presumption whatever as to the law of the foreign jurisdiction, apply the substantive rule of law of the forum that fits the case, upon the ground that, by failing to prove the proper foreign law, the parties tacitly accept the law of the forum, as the arbiter of their rights and obligations.

e. Refusal to apply any substantive law.

When a right or defense claimed by a party properly depends upon the law of another jurisdiction which is not proved, the court may, conceivably, decline to apply any substantive law thereto, and dispose of the point by merely applying the rule of practice at the forum, to the effect that the party having the affirmative must fail unless he establishes the facts upon which his right or defense depends; in other words, if the right or defense of a party depends upon a foreign law,—the existence and provisions of which are questions of fact,—he must prove that law or be denied all relief in the premises. Some of the cases use language broad enough to indicate that this is the general rule. Thus, in *Gunderson v. Gunderson*, 25 Wash. 459, 65 Pac. 791, the court said that it is a general rule that, if one relies upon the laws of a foreign state or country, he must allege in the pleading and prove as facts what those laws are. It is apparent, however, that the court did not mean that, if the party fails to make such proof, he must necessarily fail in the action, but merely that his rights in such case will be determined by the law of the forum, or at least by the common law, since it held that, in the absence of proof of the law of Oregon governing property relations of husband and wife, it would be presumed that the law was the same as the statute of Washington on the subject.

Leach v. Pillsbury, 15 N. H. 137, was a proceeding by a creditor of the father of a person who died intestate in Louisiana, to attach funds of the estate in the hands of a trustee upon the ground that the father of the decedent succeed-

ed thereto. The court held that it could not be presumed, in the absence of evidence to that effect, that the laws of Louisiana regulating the descent of intestate estates are like the laws of New Hampshire, by which the father inherits the estate, if the deceased leaves no descendants. The conclusion was that, as the court could make no such presumption, there was no ground upon which the trustee could be charged. But an examination as a whole of the cases which have declined to apply any substantive law to a claimed right or defense discloses that this doctrine applies only in exceptional cases, and that as a rule when the proper law is not proved, the courts adopt one of the three courses already discussed, namely: (1) Indulge the presumption that the common law on the point in question prevails in the other jurisdiction; (2) Indulge the presumption that the law of the other jurisdiction is the same as the law of the forum; (3) apply the law of the forum—4. *e.*, the substantive law of the forum upon the point in question—as the only law before the court. For example, when an action is brought upon an ordinary commercial contract governed by the law of another jurisdiction, the court will not ordinarily deny the plaintiff all relief, if he fails to prove the foreign law applicable to the case; but proceeding upon one or the other of the theories already discussed, will either give him such relief as he would be entitled to by the common law, or such relief as he would be entitled to by the law of the forum.

So, in case of an action for tort which would create a cause of action at common law, it is not incumbent upon the plaintiff to prove, in the first instance, that the *lex loci delicti* creates such a cause of action; if it does not, that is a matter of defense. *Atchison, T. & S. F. R. Co. v. Dickey*, 1 Kan. App. 770, 41 Pac. 1070; *Mexican C. R. Co. v. Mitten*, 13 Tex. Civ. App. 653, 36 S. W. 282; *Mackey v. Mexican C. R. Co.* 78 N. Y. Supp. 966; *Wooden v. Western N. Y. & P. R. Co.* 126 N. Y. 10, 13 L. R. A. 458, 22 Am. St. Rep. 803, 26 N. E. 1050. See also, *MacCarthy v. Whitcomb*, 110 Wis. 113, 85 N. W. 707, *infra*.

When, however, the plaintiff's cause of action is not one which is recognized at common law, but is one which, if it exist at all, is created by statute, it is incumbent upon the plaintiff, in the first instance, to prove that there is such a statute in the foreign jurisdiction, even though there be such a statute at the forum; and this seems to be true whether the courts of the forum, in general indulge the presumption in favor of the common law or the presumption that the law of another state is the same as the law of the forum, be the latter statutory or common law. Cases of the class under consideration are, therefore, an exception to the rule last referred to.

No presumption will be indulged in an action for negligent homicide occurring in another state, that there is a statute in that state similar to the statute of the forum creating a cause of action for death. *Selma, R. & D. R. Co. v. Lacy*, 43 Ga. 461 (Ala.); *Louisville & N. R. Co. v. Williams*, 113 Ala. 402, 21 So. 938; *State use of Allen v. Pittsburgh, & C. R. Co.* 45 Md. 41; *Myers v. Chicago, St. P. M. & O. R. Co.* 69 Minn. 476, 65 Am. St. Rep. 579, 72 N. W. 694; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48, 38 Am. Rep. 481; *McDonald v. Mallory*, 77 N. Y. 546, 83 Am. Rep. 664; *Wooden v. Western N. Y. & P. R. Co.* 126 N. Y. 10, 13 L. R. A. 67 L. R. A.

458, 22 Am. St. Rep. 803, 26 N. E. 1050. It will be observed by referring to III. c. *supra*, that the respective states in which the cases last cited were decided adhere, in general, to the presumption in favor of the common law, even when the common law on the subject has been displaced by statute at the forum. These decisions, therefore, might properly be referred to that general presumption, since there was no action at common law for a negligent homicide. It is apparent, however, from the language used in these cases, that, even if the courts had been committed to the general presumption that the law of another state is the same as that of the forum, they would have made an exception in case of a statute of the forum creating causes of action which did not exist at common law; and it will be observed that in Wisconsin, where the presumption that the law of another state is the same as that of Wisconsin is generally indulged, whether the latter be common law or statutory, the court, in *MacCarthy v. Whitcomb*, 110 Wis. 113, 85 N. W. 707, while indulging the presumption that the law of Illinois was similar to the statute of Wisconsin abolishing the fellow-servant rule in certain cases, distinguishes such a statute from one which creates a cause of action for death, and clearly implies that no presumption would be indulged with respect to a statute of the latter kind.

The doctrine which operates to deny all relief to a party whose rights properly depend upon a foreign law, unless he proves that law, is also sometimes applied to affirmative defenses. Thus, even those courts which generally indulge the presumption that the law of the other state is the same as the law of the forum, even when the latter is statutory, refuse to indulge such presumption with respect to a statute which, like a usury statute, creates a penalty or forfeiture. *Hubble v. Morristown Land & Improv. Co.* 95 Tenn. 585, 32 S. W. 965; *Bird v. Olmstead* (Tenn. Ch. App.) 53 S. W. 978; *Allen-West Commission Co. v. Carroll*, 104 Tenn. 489, 58 S. W. 314; *Hull v. Augustine*, 23 Wis. 383. See also *Phelps v. American Sav. & L. Asso.* 121 Mich. 343, 80 N. W. 120; *Walte v. Bartlett*, 53 Mo. App. 378; *Van Auken v. Dunning*, 81 Pa. 464,—*supra*, III. c.

In *Mutual Home & Sav. Asso. v. Worz*, 67 Kan. 506, 73 Pac. 116, however, the court upheld the plea of usury to a building and loan association contract, even upon the assumption that it was a Missouri contract, upon the ground that, in the absence of proof to the contrary, the statute of Missouri relating to usury would be presumed to be similar to the statute of Kansas. It appears, however, that the court was of the opinion that the contract was a Kansas contract, and was properly governed by the law of that state.

Of course, in states which are committed to the presumption in favor of the common law, the plea of usury may be defeated by indulging the presumption in favor of the common law, since there was no usury at common law. (See *Smith v. Muncie Nat. Bank*, 29 Ind. 158.) In some cases the same result as regards usury is attributed to the presumption in favor of the validity of a contract. See *Flournoy v. First Nat. Bank*, 79 Ga. 810, 2 S. E. 547; *Graven v. Bates*, 96 Ga. 78, 23 S. E. 202; *Leake v. Bergen*, 27 N. J. Eq. 360; *Columbian Bldg. & L. Asso. v. Rice*, 68 S. C. 236, 47 S. E. 63,—*supra*, III. c.

The exception, in case of a statute of the forum creating a penalty or forfeiture, to the general rule adopted in many of the states, that the law of another state will be presumed to be the same as the law of the forum whether the latter is common law or statutory, applies to other defenses, as well as to the defense of usury. Thus, the court in *Schoenberg v. Adler*, 105 Wis. 645, 81 N. W. 1055, applying this exception, held that there was no presumption that there was a law in another state like the statute of Wisconsin declaring that all contracts resting in whole or in part upon gambling transactions shall be void. See also *Bartlett v. Collins*, 109 Wis. 477, 83 Am. St. Rep. 928, 85 N. W. 703.

So the court in *Western U. Teleg. Co. v. Way*, 83 Ala. 542, 4 So. 844, although unable to indulge the presumption in favor of the common law, declined to indulge the presumption that the law of Germany, like the law of Alabama, invalidates "future" contracts not contemplating actual delivery.

In *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308, a similar result was reached, though it was referred in this case to the general presumption in favor of the common law, notwithstanding that the common law on the subject had been changed by statute in New Jersey.

But see *Harvey v. Merrill*, 150 Mass. 1, 5 L. R. A. 200, 15 Am. St. Rep. 159, 22 N. E. 49, *supra*, III. c, which reaches a contrary result as to this class of contracts by indulging the presumption in favor of the common-law rule as held in Massachusetts.

So *O'Rourke v. O'Rourke*, 43 Mich. 58, 4 N. W. 531, refused to indulge the presumption that there was a statute in New York like that of Michigan invalidating contracts made on Sunday.

And *Adams v. Gay*, 19 Vt. 358, expressly refused to indulge the presumption that there was a law in New Hampshire like that of Vermont invalidating contracts made on Sunday.

A contrary decision was rendered in *Brimhall v. Van Campen*, 8 Minn. 13, Gil. 1, 82 Am. Dec. 118, with reference to Sunday laws; but this case has been overruled. See *supra* subdivision III. c.

In *Hill v. Wilker*, 41 Ga. 449, 5 Am. Rep. 540, the court said that it would be presumed that the law of Kansas where the contract in suit was made was the same as that of Georgia, and invalidated contracts made on Sunday. The court said in support of this position: "We are sustained in this presumption by the fact that a contrary view would suppose the people of Kansas to have annulled the decalogue, and to have permitted by law the disregard of Christian obligations."

Sayre v. Wheeler, 32 Iowa, 559, also indulged the presumption that the law of Missouri, like the statute of Iowa, renders contracts made on Sunday void.

In *Thompson v. Ketcham*, 8 Johns. 189, 5 Am. Dec. 332, it was held that, if defendant, whose contract was governed by the law of Jamaica, relied upon the defense of infancy, he must show that infancy is a defense by the law of that country. G. H. P.

KANSAS SUPREME COURT.

KEENE SYNDICATE, *Plff. in Err.*,
v.

WICHITA GAS, ELECTRIC LIGHT, &
POWER COMPANY.

(.....Kan.....)

*A corporation, engaged in the business of generating and furnishing electricity for public and private use, leased to a rival corporation in the city, for a period of ten years, machinery and appliances used in generating electricity, obligating itself by the provisions of said lease not to engage in the business of furnishing electric light and power to public or private consumers in the city during said period, and

*Headnote by ATKINSON, J.

NOTE.—For other cases in this series as to validity of contracts in restraint of trade when selling business, see *Western Wooden Ware Assn. v. Starkey*, 11 L. R. A. 503; *Gamewell Fire Alarm Teleg. Co. v. Crane*, 22 L. R. A. 673, and *note*; *Cowan v. Fairbrother*, 32 L. R. A. 829; *Lufkin Rule Co. v. Fringell*, 41 L. R. A. 185; *Anchor Electric Co. v. Hawks*, 41 L. R. A. 189; *Trenton Potteries Co. v. Oliphant*, 46 L. R. A. 255; *Stelchen v. Fehleisen*, 51 L. R. A. 412; *Pohlman v. Dawson*, 54 L. R. A. 913; and *Swigert v. Tilden*, 63 L. R. A. 608. 67 L. R. A.

not to dispose of any of its property, machinery, or appliances retained by it for producing or generating in said city electric light and power. *Held*, in an action on said lease to recover rents from the lessee, that the lease is in contravention of public policy, and that no action to recover rents can be maintained thereon by the lessor or its assignee.

(May 7, 1904).

ERROR to the District Court for Sedgwick County to review a judgment in favor of defendant in an action brought to enforce payment of rent alleged to be due and unpaid. *Affirmed*.

The facts are stated in the opinion.

Messrs. Thomas B. Wall, Ros Harris, and J. V. Daugherty, for plaintiff in error:

The public policy of the state must be determined from its Constitution, laws, and judicial decisions.

From *Bemis v. Becker*, 1 Kan. 227, to *Hardy v. Jones*, 63 Kan. 8, 88 Am. St. Rep. 223, 64 Pac. 969, it has never been the policy of this court to encourage frauds by releasing the fraudulent party from the obligations of his contract.

The stipulation in the lease is not in

violation of any statute, Federal or state. To justify the court in sustaining the demurrer it must appear from the petition that the lease or contract is *malum in se*, or *malum prohibitum*.

The leased property has earned the amounts set forth in the said several causes of action; the contract has thus been executed so far as the amounts due are concerned; it must follow then, even if the consideration of the lease was illegal, a recovery can be had.

Hardy v. Jones, 63 Kan. 8, 88 Am. St. Rep. 223, 64 Pac. 969; *Evans v. Trenton*, 24 N. J. L. 764; *Detroit v. Redfield*, 19 Mich. 376; *Boggs v. Caldwell County*, 28 Mo. 586; *Garrett v. Boone County*, 92 Ind. 518; *Spearman v. Tezakana*, 58 Ark. 348, 22 L. R. A. 855, 24 S. W. 883; *United States v. Brindle*, 110 U. S. 688, 28 L. ed. 286, 4 Sup. Ct. Rep. 180; *Brown v. Atchison*, 39 Kan. 37, 7 Am. St. Rep. 515, 17 Pac. 465.

The plaintiff in this action has agreed to do no unlawful thing; it is the owner of the property, and, as such, is entitled to have the value of the use of the property, and might recover for its destruction.

McKinney v. Andrews, 41 Tex. 363.

It would be grossly unjust, and inequitable to permit the defendant in error to evade its obligation, and thus get something for nothing on the ground that it, as it claims, engaged in a transaction voluntarily and knowingly that might be in violation of some rule of public policy. To permit the defendant in error to make such a defense is permitting it to use the rule it invokes to accomplish a fraud, rather than prevent it.

Wonsettler v. Lee, 40 Kan. 367, 19 Pac. 862; *Kansas & N. M. Land & Cattle Co. v. Thompson*, 57 Kan. 792, 48 Pac. 34; *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808; *Bath Gaslight Co. v. Claffy*, 151 N. Y. 24, 36 L. R. A. 664, 45 N. E. 390; *Alexandria, A. & Ft. S. R. Co. v. Johnson*, 58 Kan. 175, 48 Pac. 847; *Blue Rapids Opera House Co. v. Mercantile Bldg. & L. Asso.* 59 Kan. 778, Appx., 53 Pac. 761; *Greenville Compress & Warehouse Co. v. Planters' Compress & Warehouse Co.* 70 Miss. 669, 35 Am. St. Rep. 681, 13 So. 879; *Vought v. Eastern Bldg. & L. Asso.* 172 N. Y. 508, 92 Am. St. Rep. 761, 65 N. E. 496; *Carson City Sav. Bank v. Carson City Elevator Co.* 90 Mich. 550, 30 Am. St. Rep. 454, 51 N. W. 641; *Brunswick Gaslight Co. v. United Gas, Fuel, & Light Co.* 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. 525.

Messrs. Houston & Brooks, for defendant in error:

The modern rule that contracts between private individuals in partial restraint of 67 L. R. A.

trade, based upon sufficient consideration and reasonable in their scope and operation, are not void, does not apply to corporations engaged in furnishing that which is a matter of public concern to the inhabitants of a city.

Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co. 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169; *Greenhood*, Pub. Pol. Rule DLVI. 1st ed. p. 672.

The common law will not permit persons to obligate themselves by a contract either to do or not to do a particular thing when the thing to be done or omitted is in any degree injurious to the public.

West Virginia Transp. Co. v. Ohio River Pipe Line Co. 22 W. Va. 617, 46 Am. Rep. 527; *Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160, 38 Am. Rep. 781; *Raymond v. Leavitt*, 48 Mich. 447, 41 Am. Rep. 170, 9 N. W. 525; *Stewart v. Erie & W. Transp. Co.* 17 Minn. 395, Gil. 348; *Wright v. Ryder*, 36 Cal. 342, 95 Am. Dec. 186; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Atcheson v. Mallon*, 43 N. Y. 149, 3 Am. Rep. 678; *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282; *Saratoga County Bank v. King*, 44 N. Y. 87; *Anderson v. Jett*, 89 Ky. 375, 6 L. R. A. 390, 12 S. W. 670; *Firemen's Charitable Asso. v. Berghaus*, 13 La. Ann. 209.

Whatever tends to prevent competition between those engaged in a public employment or business, impressed with a public character, is opposed to public policy, and therefore unlawful.

People ex rel. Peabody v. Chicago Gas Trust Co. 130 Ill. 268, 8 L. R. A. 505, 17 Am. St. Rep. 319, 22 N. E. 798; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *Greenhood*, Pub. Pol. 1st ed. 643-655, 670-672; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.* 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. 169.

If the contracting parties are not engaged in a quasi public business, yet are handling a commodity of common utility, or of common consumption or use among the people, a contract which tends to create a monopoly is void as against public policy.

Tuscaloosa Ice Mfg. Co. v. Williams, 127 Ala. 110, 50 L. R. A. 175, 85 Am. St. Rep. 125, 28 So. 669; *Clark v. Needham*, 125 Mich. 84, 51 L. R. A. 785, 84 Am. St. Rep. 559, 83 N. W. 1027; *Culp v. Love*, 127 N. C. 457, 37 S. E. 476; *Cummings v. Union Blue Stone Co.* 164 N. Y. 401, 52 L. R. A. 262, 79 Am. St. Rep. 655, 58 N. E. 525; *Chapin v. Brown Bros.* 83 Iowa, 156, 12 L. R. A. 428, 32 Am. St. Rep. 297, 48 N. W.

1074; *Bishop v. Palmer*, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299; *Saratoga County Bank v. King*, 44 N. Y. 87; *Settler v. Alvey*, 15 Kan. 157.

A corporation cannot disable itself from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests.

Gibbs v. Consolidated Gas Co. 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553; *Thomas v. West Jersey R. Co.* 101 U. S. 83, 25 L. ed. 952; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 17 Am. St. Rep. 319, 22 N. E. 798; *Visalia Gas & Electric Light Co. v. Sims*, 104 Cal. 326, 43 Am. St. Rep. 105, 37 Pac. 1042; *Morawetz, Priv. Corp.* 2d ed. § 656.

A corporation cannot lease or alienate any franchise or any property necessary to perform its obligations and duties to the state without legislative power.

Black v. Delaware & R. Canal Co. 22 N. J. Eq. 130; *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964; 1 Clark & M. Priv. Corp. § 177; 7 Am. & Eng. Enc. Law, p. 747; *State v. Nebraska Distilling Co.* 29 Neb. 700, 46 N. W. 160; *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 153 Ind. 483, 53 L. R. A. 413, 74 Am. St. Rep. 314, 53 N. E. 1089; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950.

The contract in suit is in violation of chapter 265 of the laws of 1897, known as the anti-trust law.

Texas & P. Coal Co. v. Lawson, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919; *Harding v. American Glucose Co.* 182 Ill. 551, 64 L. R. A. 738, 74 Am. St. Rep. 189, 55 N. E. 599; *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118, 54 S. W. 291; *Texas Brewing Co. v. Templeman*, 90 Tex. 277, 38 S. W. 27; *Fuqua v. Pabst Breicing Co.* 90 Tex. 298, 35 L. R. A. 241, 38 S. W. 29, 750.

No court, either of law or equity, will lend its assistance to give effect to a contract void as against public policy.

Settler v. Alvey, 15 Kan. 157; *Ainsworth v. Miller*, 20 Kan. 222; *Gerlach v. Skinner*, 34 Kan. 86, 55 Am. Rep. 240, 8 Pac. 257; *Korman v. Henry*, 32 Kan. 49, 343, 3 Pac. 764, 4 Pac. 262; *Hinnen v. Newman*, 35 Kan. 709, 12 Pac. 144; *Bartle v. Nutt*, 4 Pet. 184, 7 L. ed. 825; *Mayes v. Cherokee Strip Live Stock Asso.* 58 Kan. 716, 51 Pac. 215; *Hallam v. Huffman*, 5 Kan. App. 303, 48 Pac. 602; *Armstrong v. Toler*, 11 Wheat. 278, 6 L. ed. 473; *Sheldon v. Pruessner*, 52 Kan. 580, 22 L. R. A. 709, 35 Pac. 201; *McBlair v. Gibbs*, 17 How. 236, 15 L. ed. 134; *Gould v. Kendall*, 15 Neb. 549, 19 N. W. 483; *Chicago, M. & St. P. R. Co. v. Wabash, St.* 67 L. R. A.

L. & P. R. Co. 4 Inters. Com. Rep. 578, 9 C. C. A. 659, 27 U. S. App. 1, 61 Fed. 993; *Shipley v. Reasoner*, 80 Iowa, 548, 45 N. W. 1077; *Robinson v. Patterson*, 71 Mich. 141, 39 N. W. 21; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102; *Burck v. Abbott*, 22 Tex. Civ. App. 216, 54 S. W. 315; *McMullen v. Hoffman*, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; *Cansler v. Penland*, 125 N. C. 578, 48 L. R. A. 441, 34 S. E. 683; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Bowman v. Phillips*, 41 Kan. 364, 3 L. R. A. 631, 13 Am. St. Rep. 292, 21 Pac. 230.

Atkinson, J., delivered the opinion of the court:

On the 14th day of May, 1897, the Wichita Electric Railway & Light Company, a corporation under the laws of Kansas, with its place of business at the city of Wichita, entered into a contract or lease in writing with the Wichita Gas, Electric Light, & Power Company, a corporation under the laws of Kansas, with its place of business at the city of Wichita. By the terms of the contract or lease the former leased to the latter for a period of ten years, at an annual rental of \$3,000, payable semiannually, certain machinery and appliances, in the city of Wichita, adapted to and used by the lessor for the purpose of generating electricity for light, heat, and power. On the 20th day of March, 1900, the Keene Syndicate, a corporation, purchased of the lessor, the Wichita Electric Railway & Light Company, the property included in and covered by said lease, and also its interest in said lease, taking a written assignment thereof. The lessee, the Wichita Gas, Electric Light, & Power Company, being in default of three years' rent in August, 1900; the Keene Syndicate, as assignee of the Wichita Electric Railway & Light Company, commenced its action in the district court of Sedgwick county to recover the rent, the amount claimed due it from the lessee. The petition of plaintiff presented seven causes of action, and attached thereto was a copy of the said written contract or lease. The first six causes of action were each a specific claim for recovery upon one of the semiannual payments of rent. Each cause of action made reference to said contract or lease, and made it a part thereof. The seventh and last cause of action in the petition was by plaintiff intended to state a claim for recovery of defendant upon a quantum meruit for the use of the machinery delivered to defendant under the lease, and by defendant received and used. This last or seventh cause of action made reference to the preceding causes of action.

adopted portions of each, and made them a part thereof, which adoption had the effect to include also in the seventh cause of action the contract or lease attached to and made a part of the petition. The seventh cause of action became thereby also an action for recovery on the contract or lease, and not a cause of action for recovery on a *quantum meruit*, as was contemplated by plaintiff. Defendant filed a demurrer to the petition, which was sustained by the court. Plaintiff elected to stand upon its petition, and judgment was entered against it for costs. Plaintiff brings error.

Does the petition on its face disclose a cause of action,—a right of plaintiff to recover from defendant? It is charged by defendant that the petition discloses the contract or lease sued upon to be against public policy and void. The district court found the contract sued upon to be void for that reason. Whether or not the petition on its face disclosed the contract or lease to be against public policy and void is the only question before us for our determination. The petition of plaintiff, by its averments, in addition to embodying the facts above stated with reference to location, corporate existence, the execution of the lease, the leasing of the machinery for the term and consideration mentioned, and the assigning of the lease by the lessor to plaintiff, may fairly be said to also disclose, by its averments, that the lessor and the lessee, at the time the lease was entered into, were rival public utility corporations, in the city of Wichita, engaged in generating and furnishing electricity for public and private use for light, heat, and power. The petition also, in substance, avers that the assignor of plaintiff, the Wichita Electric Railway & Light Company, had delivered to defendant all the property described in the lease, under and by virtue of said lease, and had duly performed all the conditions, agreements, and stipulations in said lease to be by it performed. The contract or lease, attached to and made a part of the petition, and upon which the action for recovery is based, contains the following language: "The said first party hereby binds and obligates itself not to engage in the business of furnishing electric light and power to private or public consumers within the city of Wichita, during the period covered by this agreement, except for the purpose of operating the street railway now owned by the first party, and said first party furthermore agrees not to dispose of any of the apparatus, machinery, appliances, etc., retained by it, for producing or generating electric light and power in said city of Wichita." The above language quoted from the contract or lease, applied to

and construed with the averments of the petition of which the contract or lease formed a part, fairly discloses that the lessor obligated itself not to engage in the business of furnishing electric light and power to private and public consumers within the city of Wichita during the period of ten years covered by the lease, and further agreed that during said period of ten years it would not dispose of any of its machinery or appliances, retained by it, for the purpose of being used to generate electric light and power in the city of Wichita. The effect of which, if carried out, would be that the lessor, for said period of ten years, would abandon the exercise of its corporate power to generate and furnish electric light and power for public and private use in the city of Wichita, withdraw itself from the field of competition with the lessor, its former competitor in the business, for said period of ten years, and refrain from the sale of property to others who might thereby become competitors of the lessor in the said field of competition during said period of ten years. But it is not necessary, for the determination of this case, to inquire whether the effect of the agreement between the lessor and the lessee was in fact detrimental to the city of Wichita or its citizens. The inquiry should be, and the true rule is, that agreements which, in their necessary or contemplated operation upon the actions of the parties to them, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or of third parties, are against the principles of sound public policy, and consequently void. *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678.

In *Western Wooden-Ware Asso. v. Starkey*, 84 Mich. 76, 11 L. R. A. 503, 22 Am. St. Rep. 686, 47 N. W. 604, an action to enjoin the association from engaging in a certain business, and from using certain premises in carrying on said business, in violation of a contract with plaintiff, which contract provided that the association would not engage in or carry on the business in controversy for a period of five years, and would not within said period use the said premises or sell them, or permit them to be sold or used, without the consent of plaintiff, the court denied the injunction, and held the contract void as against public policy. Referring more particularly to that feature of the case wherein the association had contracted not to use or permit the premises to be used, nor sell the premises for use, in competition with plaintiff, an element in that case not unlike one of the elements in the case at bar, Mr. Justice Long, speaking for the court, said: "In the present case the defendants . . . were not only

to remain out of such business for the full time specified, but the premises which had been used to carry on the manufacturing by them, though not sold and conveyed under the contract, could not be again used for such time by them or any other party for the same business. I do not think it needs the citation of authorities to show that contracts of this nature have frequently been condemned by the courts and held void as unreasonable restraints of trade, and therefore void on the ground of public policy." Among the contracts declared illegal under the common law because opposed to public policy, were contracts in general restraint of trade, and contracts between individuals to prevent competition and keep up the price of articles of utility.

It is well settled that in the law of contracts the first purpose of the court is to look to the welfare of the public, and, if the enforcement of the agreement would be detrimental to its interest, no relief should be granted to the party injured, and that even though it might result beneficially to one of the parties who made and violated the agreement. In *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979, 9 Sup. Ct. Rep. 553, the court said: "Courts decline to enforce contracts which impose a restraint, though only partial, upon business of such character that restraint to any extent will be prejudicial to the public in-

terest." The rule that contracts and agreements, when contrary to public policy, will not be enforced, is one of the great preservatives of a state. It has been the uniform rule of this court, and, indeed, of all courts, to hold that contracts tainted with illegality are absolutely void. *Hawley v. Kansas & T. Coal Co.* 48 Kan. 593, 30 Pac. 14; *Hinnen v. Newman*, 35 Kan. 709, 12 Pac. 144. Plaintiff, the assignee of the lessor, the Wichita Electric Railway & Light Company, is in no better position to recover than the lessor, as the illegal consideration appears upon the face of the contract or lease. *Saratoga County Bank v. King*, 44 N. Y. 87; *Setter v. Alvey*, 15 Kan. 157. Whether plaintiff could maintain an action against defendant on a *quantum meruit* or otherwise, independently of the contract, need not be here considered. That question, in the view we have taken of the seventh cause of action of the petition, is not in the record before us. The contract or lease sued upon being in contravention of public policy, no action for a recovery upon it can be maintained.

The judgment of the District Court will be affirmed.

All the Justices concur.

Petition for rehearing denied.

LOUISIANA SUPREME COURT.

B. J. WOLF *et al.*, *Appts.*,
v.

NEW ORLEANS TAILOR-MADE PANTS
COMPANY *et al.*

(.....La.....)

- *1. Where an exception of no cause of action was sustained, with leave to amend, and plaintiff amended his petition in obedience to the order of the court, he thereby waived his right to question the correctness of the ruling on the exception.
2. Where a commercial traveler engaged his services to plaintiffs for the term of one year, and when about one half the term had expired sought other employment, and engaged his services to defendant company, which at the time had no information that his term would not expire for five or six months, and when, after

he had quit the services of plaintiffs, they informed defendant company of the terms of the contract, and thereupon the employee offered to release his new employers, but at the same time expressed his determination not to return to the plaintiffs,—*Held*, that plaintiffs have no cause of action against defendant company for damages, because it did not release or discharge the employee.

(June 6, 1904.)

APPEAL by plaintiffs from a judgment of the Civil District Court for the Parish of Orleans in favor of defendants in an action brought to recover damages for inducing plaintiffs' employee to leave his employment. *Affirmed.*

The facts are stated in the opinion.

Mr. Henry L. Lasarus, for appellants:

An action will not lie for breach of contract, both against those who fail to observe their obligations resulting from the contract, and against those who inspire or aid the obligor in the commission of the breach.

For every right, and for every injury done a man in his person, reputation, or property, the party hath a remedy.

*Headnotes by LAND, J.

NOTE.—As to liability for inducing servant to break his contract, see cases in *notes to Chambers v. Baldwin*, 11 L. R. A. 548, and *Boysen v. Thorn*, 21 L. R. A. 238; also *Flaccus v. Smith*, 54 L. R. A. 640.
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Comyns, Dig. *Action upon the Oase*; 1 Bacon, Abr. p. 102, *Actions on the Case*; Civil Code, arts. 2315, 2324.

The present cause of action, as disclosed by the pleadings and the evidence, has its primary foundation in the great and immutable principle of right and justice proclaimed from Mount Sinai: "Thou shalt not covet thy neighbor's servant."

Dickson v. Dickson, 33 La. Ann. 1263; *Graham v. St. Charles Street R. Co.* 47 La. Ann. 218, 27 L. R. A. 416, 49 Am. St. Rep. 366, 16 So. 806, 47 La. Ann. 1659, 49 Am. St. Rep. 436, 18 So. 707; Bl. Com. p. 142; Wood, Mast. & S. §§ 230, 231; 14 Am. & Eng. Enc. Law, p. 800; *Lumley v. Gye*, 2 El. & Bl. 217; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333; *Evans v. Walton*, L. R. 2 C. P. 622; *Ashby v. White*, 2 Ld. Raym. 938; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 14, 38 L. ed. 63, 14 Sup. Ct. Rep. 240; *Walker v. Cronin*, 107 Mass. 555; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Chipley v. Atkinson*, 23 Fla. 216, 11 Am. St. Rep. 367, 1 So. 934; *Noice v. Brown*, 39 N. J. L. 572; *Lucke v. Clothing Cutters' & T. Assembly No. 7507*, K. of L. 77 Md. 396, 19 L. R. A. 408, 39 Am. St. Rep. 430, 26 Atl. 505; *Perkins v. Pendleton*, 90 Me. 166, 60 Am. St. Rep. 253, 38 Atl. 96; *Jones v. Stanly*, 76 N. C. 355; *Lally v. Cantwell*, 30 Mo. App. 528.

Before negotiations between defendant and Bratman were concluded defendants were in possession of information from B. J. Wolf & Sons that there was a subsisting contract; and that they had from Bratman the contract itself.

On petition for rehearing.

The court erred in holding and determining, as a question of fact, that Bratman would not have returned to the employ of plaintiffs and observed the conditions of his contract had defendants, after notice of the existence of the contract and its provisions, released him from the tentative agreement between them.

This court erred, as a question of law, in holding that the amendment under directions of the trial court, and under the protest of the plaintiffs, was, in law, an abandonment of their primary cause of action.

Where there is error apparent upon the face of the record, advantage may be taken of it in the reviewing tribunal without a formal bill of exception being reserved.

3 Enc. Pl. & Pr. p. 404; *Harrison v. Waymouth*, 3 Rob. (La.) 340; *State ex rel. Schlater v. Twenty-Third Dist. Judge*, 40 La. Ann. 809, 5 So. 407; *Exchange & Bkg. Co. v. Yorke*, 4 La. Ann. 138; *Scott v. Lawson*, 10 La. Ann. 547; *Sedgwick v. Dawkins*, 18 Fla. 335; *Gates v. Hayner*, 22 Fla. 325; *Zimmerman v. Cowan*, 107 Ill. 67 L. R. A.

631, 47 Am. Rep. 476; *Blake v. Pitcher*, 46 Md. 462; *Moline Plow Co. v. Webb*, 141 U. S. 616, 35 L. ed. 879, 12 Sup. Ct. Rep. 100; *Post v. Pearson*, 108 U. S. 418, 27 L. ed. 774, 2 Sup. Ct. Rep. 799; *Coughlin v. District of Columbia*, 108 U. S. 7, 27 L. ed. 74, 1 Sup. Ct. Rep. 37; *State v. Judy*, 60 Ind. 138; *Doctor v. Hartman*, 74 Ind. 230; *Black v. Howell*, 56 Iowa, 630, 10 N. W. 216.

One who maliciously, i. e., knowingly and wilfully, with a view to his own benefit and detriment to another, causes, or assists, or encourages, another to violate his contract with his employer, is liable, not only for all actual losses sustained, but also for exemplary damages.

Cooley, Torts, 2d ed. p. 330; Pollock, Torts, 1887, pp. 269, 270, and note, 450-452; Pigvott, Torts, 1885, p. 352; Wood, Mast. & S. § 230; Bishop, Non-Contract Law, § 370; 14 Am. & Eng. Enc. Law, p. 800; 16 Am. & Eng. Enc. Law, 2d ed. p. 1109; *Webber v. Barry*, 11 Am. St. Rep. 474, note, 66 Mich. 127, 33 N. W. 289; *Lumley v. Gye*, 2 El. & Bl. 217; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333; *Evans v. Walton*, L. R. 2 C. P. 622; *Ashby v. White*, 2 Ld. Raym. 938; *Temperton v. Russell* [1893] 1 Q. B. 715; *Allen v. Flood* [1898] A. C. 1; *Quinn v. Leatham* [1901] A. C. 495; *Walker v. Cronin*, 107 Mass. 564; *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 13, 38 L. ed. 62, 14 Sup. Ct. Rep. 240; *Noice v. Brown*, 39 N. J. L. 572; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881; *Frank v. Herald*, 63 N. J. Eq. 443, 52 Atl. 152; *Bisby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Lally v. Cantwell*, 30 Mo. App. 524; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Jones v. Stanly*, 76 N. C. 356; *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14; *Daniel v. Swearingen*, 6 S. C. N. S. 297, 24 Am. Rep. 471; *Huff v. Watkins*, 15 S. C. 82, 40 Am. Rep. 680; *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, 1 So. 934; *Lucke v. Clothing Cutters' & T. Assembly No. 7507*, K. of L. 77 Md. 396, 19 L. R. A. 408, 39 Am. St. Rep. 421, 26 Atl. 505; *London Guarantees & Acci. Co. v. Horn*, 101 Ill. App. 355; *Lee v. West*, 47 Ga. 311; *Sherwood v. Hall*, 3 Sumn. 127, Fed. Cas. No. 12,777; *Plummer v. Webb*, 4 Mason, 380, Fed. Cas. No. 11,233; *Perkins v. Pendleton*, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96; *Hewitt v. Ontario Copper Lightning Rod Co.* 44 U. C. Q. B. 297; *Morgan v. Andrews*, 107 Mich. 33, 64 N. W. 869; *Webber v. Barry*, 66 Mich. 127, 11 Am. St. Rep. 466, 33 N. W. 289; *Dickson v. Dickson*, 33 La. Ann. 1263; *Graham v. St. Charles Street R. Co.* 47 La. Ann. 218, 27 L. R. A. 416, 49

Am. St. Rep. 366, 16 So. 806, 47 La. Ann. 1657, 49 Am. St. Rep. 436, 18 So. 707; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. 48; *Nashville, C. & St. L. R. Co. v. McConnell*, 82 Fed. 65; *J. S. Brown Hardware Co. v. Indiana Stove Works*, 96 Tex. 453, 73 S. W. 800.

An action lies against one who continues to employ the servant of another after he has knowledge or notice that he is such servant, whether he knew that fact or not when he first employed him. The gist of this action is the retention of the servant after knowledge of the fact that his services are due to another.

Webber v. Barry, 66 Mich. 127, 11 Am. St. Rep. 466, 33 N. W. 289; *Faucet v. Beavres*, 2 Lev. 63; *Blake v. Lanyon*, 6 T. R. 221; *Evans v. Walton*, L. R. 2 C. P. 615; *Everett v. Sherfey*, 1 Iowa, 356; *Ferguson v. Tucker*, 2 Harr. & G. 182; *Butterfield v. Ashley*, 6 Cush. 249; *Stowe v. Heywood*, 7 Allen, 118; *Sargent v. Mathewson*, 38 N. H. 54; *Morris v. Neville*, 11 Lea, 271; Wood, Mast. & S. § 240.

Messrs. Dinkelspiel & Hart, for appellees:

This court cannot finally pass upon the issues not decided in the court below, because of dismissal of the pleading raising the same.

Grover's Succession, 49 La. Ann. 1050, 22 So. 313; *St. Charles Street R. Co. v. Fidelity & D. Co.* 109 La. 491, 33 So. 574.

The action of the plaintiffs against their former employee, Bratman, is limited to the damages provided in art. 2750, Rev. Civ. Code; that is, the forfeiture of all the wages that might be due him, and the repayment of what he had received during the time of his engagement.

Union Oil Co. v. Marrero, 52 La. Ann. 357, 26 So. 766.

This is their entire measure of damages, and they have no other remedy than an action for damages.

Healy v. Allen, 38 La. Ann. 867; *Healey v. Dillon*, 39 La. Ann. 503, 2 So. 49; *Levine v. Michel*, 35 La. Ann. 1121; *Mirandona v. Burg*, 49 La. Ann. 656, 21 So. 723; *Larousini v. Werlein*, 48 La. Ann. 13, 18 So. 704; *State ex rel. New Orleans v. New Orleans & C. R. Co.* 37 La. Ann. 589; *New Orleans v. New Orleans & N. E. R. Co.* 44 La. Ann. 64, 10 So. 401.

The word "laborer" applies to all kinds of employees, except menial servants.

M'Phillin v. Gillise, 8 La. 181; *Beokman v. New Orleans Cotton Press Co.* 12 La. 67; *Sherburne v. Orleans Cotton Press*, 15 La. 360; *Lartigue v. Peet*, 5 Rob. (La.) 91; *Decamp v. Hewitt*, 11 Rob. (La.) 290, 43 Am. Dec. 204; *Angello v. Rivollet*, 2 La. Ann. 652; *Callean v. Stafford*, 18 La. Ann. 67 L. R. A.

556; *Orphan Asylum v. Mississippi Marine Ins. Co.* 8 La. 181.

There is no allegation in the petition to the effect that actual damages were caused the plaintiffs by the acts of the defendants.

Wood, Mast. & S. § 237, p. 457.

An action cannot, in general, be maintained for enticing a third person to break his contract with the plaintiff; the consequence, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it.

Cooley, Torts, 2d ed. p. 581; *Bird v. Randall*, 1 W. Bl. 387.

The enticing away of a servant from his employment under contract of hire is made an actionable tort by statute in England, and in several of the states.

Jones v. Blocker, 43 Ga. 331; *Soidmore v. Smith*, 13 Johns. 322; *Birby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Jones v. Stanly*, 76 N. C. 355; *Huff v. Watkins*, 20 S. C. 477; *Hartley v. Cummings*, 5 C. B. 247; *Anonymous*, Loft, 493; *Hart v. Aldridge*, Cowp. pt. 1, p. 54.

The better current of American authority is that such an act as this, without a statute, and in the absence of peculiar surrounding circumstances, is not actionable.

Chambers v. Baldwin, 91 Ky. 121, 11 L. R. A. 548, 34 Am. St. Rep. 165, 15 S. W. 57; *Bourlier Bros. v. Macauley*, 91 Ky. 135, 11 L. R. A. 550, 34 Am. St. Rep. 171, 15 S. W. 60; *Kline v. Eubanks*, 109 La. 241, 33 So. 211; *Jaggard*, Torts, p. 636; *Smith v. Drew*, 5 Mass. 514.

Land, J., delivered the opinion of the court:

The present litigation is the sequel of a suit bearing the same title, which was dismissed because brought in the names of the partners instead of the partnership. See 52 La. Ann. 1357, 27 So. 893.

A new suit was instituted in the name of the partnership. Defendants pleaded the prescription of one year, and the plea was maintained. Plaintiffs appealed, and this court reversed the judgment of the district court, and remanded the cause for further proceedings. See 110 La. 427, 34 So. 590.

The original petition is set out in full in 52 La. Ann. 1357, 27 So. 893.

The case presented by the petition is that plaintiffs had in their employ one H. Bratman, an experienced traveling salesman or drummer, under a written contract for his exclusive services for one year, commencing May 14, 1898, and expiring on May 13, 1899, the said Bratman receiving a fixed commission on sales made by him in lieu of salary or wages; that in November, 1898, defendants combined, confederated, and con-

spired to secure the services of said Bratman, and to entice him from his employment with plaintiffs, and that their said employee, induced by dishonest and sinister motives, yielded to the persuasion of his codefendants in committing a breach of his contract with plaintiffs; that, being advised of the negotiations pending between the defendants, plaintiffs, on November 12, 1898, gave defendant company, officers, and stockholders notice by letter of their contract with Bratman, and its terms and conditions; that, notwithstanding said notice, said defendants employed Bratman, and induced him to violate his contract with petitioners, to their damage and injury, and to the benefit and advantage of defendant company; that the relations and contract obligations between plaintiffs and Bratman were disturbed and violated by the wrongful and malicious intervention of said defendants; and that thereby said Bratman was wrongfully prevented from performing his contract duties with plaintiffs; and that defendants employed said Bratman after notice and with the knowledge of the existence of said contract.

The petition further alleged, in substance, that while Bratman was employed by plaintiffs a certain territory was assigned to him, which he worked in the interests of plaintiffs, and wherein they enjoyed a large and profitable business; that said territory has been invaded by said Bratman in the interest of said defendants, and by their direction, and the former trade of plaintiffs therein diverted to the defendant corporation; that plaintiffs used every reasonable effort to secure the services of a competent drummer in said territory to hold their said trade therein, but were unable to do so, and said trade was diverted by said defendants to the prejudice and wrong of plaintiffs.

The petition further charges that defendants made repeated efforts to entice and seduce from the employ of plaintiffs other clerks and salesmen, whose services had been advantageous and profitable to plaintiffs, with the view of diverting a part of the business which they had established.

Petitioners further represented that, as they had no representative in said territory, for the reasons stated, during the unexpired term of said Bratman, "there is no way in which they can estimate the exact measure of damages sustained by them in consequence of the wanton, malicious, and dishonest conduct on the part of the defendants herein as aforesaid, and the result of their said conspiracy," save by taking as a basis the quantity of goods sold by Bratman under his prior contract from December 1, 1897, to May 13, 1898.

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On this basis plaintiffs estimated their loss to be \$1,796, and they also claim \$3,500 as "punitive and statutory damages" and "damages by way of punishment, punitive and exemplary," for the unlawful conduct and acts of defendants, "inspired by wanton, selfish, and malicious motives."

Defendants filed a number of exceptions, including one of no cause of action, and the judgment rendered thereon decreed: "That the exceptions of no cause of action be maintained in so far as to order plaintiffs to amend their petition so as to make it conform, as to measure of damages, with the provisions of article 2750 of the Revised Civil Code of Louisiana and act No. 50 of 1892, p. 72, § 2, and that in default of such amendment within ten days from the date of this judgment plaintiffs' demand be dismissed, at their cost."

Plaintiffs, within the delay, filed an amended and supplemental petition, in obedience to the order of the court, in which they alleged that Bratman had received \$1,418.49 on account of his salary, but they prayed for judgment as in their original petition.

Defendants again excepted, one of the grounds being that plaintiffs had not obeyed the order of court, and judgment was rendered as follows: "It is ordered that said exceptions be maintained in so far as to order plaintiffs to further amend their petition herein, within ten days, by setting forth the amount of commissions earned by and paid to defendant as salary during the term of his employment, and that, in default of said amendment being filed, plaintiffs' demand be dismissed, with costs."

Plaintiffs filed a second amended petition reiterating and affirming all of the allegations contained in their original and first amended petition, but, in obedience to the court's order, alleged that Bratman earned commissions as salary in the sum of \$1,672.56; that between May 1 and November 5, 1898, he had been paid \$1,510.44, and \$165 prior to said May 1st, making a total of \$1,675.44 paid. They further alleged that they were entitled to recover double the amount paid as statutory damages, and also exemplary and punitive damages, the whole amounting to the full sum of \$5,000. Wherefore plaintiffs prayed for judgment as in their original petition.

Defendants again excepted, but their exceptions were overruled, and, reserving the benefit of their exceptions, answered, pleading the general issue, and averring that they employed Bratman in the usual course of business, specially denying any notice or knowledge at the time of his alleged contract with plaintiffs, and that they enticed said Bratman from his employment with

plaintiffs for any purpose. Further answering, defendants specially denied that their employment of Bratman caused any damages to plaintiffs, or, if it did, they averred that such damages were too remote and speculative to form a basis for recovery.

There was judgment in favor of the defendants, and plaintiffs have appealed.

In ruling on the exceptions of no cause of action the court held as a matter of law that plaintiffs had no right to recover the damages alleged in the petition, but were confined to the damages provided by article 2750 of the Civil Code and act No. 50 of 1892, p. 72, and the court sustained the exceptions, with leave to plaintiffs to amend their petition in accordance with the order of court.

Plaintiffs had their option to amend or not to amend. Having elected to amend, and by so doing acquiesced in the judgment, they waived whatever right they may have had to contest the ruling of the court. Originally, the sustaining of a demurrer put the plaintiff out of court, but the practice grew up in courts of equity to allow amendments on certain conditions. If the conditions were not complied with, the decree became final and effective.

The present rules of practice in chancery are set forth as follows:

"If a demurrer to a bill is sustained with leave to amend, and the amendment is not made within the time limited, the bill must be dismissed. Where a bill is amended after demurrer thereto has been sustained, the amendment operates as a waiver of the right to question the correctness of the ruling sustaining the demurrer." 6 Enc. Pl. & Pr. p. 428. The same rules apply at common law. *Id.* 359, 360, and notes.

A plaintiff has the right to stand by his original pleadings and appeal from the decree pronouncing them insufficient in law, or to acquiesce in the decree by availing himself of the leave contained therein to amend. He cannot do both, and must make his election at the proper time.

In this very case the court on the trial of the cause excluded all evidence to prove the kind of damages claimed in the original petition, to wit, loss of profits and exemplary or punitive damages. On the evidence the claim of plaintiff was limited to the damages fixed by the Code and the statute.

On the facts of the case defendant company, when they engaged the services of H. Bratman, did not know that he had a time contract with plaintiffs. It is true that they were notified of the contract before Bratman commenced working for them, and that he offered to release them if they so desired. But the defendants referred the matter to their counsel, and on his advice

decided to carry out their contract with Bratman, who testified that he had no intention of returning to plaintiffs' service. Albert Lob had a number of conversations with Bratman, and testified that the latter said that his time was up on November 15th. Bratman had misunderstandings with plaintiffs, and was seeking new employment.

Godfrey Lob testified that Bratman twice stated in the presence of the attorney that he would not go back to Wolf & Sons.

Boiled down, the question before the court is whether the defendant company and stockholders are liable for damages for not releasing or discharging Bratman when they were informed of his time contract with plaintiffs.

Article 2750 of the Civil Code provides that the laborer who leaves his employer, before the time of his engagement has expired, without just cause of complaint, shall forfeit all the wages that may be due to him, and shall, moreover, be compelled to repay all the money he has received, either as due for his wages or in advance thereof, on the running year, or on the time of his engagement.

This article fixes the damages as between the laborer and his employer, but has no application to third persons.

Act No. 50 of 1892, p. 72, is a criminal statute, and its object is to enforce labor contracts or contracts of labor, and to punish third persons who wilfully interfere therein, entice away, knowingly employ, or induce a laborer, before the expiration of his contract, to leave his employer or the place rented. The statute provides that the third person violating its provisions shall be fined, and "shall be liable in double the amount of damages in a civil action which such employer or landlord may suffer by such abandonment."

In *Kline v. Eubanks*, 109 La. 242, 33 So. 211, we held that the civil action provided by that statute would not lie until after a criminal conviction. We also considered the case under Civil Code, art. 2315, which provides that "every act of man that causes damage to another obliges him by whose fault it happened to repair it;" and we held that no action was maintainable under said article where a third person had knowingly employed and enticed away a laborer before the expiration of the term of his contract.

We approved the doctrine that "an action cannot, in general, be maintained for inducing a third person to break his contract." In addition to the authorities cited by us in that case, we extract from Cooley on Torts, 2d ed. *497, the following statement of the accepted jurisprudence in our sister states, *viz.*: "An action cannot, in general, be maintained for inducing a third

person to break his contract with the plaintiff; the consequence, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it. But if the third person was induced to break his contract by deception, it may be different. If, for example, one were to personate a vendee of goods, and receive and pay for them as on a sale to himself, the vendee would have his action against the vendor, but he might also pursue the party who, by deceiving one, had defrauded both." The same author, under the title of *Injuries to Family Rights* and under the head of *Master and Servant* says: "The wrongs which the master may sustain in that relation at the hands of others are substantially confined to being deprived of services. . . . The principles which govern the recovery have been sufficiently indicated in speaking of parent and child." Under the subtitle of *Action by the Parent*, the same learned author says: "Loss of service to the parent may be occasioned by enticing the child away, by forcibly abducting the child, by beating or otherwise purposely injuring the child." It is apparent that the doctrine announced by Cooley originated at a time when the child and the servant were on the same footing, and "when serfdom and villenage very largely prevailed." *222. The civil law is different. Our Code says: "A man is at liberty to dismiss a hired servant attached to his person or family without assigning any reason for so doing. The servant is also free to depart without assigning any cause." Civil Code, art. 2747.

The English authorities cited by plaintiffs' counsel have not been followed in this country, and we do not think have any application to employees in commercial pursuits.

Our ruling in *Kline v. Eubanks* is in accord with the weight of jurisprudence in this country, and more in consonance with the spirit of free labor. In that case we expressed the opinion that the act of 1892 applied only to agricultural laborers and tenants, and we may add that this is a matter of common knowledge.

While the Mosaic law, cited by counsel, declares that "thou shalt not covet thy neighbor's servant," it does not impose a pecuniary penalty for disobedience. It may also be noted that in the time of Moses servants were slaves, and were classed with the ox and the ass.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed.

Petition for rehearing denied June 29, 1904.

37 L. R. A.

STATE of Louisiana *ex rel.* Edward GALLE
v.

City of NEW ORLEANS, *Appt.*

(.....La.....)

- *1. The business of selling intoxicating liquors is made lawful by the Constitution and statutes of this state, and the right of any citizen to engage in it is one, the enjoyment of which is subject to such conditions only as may be imposed or authorized by the general assembly in the legitimate exercise of the police power of the state.
2. The police power of the state, like other governmental authority, is to be used for the common welfare, impartially and without unjust discrimination; and whilst, as between liquor selling and other callings less harmful to the public, the former may be discriminated against, there is no warrant for unjust discrimination as between individuals engaged in the same business.
3. The discretion vested in the city of New Orleans with respect to granting permission to open and conduct barrooms is not unlimited, and does not give that body absolute control of the matter; and, where the refusal to grant such permission is arbitrary, discriminatory, and unjust, a writ of mandamus will issue.
4. An applicant for a barroom license, to whose character no objection is found, ought not to be refused permission to engage in that business, in a neighborhood where others are so engaged, on the objection of a minority of the property holders, or on the ground that no more barrooms are needed.

(Nicholls, J., dissents.)

(April 11, 1904.)

A PPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans in favor of relator in a mandamus proceeding to compel the granting of a license to carry on a barroom. *Affirmed.* The facts are stated in the opinion.

*Headnotes by MONROE, J.

NOTE.—As to extent of discretion in granting liquor licenses, see also *note* to *Sherlock v. Stuart*, 21 L. R. A. 580.

As to power of city to single out a certain saloon and arbitrarily declare it a nuisance and order it closed, see *De Blanc v. New Iberia*, 56 L. R. A. 285.

As to power of city to declare all places where liquors are sold to be nuisances, see *Lauget v. Bushnell*, 58 L. R. A. 266.

As to right to provide for destruction without jury trial of intoxicating liquors kept for illegal sale, see *Kirkland v. State*, 65 L. R. A. 76.

As to extent of police power in regulating sales of intoxicating liquors generally, see *notes* to *State v. Fulker*, 7 L. R. A. 183; *State v. Creeden*, 7 L. R. A. 295; and *Tragesser v. Gray*, 9 L. R. A. 780; also the other cases in this series of *Altensburg v. Com.* 4 L. R. A. 543; *McCullough v. Brown*, 23 L. R. A. 410; *Com. v. Fowler*, 33 L. R. A. 839; and *State v. Gerhardt*, 33 L. R. A. 313.

Messrs. H. G. Dupré and Samuel L. Gilmore, for appellant:

The court or board charged with the duty of issuing licenses is invested with a sound judicial discretion, to be exercised in view of all the facts and circumstances of each particular case, as to granting or refusing the license applied for.

Black, Intoxicating Liquors, § 170; *Re Hoover*, 30 Fed. 51; *Sparrow's Petition*, 138 Pa. 116, 20 Atl. 711; *United States ex rel. Hover v. Ronan*, 33 Fed. 117; *Batters v. Dunning*, 49 Conn. 479; *Ailstock v. Page*, 77 Va. 386; *Perkins v. Ledbetter*, 68 Miss. 327, 8 So. 507.

The right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States.

Barthemeyer v. Iowa, 18 Wall. 129, 21 L. ed. 929; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Crowley v. Christensen*, 137 U. S. 91, 34 L. ed. 623, 11 Sup. Ct. Rep. 13.

The act of the licensing board or court vested with the power of issuing licenses is not merely ministerial, but it acts in a judicial capacity.

17 Am. & Eng. Enc. Law, 2d ed. p. 254, § 17; *Black, Intoxicating Liquors*, § 170; *Perkins v. Ledbetter*, 68 Miss. 327, 8 So. 507; *Sherlock v. Stuart*, 96 Mich. 193, 21 L. R. A. 580, 55 N. W. 845; *United States ex rel. Hover v. Ronan*, 33 Fed. 117; *Wiggins v. Varner*, 67 Ga. 583; *Re Bickerstaff*, 70 Cal. 35, 11 Pac. 393; *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 747.

A writ of mandamus will not lie to control or interfere with matters resting purely in the discretion of those against whom the writ would be directed.

Dundar v. Frazer, 78 Ala. 529; *Hopson's Appeal*, 65 Conn. 140, 31 Atl. 531; *Polk County v. Johnson*, 21 Fla. 578; *State ex rel. Reynolds v. Tippecanoe County*, 45 Ind. 501; *Leighton v. Maury*, 76 Va. 865; *State ex rel. Noble v. Cheyenne*, 7 Wyo. 417, 40 L. R. A. 710, 52 Pac. 975; *Perry v. Salt Lake City*, 7 Utah, 143, 11 L. R. A. 446, 25 Pac. 739, 998.

The state expects her servants to do their duty, and she frames laws accordingly, and, hence, she feels that the rights of those of her citizens who wish to enter the liquor business are as amply safeguarded by the final action of a municipal council as if she had granted to them the right of successive appeals from the council's decision up to the supreme tribunal of the land.

Swift v. People, 162 Ill. 534, 33 L. R. A. 472, 44 N. E. 528; *Re Hoover*, 30 Fed. 51.

The fact that a certain section is a residence district justifies the licensing board in refusing to locate a barroom therein.

Swift v. People, 63 Ill. App. 453; *People* 67 L. R. A.

ex rel. Jones v. Bennett, 4 Misc. 10, 23 N. Y. Supp. 695; *People ex rel. McNutt v. Mills*, 91 Hun, 144, 36 N. Y. Supp. 273.

The liquor business stands on an absolutely different basis from any other vocation.

Black, Intoxicating Liquors, § 34; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Ex parte Christensen*, 85 Cal. 213, 24 Pac. 747; *Shea v. Muncie*, 148 Ind. 31, 46 N. E. 138; *State ex rel. Kyger v. Holt County Justices*, 39 Mo. 524; *State ex rel. Noble v. Cheyenne*, 7 Wyo. 417, 40 L. R. A. 716, 52 Pac. 975.

The court cannot apply, in this case, the principles which it has enunciated in the market, stable, and dairy cases.

Perry v. Salt Lake City, 7 Utah, 143, 11 L. R. A. 446, 25 Pac. 739, 998; *Muller v. Buncombe County*, 89 N. C. 171; *State ex rel. Noble v. Cheyenne*, 7 Wyo. 417, 40 L. R. A. 716, 52 Pac. 975; *Sherlock v. Stuart*, 96 Mich. 193, 21 L. R. A. 580, 55 N. W. 845; *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633.

Messrs. Dinkelspiel & Hart, for appellee:

The business of keeping a barroom is not one prohibited in the city of New Orleans. This being so, it is incompetent for the city council, by ordinance or otherwise, to punish anyone for carrying on this lawful business.

State v. Quaid, 43 La. Ann. 1076, 26 Am. St. Rep. 207, 10 So. 183; *Shreveport v. Maloney*, 107 La. 193, 31 So. 702.

The fact that the authorities charged with the duty of issuing liquor licenses wrongfully or arbitrarily refused to grant a license to the applicant is not equivalent to a proper license, and affords him no justification or defense for engaging in the traffic without a license; he has his remedy by mandamus, and this remedy he must successfully pursue before he can legally begin selling.

Brook v. State, 65 Ga. 437; *Kadgihn v. Bloomington*, 58 Ill. 229; *Kansas v. Flanders*, 71 Mo. 281; *State v. Jamison*, 23 Mo. 330; *Zanone v. Mound City*, 103 Ill. 552; *Black, Intoxicating Liquors*, § 119.

The use of the word "may" did not vest a discretion in the county court that could not be controlled by mandamus.

McLeod v. Scott, 21 Or. 94, 26 Pac. 1061, 29 Pac. 1; *Potter v. Homer*, 59 Mich. 8, 26 N. W. 208.

The only power vested in the council was to inquire whether the applicant for the liquor license had complied with the requisites of the law, and whether the protest against him was sufficient in law to overcome the effect of his application.

Amperse v. Kalamazoo, 59 Mich. 78, 26 N. W. 222, 409; *State ex rel. Adamson v. Lafayette County Court*, 41 Mo. 221; *Ex parte Candee*, 48 Ala. 386; *Prospect Brewing Co.'s Petition*, 127 Pa. 523, 17 Atl. 1090; 11 Am. & Eng. Enc. Law, p. 662; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

If a license has been refused to a properly qualified person without any reason whatever, or without any reason which is valid and sufficient in law, but in the arbitrary or capricious exercise of the power vested in the licensing authorities, then redress may be had by the process of mandamus.

Black, Intoxicating Liquors, § 172; *Re Sparrow* (Pa.) 20 Atl. 692; *McQuillin*, Mun. Ord. § 193; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Deehan v. Johnson*, 141 Mass. 23, 6 N. E. 240; *State v. Mahner*, 43 La. Ann. 496, 9 So. 480; *McDonoughville v. James Band*, No. 14,958 (La.) Feb. 1st, 1904.

Monroe, J., delivered the opinion of the court:

The respondent has appealed from a judgment making peremptory a writ of mandamus commanding it to grant to the relator the right to open and carry on a barroom. Whether the judgment appealed from is correct or incorrect depends upon the interpretation which shall be placed upon certain provisions of state and municipal law, there being no dispute as to the facts.

The present charter of the city of New Orleans (Act Gen. Assem. No. 45, p. 53, of 1896), § 14, confers on the council the power, *inter alia*, to adopt and enforce such ordinances as may be necessary and proper "(1) to preserve the peace and good order of the city." Section 15, amended and re-enacted by act No. 131, p. 228, of 1902: "(10) To regulate the police of theaters, public halls, dance houses, concert saloons, taverns, hotels, houses of public entertainment, shops for retailing alcoholic liquors, houses of prostitution and assignation, and to close such houses from certain limits; and shall have power to exclude the same, and to close houses and places for the sale of intoxicating liquors when the public safety may require it, and to authorize the mayor and police to close such places; . . . (14) . . . to exercise general police power in the city of New Orleans." Section 21 of the act provides that "the council shall not grant any privilege for the opening of any barroom, saloon, concert saloon, or dance hall, except upon the consent of a majority of the bona fide householders or property holders within 300 feet, measured along the street fronts, of the proposed

location of such barroom, saloon, concert saloon, or dance hall, and that it shall revoke any privilege on the petition of a like number of such persons, any prior license or privilege to the contrary notwithstanding."

Acting under the authority thus conferred, the council adopted an ordinance (No. 12,636, C. S.) which reads:

"Be it ordained . . . that hereafter it shall not be lawful for anyone to set up or establish any barroom, saloon, concert saloon, dance hall, beer house, or place where liquors are sold at retail, by the glass, to be consumed then, without the permission of the council previously applied for in writing, which shall be accompanied by the written consent of a majority of the bona fide property holders, within 300 feet, measured along the street front, of the proposed location of such barroom, saloon, concert saloon, dance hall, beer house, or place where liquors are sold at retail, by the glass," etc. The ordinance further provides that the petition of the applicant for either of the privileges enumerated shall be accompanied by a certificate from the city engineer showing that it has been signed by the requisite number of property holders, that violation of the ordinance shall be punishable by fine or imprisonment, and that such privileges shall be revocable at the pleasure of the council.

The council also adopted an ordinance (No. 13,481, C. S.) which reads: "Be it ordained . . . that, from and after the promulgation of this ordinance, no application for a barroom privilege shall be considered by the council unless accompanied by the treasurer's receipt, showing that he deposited with said treasurer the amount of the license due for barroom business at the date of the application."

Apart from the provisions of the respondent's charter which have been quoted, there were embodied in the Revised Statutes, when and before that charter was adopted, certain provisions in regard to the sale of intoxicating liquors, some of which were amended and re-enacted by act No. 221, p. 451, of 1902, as follows:

"Section 1. Be it enacted that §§ 1211 and 2778 of the Revised Statutes of 1870 be amended and re-enacted so as to read: "That the police juries of the several parishes of the state, the municipal authorities of the several villages, towns, and cities, and the city council of the city of New Orleans, shall have the exclusive power to make such rules and regulations for the sale, or the prohibition of the sale, of intoxicating liquors, as they may deem advisable, and to grant, or withhold, licenses for drinking houses and shops within the limits of a city, parish, ward of a parish, town, or village,

as a majority of the legal voters of any city, parish, ward of a parish, town, or village may determine by ballot, and the said ballot shall be taken whenever deemed necessary by the police juries, of the several parishes, the municipal authorities of the several towns, and the city council of the city of New Orleans: Provided, said election shall not be held oftener than once a year, and, when so held, the effect of said election shall continue in force until another election in the parish, ward of a parish, city, town, or village, is held on the same question; and provided further, that whenever [at] an election held under this section, the majority of the votes cast in said ward, if only a ward election has been held, or a majority of the votes cast in the parish, if an election has been held for the whole parish, shall be against granting the licenses for the sale of intoxicating liquors, said vote or decision shall control the action of said ward, city, town, or village, within the limits of the said ward, or parish, as the case may be, as fully and completely as if said election had been held by authority of said city, town, or village.

"Sec. 2. That all laws in conflict with this act be, and the same are, hereby repealed."

By another provision of the Revised Statutes (§ 1212), the state relinquishes the right to grant licenses in any town, city, or parish where they are not granted by the local authorities. Beyond this the general law (act No. 171, p. 387, of 1898) providing for the levying and collection of licenses applies, in terms, to barrooms, and requires that licenses shall be paid therefor as for any other business.

In his petition to the court, the relator alleges that, notwithstanding his compliance with the law, and notwithstanding the fact that its duty in the premises is purely ministerial, the council of the city of New Orleans refuses to grant him permission to open and conduct a barroom, and he prays for a writ of mandamus. To this the respondent answers that it carefully considered the relator's application, and, "in view of the protest of a respectable minority of the property holders, and of the fact that a similar application had been recently denied, and the further fact that a sufficient number of barrooms already existed in said vicinity, and for other good and substantial reasons rejected the same." It denies that the relator can engage in the business of selling liquor at retail without its permission, and emphatically denies that the consent of a majority of the property holders living within 300 feet of the proposed barroom entitles him, of right, to such permission; and it avers that the granting or withholding of the same is a matter entirely

within its discretion, and with respect to which it cannot be controlled by mandamus. It also denies that the relator made the deposit with the treasurer as required by ordinance 13,481. Upon the trial it was admitted, or proved without attempt at contradiction, that the relator presented a petition to the city council for permission to open and conduct a barroom at the corner of North Rampart and Iberville streets; that the petition so presented was accompanied by the written consent of 22 out of a total of 39 persons holding property within 300 feet of the proposed location, as certified by the city engineer; that 10 such persons thereafter protested against the granting of the permission; that the application was unfavorably acted on by the council, but that such action was not based upon any objection to the character of the applicant; and that there are several barrooms already established within 300 feet of the proposed location. The defendant offered to show by what considerations different members of the council and protesting property holders were influenced in refusing and opposing the granting of the permission desired by the relator, but some of the evidence upon that subject, having been objected to as irrelevant was excluded.

The main facts relied on by the respondent having been disclosed, however, no action is here invoked with respect to the ruling thus made. Those facts are substantially as follows: The clubhouse of the Young Men's Gymnastic Club is within half a square of the site selected for the proposed barroom. The Eye, Ear, Nose, & Throat Hospital, a charitable institution, is diagonally opposite, on Rampart street. A number of gentlemen holding property on Rampart street have organized themselves into a commission for the purpose of improving the condition of the street, concerning which respondent's counsel says in his brief: "Rampart street, from the second block down to Esplanade avenue, is essentially a residence street, and, . . . whilst there are barrooms in the first block, and some scattering ones below, the buildings are occupied in a majority of instances as residences, and there is a constantly increasing tendency in that direction. Another barroom, on a block now free from saloons, would be likely to give a setback to the development of the avenue."

Per contra, it appears that relator proposes to establish his barroom at the northeast corner of Rampart and Iberville streets; that on Rampart street between Iberville and Canal—being that part to which respondent refers as the "first block," immediately south of and adjacent to said corner—there are already several barrooms, and that on Rampart street, to the north of the

square in which relator proposes to establish his barroom, for some 8 or 10 squares, to Esplanade avenue, there are quite a number of barrooms, grocery stores, stables, undertaker's shop, soda-water factory, etc. The Young Men's Gymnastic Club, whose clubhouse is on the same square with the proposed site, has a barroom for the use of its members. It does not appear that the respondent or the property holders have attempted to close any barroom now open on Rampart street, which street, it may be said, is 100 feet wide, or more; and the hospital, on the opposite side, diagonally, cannot be much, if any, farther from the barrooms already established than from the site selected by the relator.

The Constitution of this state contains these provisions pertinent to the matter at issue, to wit:

"Art. 2. No person shall be deprived of life, liberty, or property except by due process of law." "Art. 181. The regulation of the sale of alcoholic and spirituous liquors is declared a police regulation, and the general assembly may enact laws regulating their sale and use." Interpreting the word "liberty," as used in the connection in which it is found in article 2, the court of appeals of New York has well said: "Liberty, in its broad sense, as understood in this country, means the right not only of freedom from actual, servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 386, 52 Am. Rep. 34, 2 N. E. 29; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 476.

Our organic law therefore secures to every citizen the right to earn his livelihood in any lawful calling, unless he is deprived of that right by due process of law, and it recognizes the business of selling intoxicating liquors as a lawful calling by conferring upon the general assembly the right to regulate rather than to prohibit it; and conformably to the mandate thus conferred, the general assembly recognizes it as a lawful calling by including it among other callings, for the pursuit of which it authorizes the issuance of licenses, and by making no attempt to prohibit it, or to authorize its prohibition by any municipal corporation in the state. On the contrary, it has re-enacted, in part, since the adoption of the latest amendment to the charter of the city of New Orleans, a statute which, applying to the city in terms as specific as those of the charter provides that "the city council of the city of New Orleans shall have the ex-

clusive power to make such rules and regulations for the sale, or the prohibition of the sale, of intoxicating liquors as they may deem advisable, and to grant, or withhold, licenses from drinking houses and shops . . . as a majority of the legal voters may determine by ballot." Act No. 221, p. 451, of 1902, *supra*.

If we assume the different laws thus mentioned to be in all respects competent legislation, the question of prohibition *vel non* in New Orleans must be referred to the legal voters, to be decided by them at an election to be held for that purpose. In default of action by the legal voters prohibiting the liquor business, the question whether a particular individual shall engage in the business is to be decided by the city council in the event of, and after, favorable action by a majority of the persons holding property within 300 feet of the place where the business is to be conducted; unfavorable action by such property holders being conclusive. The power to regulate the business, if it be not prohibited by the voters, and to enforce the prohibition, if it be prohibited, is likewise vested in the council. The legal voters having taken no action, the selling of liquor in New Orleans is a legitimate business, recognized by the Constitution and authorized by law, in which some thousands of persons are engaged, but in which the right of the relator to engage is denied by the city council, notwithstanding that he has done all that the law requires in the matter, and that no objection to his character is suggested.

It is wholly immaterial, for the purposes of the question presented, that it has been held that the right to sell intoxicating liquors is not inherent in a citizen of a state or of the United States (*Orowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13), and equally immaterial that in another state it has been held that such right is derived from the common law (*Welsh v. State*, 126 Ind. 71, 9 L. R. A. 606, 25 N. E. 883), since in Louisiana it is a right conferred by the written law of the state, the enjoyment of which is subject to such conditions only as may be imposed or authorized by the general assembly in the legitimate exercise of the police power of the state.

The police power of the state can, however, be exercised only in the enactment and enforcement of laws, and the lawmaking power is restricted within the limitations imposed by the Constitution of the United States and its own Constitution, and those which are said to be inherent in American institutions, and, like other governmental authority, is to be used for the common welfare,—impartially and without arbitrary

or unjust discrimination to the prejudice of private rights and individual liberty. These propositions are interwoven among the principles upon which our system of government is founded, and are supported by the following among other authorities, to wit:

"It belongs to that department" [the legislative] says the Supreme Court of the United States in a leading case, "to exert what are known as the police powers of the state, and to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety. It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go." . . . The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

In *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721, the Supreme Court of the United States sustained a statute of Texas requiring a bond of \$5,000 to be given by all persons engaged in the business of selling intoxicating liquors by retail, and said: "This statute affects all persons in Texas engaged in the sale of liquors in exactly the same manner and degree. Whether considered as imposing restrictions upon the sale, in the exercise of the police power of the state, or as levying taxes upon occupations, under authority of the legislature in that behalf, petitioner was not arbitrarily deprived of his property nor denied of the equal protection of the laws."

In *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108, the supreme court of Illinois held that the police power does not justify a statute which makes it unlawful for barbers to do business on Sundays, without interfering with any other class of business, and, in so doing, said: "The fundamental principle upon which liberty is based . . . is equality under the law of the land." 47 L. R. A.

Assuming to be acting in the exercise of its police power, the council of New Orleans passed an ordinance prescribing the limits within which dairies might be conducted "by permission," and making it unlawful to keep more than two cows without such permission. This court held that the ordinance was illegal, because it did not affect all citizens engaged in the same business in the same way; because the discretion vested by the ordinance in the council was in no way regulated or controlled, and might be controlled by partisan considerations, race prejudice, or personal animosity, and exercised in the interest of a favored few. *State v. Mahner*, 43 La. Ann. 496, 9 So. 480. It has likewise been held that a market ordinance adopted in the exercise of the police power "must be impartial, making no discriminations and creating no monopolies (*State v. Sarradat*, 46 La. Ann. 700, 24 L. R. A. 584, 15 So. 87;)" that an ordinance prohibiting the stabling of more than two horses without permission of the council was unequal in its operation, repugnant to the 14th Amendment of the Constitution of the United States, and void (*State v. Kuntz*, 47 La. Ann. 106, 16 So. 651); that an ordinance, the effect of which was to permit four livery stables, already established, to be maintained in the business part of a town, whilst others were to be relegated to the suburbs, was neither "lawful," "fair," "general," "reasonable," "impartial," nor "consistent with public policy" (*Orowley v. West*, 52 La. Ann. 526, 47 L. R. A. 652, 78 Am. St. Rep. 355, 27 So. 53); that a similar ordinance concerning barrooms was void for similar reasons (*Mandeville v. Band*, 111 La. 806, 35 So. 915).

In *State v. Garibaldi*, 44 La. Ann. 809, 11 So. 36, it was held that an ordinance prohibiting the establishment of private markets without permission previously obtained on petition accompanied by the consent of a majority of the persons holding property within 600 feet of the site of any proposed market was void, in so far as it purported to delegate to private citizens the police power vested in the city council; and in *Noel v. People*, 187 Ill. 587, 52 L. R. A. 287, 79 Am. St. Rep. 238, 58 N. E. 616, it was held that a statute vesting in a board of pharmacy the right to determine who should and who should not sell the usual domestic and proprietary remedies, without in any way regulating the discretion vested in such board, was void.

It has also been held by the supreme court of Illinois that, "under a general ordinance of a city for licensing dramshops, the city authorities have no right to make an arbitrary discrimination in granting licenses. They cannot grant the same to a

avored few, and refuse it to another who has in all respects complied with the ordinance and laws of the state, and who is admitted to be in every respect a suitable person. The business of dealing in liquor is recognized by the Constitution as a legitimate business, and a license to keep a grocery or dramshop is placed in the same category with licenses to carry on any other lawful business, and it must be dealt with according to law, and special privileges are not to be granted to particular persons.

. . . Ordinances must be general in their character, and operate equally upon all persons within the municipality, of the same class, to whom they relate. They must not be in violation of any law, contrary to public policy, or unnecessarily oppressive, and must not unjustly and arbitrarily discriminate between citizens of the same class." *Zanone v. Mound City*, 103 Ill. 552.

The case at bar differs from some of those which have been cited, in that they concerned harmless callings, whilst that in which the relator proposes to engage is usually regarded as pernicious. That fact, no doubt, furnishes a sufficient reason for discriminating against the calling, but it affords no justification for discriminating between persons similarly situated who may be, or may desire to become, engaged in that calling. The relator occupies the same relation to any other barkeeper that the trade of the barber does to that of the baker, and the principle applied as between the two trades is equally applicable as between the two individuals engaged in the same business or trade. A statute of this state imposing conditions upon the business of selling intoxicating liquors, though such conditions be more onerous than those imposed upon another business, may be sustained because the business of selling intoxicating liquors more seriously affects the health, morals, and general welfare of the public than another business; but where, as in this case, the state legalizes the business of selling liquors, and an individual citizen is denied the right to engage in it in a place and under conditions where and under which others having no better qualifications than he are so engaged, the law, if any there be, authorizing such denial, has no just foundation in reason or in the police power of the state, for it deprives one citizen of the right to earn his livelihood by means of a lawful calling, whilst according that right to others similarly situated, and, in so doing, deprives him of the equal protection of the law, and of his liberty, without due process of law, and oversteps those restrictions upon legislation which are said to be inherent in the nature of American institutions.

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The answer concedes, and the fact is, that the relator's application was considered and acted on by the council, and the defense that he failed to comply with the requirements of ordinance No. 13,481 is not insisted on. Our conclusion, then, is that the reasons assigned by the respondent are insufficient to support its refusal to grant to the relator permission to engage in the business of keeping a barroom at the place mentioned in the petition, and that the writ of mandamus was properly issued. *The judgment appealed from is accordingly affirmed at the cost of the respondent.*

Provosty and Land, JJ., concur in the decree holding that, under the statute, the discretion as to the granting or withholding of a license is confided exclusively to the property holders.

Nicholls, J., dissents.

Petition for rehearing denied June 6, 1904.

Thomas CRICHTON *et al.*, *Appts.*,

v.

WEBB PRESS COMPANY, Limited.

(.....La.....)

- *1. Where the same five persons compose both the directorate and the body of the stockholders of a corporation, two of these persons cannot, by joining with a third, enter into contracts with the corporation, or fix their own salaries, or vote allowances to themselves, over the protest of their two other associates. It is not possible for a person to be on both sides of a contract, and equity will not permit the members of a corporation, whether as directors or as stockholders, to vote to themselves the money of the corporation over the protest of their associates.
2. Ordinarily there is no trust relation between the stockholder and the corporation, but the reason is that ordinarily the stockholder has no mandate to administer the affairs of the corporation; but, if stockholders undertake to discharge the functions of directors and conduct the affairs of the corporation, they become subject to the same trust relation which precludes directors from contracting with themselves to the detriment of the corporation.
3. Where the majority of the stockholders of a corporation, who were also the sole managers of its business, have

*Headnotes by PROVOSTY, J.

NOTE.—As to right of stockholders to vote salaries to themselves as officers, see also, in this series, *Eaton v. Robinson*, 29 L. R. A. 100, and *Miner v. Belle Isle Ice Co.* 17 L. R. A. 412.

As to right of stockholders who are also directors to vote in stockholders' meeting on question in which directors are personally interested, see *Hodge v. United States Steel Corp.* 60 L. R. A. 742.

gone on, over the protest of the minority, and dealt with themselves, and the court, on the complaint of the minority of the stockholders, cannot approve the basis upon which the business has been carried on, a situation is presented with which the court must deal as best it can under the circumstances, even though its intervention involves the proposition of reforming the contract between the corporation and the majority of stockholders, or revising the basis for the apportionment of the profits of the business.

4. On complaint of the minority stockholders, and on proper showing, the court will order the board of directors of a corporation to declare a dividend.

(June 6, 1904.)

APPEAL by plaintiffs from a judgment of the Judicial District Court for the Parish of Webster in favor of defendant in a suit to compel the declaration of a dividend by a corporation of which plaintiffs were stockholders. *Reversed.*

The facts are stated in the opinion.

Messrs. Alexander & Wilkinson, Stewart & Stewart, and Sutherland & Barret, for appellants:

No royalty should be paid the Webbs for the use of their patent on the 80-inch press. The 80-inch press patent is an infringement of the 90-inch press patent, and in a suit for royalties that defense could be and will be successfully urged. The 80-inch press is but another way of applying the same principle of the 90-inch press.

Galvin v. Grand Rapids, 53 C. C. A. 165, 115 Fed. 511.

By the express terms of the patent itself, S. J. Webb was only given the exclusive use of that patent for seventeen years from December 15, 1902. It did not relate back. Before the issuing of this patent, he had no right to demand or receive a royalty for its use.

Brown v. Duchesne, 19 How. 183, 15 L. ed. 595; *Marsh v. Nichols*, 15 Fed. 914; *Rein v. Clayton*, 3 L. R. A. 78, 37 Fed. 358.

The Webbs, as directors or as stockholders, have no right to fix the amount of royalty to be paid them as individuals.

Wardell v. Union P. R. Co. 103 U. S. 651, 26 L. ed. 509; *Curtin v. Salmon River Hydraulic Gold Min. & Ditch Co.* 130 Cal. 345, 80 Am. St. Rep. 132, 62 Pac. 552; *Twinkllick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 329; *Thompson v. Williams*, 76 Cal. 153, 9 Am. St. Rep. 187, 18 Pac. 153; *Thomas v. Brownville, Ft. K. & P. R. Co.* 109 U. S. 522, 27 L. ed. 1018, 3 Sup. Ct. Rep. 315; *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29; *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788; 3 *Thomp. Corp.* §§ 3929, 4042, 8478; *Cook, Corp.* § 649, p. 1263.

The agents of a corporation, and even a 67 L. R. A.

majority of the members, cannot arbitrarily withhold profits earned by the company, or apply them to any use which is not authorized by the company's charter.

Morawetz, Priv. Corp. § 447; *Fougeray v. Cord*, 50 N. J. Eq. 185, 24 Atl. 499; 2 *Cook, Corp.* p. 1010, note 3.

Until the patent is issued the inventor has no property interest in the invention, and no power over its use.

Gayler v. Wilder, 10 How. 477, 13 L. ed. 504; *Brown v. Duchesne*, 19 How. 183, 15 L. ed. 595; *Marsh v. Nichols*, 15 Fed. 914, Affirmed in 128 U. S. 605, 32 L. ed. 538, 9 Sup. Ct. Rep. 168; *Durham v. Seymour*, 161 U. S. 238, 40 L. ed. 684, 16 Sup. Ct. Rep. 452; *Kirk v. United States*, 163 U. S. 49, 41 L. ed. 66, 16 Sup. Ct. Rep. 911.

The patent law is designed to protect only original invention. The law requires more than a change of form, or juxtaposition of parts, or of the external arrangement of things, to give patentability.

Reckendorfer v. Faber, 92 U. S. 347, 23 L. ed. 719; *Galvin v. Grand Rapids*, 53 C. C. A. 165, 115 Fed. 511.

The stockholders had no right or power, under the charter, to take upon themselves the management of the corporate affairs.

7 *Am. & Eng. Enc. Law*, p. 701; *Beatty v. Marine Ins. Co.* 2 Johns. 109, 3 Am. Dec. 401; *Head v. Providence Ins. Co.* 2 Cranch, 160, 2 L. ed. 242; *Bank of United States v. Dandridge*, 12 Wheat. 64, 6 L. ed. 552; 1 *Cook, Corp.* § 11, p. 34; *Morawetz, Priv. Corp.* § 238; *Humphreys v. McKissock*, 140 U. S. 304, 35 L. ed. 473, 11 Sup. Ct. Rep. 779; *Smith v. Hurd*, 12 Met. 371, 46 Am. Dec. 690; *De La Vergne Refrigerating Mach. Co. v. German Sav. Inst.* 175 U. S. 53, 44 L. ed. 69, 20 Sup. Ct. Rep. 20; *Electrio R. Co. v. Jamaica & B. R. Co.* 61 Fed. 679; *Jones v. Williams*, 139 Mo. 1, 37 L. R. A. 702, 61 Am. St. Rep. 436, 39 S. W. 486, 40 S. W. 353; *Sellers v. Greer*, 172 Ill. 549, 40 L. R. A. 591, 50 N. E. 246.

If a majority of stockholders take control of a company's business and direct its policy, they thereby take upon themselves the correlative duty of diligence, good faith, and fair dealing to the other stockholders.

Mecker v. Winthrop Iron Co. 17 Fed. 48; *Thomp. Corp.* § 4461.

On petition for rehearing.

If the Webbs, before they applied for and obtained the patent on the 80-inch press, had sold such presses to others, then their vendees of such specific things could continue to use them or sell them to others, after the patents were applied for and obtained, without liability to the Webbs.

Andrews v. Hovey, 124 U. S. 694, 31 L. ed. 557, 8 Sup. Ct. Rep. 676; *Wade v. Metcalf*, 129 U. S. 202, 32 L. ed. 661, 9 Sup. Ct.

Rep. 271; *Dable Grain Shovel Co. v. Flint*, 137 U. S. 41, 34 L. ed. 618, 11 Sup. Ct. Rep. 8.

The patentee has no exclusive right of property in his invention except under and by virtue of the statutes securing it to him, and according to the regulations and restrictions of those statutes.

Gayler v. Wilder, 10 How. 477, 13 L. ed. 504; *Brown v. Duchesne*, 19 How. 183, 15 L. ed. 595; *Marsh v. Nichols, S. & Co.* 128 U. S. 605, 32 L. ed. 538, 9 Sup. Ct. Rep. 168.

Messrs. Wise, Randolph, & Rendall, with **Mr. Lynn Kyle Watkins**, for appellee.

Provosty, J., delivered the opinion of the court:

This suit is brought by two minority stockholders to compel the defendant corporation to declare a dividend. Incidentally, and in order to increase the dividend, the further relief is prayed that certain allowances of salary and certain contracts allowed and made by the majority to and with themselves be annulled. The individuals composing the majority are made parties defendant, together with the corporation itself. The history of the case is this:

In May, 1895, the two brothers, Samuel J. and Robert D. Webb, obtained a patent for a cotton compress of the invention of S. J. Webb. They valued it at \$50,000. Not having command of the capital or credit required to put the invention to an actual test by building one of the compresses and putting it in operation, they offered to sell a half interest in the patent to one of the plaintiffs and certain other parties. The latter preferred an arrangement by which they should go security for the Webbs for the building of the press, and in consideration thereof should have an option to buy within a limited time. This was done, and the press was built. It proved successful; but the option was permitted to run out without having been availed of,—why, is not explained. After the option had expired, the two Webbs sold to the two plaintiffs, Thomas and James Crichton, a 16-per-cent interest in the patent for \$8,000. The Webbs and the Crichtons then proceeded to exploit the patent by launching a business of compress building, under the firm name of S. J. Webb & Bro. The venture proved in a high degree successful. In the very first year, 1895, a net profit of \$16,942.26 was realized. It was then deemed advisable to organize a corporation to carry on the business, and this was accordingly done. The date of the incorporation was the 2d of January, 1896. The incorporators were the same parties who were owners of the patent, 67 L. R. A.

with the addition of J. Y. Webb, a nephew of S. J. and R. D. Webb, who took one share. The name of the corporation was S. J. Webb Company, Limited. Its capital stock was fixed at \$100,000, divided into shares of \$100. The entire stock was subscribed by the incorporators, owners of the patent, and in the same proportion in which they were owners, except, as already stated, that one share was taken by J. Y. Webb. It may be as well to mention here that the parties continued thereafter to hold the stock in the same proportion,—that is to say, as follows: Thomas Crichton, 10 shares; James E. Crichton, 6 shares; R. D. Webb, 20 shares; S. J. Webb, 63 shares; and J. Y. Webb, 1 share,—and that they so hold it up to the present time. It may also be mentioned here that shortly thereafter J. Y. Webb acquired an interest in the patent corresponding with his interest in the corporation; that is to say, a 1-per-cent interest.

While the immediate purpose of the organization was to exploit this patent, the scope of the corporation was not so limited, but was made more comprehensive; the language of the charter being as follows: "That the purpose and object of this corporation is to buy, sell, build, erect, operate, lease, or rent out compresses or compress machinery under such patent rights as this company may buy, lease, or acquire the agency of, or use and own in its own corporate right, and to procure, own, manufacture, or cause to be manufactured or be made such machinery as may be necessary or useful for carrying out the purposes stated, and to own such necessary warehouses, tools, equipments, lands and property, real and personal, for the furtherance of the business of the corporation."

The charter provided that the stockholders should meet at the office of the company on the first Monday of January of each year without special call; that postponed and called meetings of the stockholders could be held on due notice by the president, setting forth the object of the meeting. The charter also provided that a board of directors, to consist of five stockholders, three of whom should constitute a quorum, should be elected at the regular meeting on the first Monday of January of each year; the first board, however, to be composed of the five incorporators, *viz.*, S. J., R. D., and J. Y. Webb, and Thomas and James Crichton, who should hold office until their successors were elected and had qualified. The charter further provided that the board of directors should conduct the business and affairs of the company and elect the officers of the company, and fix their salaries, and should prescribe the powers and duties of the officers, with the condition, however, that their

said acts in respect to the powers and duties and salaries of the officers should be subject to ratification by the stockholders. The officers were to be a president, a vice president, a secretary, and a treasurer, and such other officers as the board of directors might deem necessary to conduct the business of the company.

On the day of the organization, January 2, 1896, the board of directors met and elected the following officers: S. J. Webb, President; Thomas Crichton, Vice President and Treasurer; R. D. Webb, Secretary,—and adopted resolutions to the following effect:

First. A resolution leasing the compress patent from the owners thereof. That is to say, the two Webbs, S. J. and R. D., and the two Crichtons, leased the patent to the corporation, whereof they themselves held the entire stock, except the one share held by J. Y. Webb. The rental was fixed at \$5,000 for each compress the company should sell or build, or cause to be sold or built, and \$1,000 for each "movement" the company should put, or cause to be put, into a Morse or any other compress; payment to be made upon erection of the machinery.

Second. A resolution authorizing the president and the secretary to make and sign all contracts for the company.

Third. A resolution accepting the proposition of S. J. Webb to work for the company during the year 1896 for \$150 a month, "reserving to himself the right to all new inventions or improvements of whatsoever nature he may make."

Fourth. A resolution to the effect that S. J. and R. D. Webb "should have all the profits on any press of their patent in Cleburne, Texas."

On the next day, a meeting of the stockholders was held, and all the proceedings of the meeting of the board of directors of the preceding day were approved and ratified. J. Y. Webb was not at that time a part owner of the patent, but, as already stated, he afterwards acquired an interest in it corresponding with his interest in the corporation; that is to say, a 1-per-cent interest. The necessity of such an interest being transferred to him in the patent arose from the fact that the agreement to pay \$5,000 per press to the owners of the patent was not intended by the parties to be carried out, but was a mere convenient arrangement for transferring the net profits of the company, which would approximately be of that amount per press, from the company to the owners of the patent; in other words, from the stockholders as stockholders to themselves as individuals. As shall be seen presently, the profits of the company on the 90-inch press soon fell below \$5,000 per press, so that, if that contract had been genuine, 67 L. R. A.

the company would soon have had to retire from it, which it had the right to do at any time under the terms of the contract, unless it chose to run with the certainty of a loss.

No other meeting, either of stockholders or of directors, seems to have taken place until the 30th of November of the same year, 1896, when there was a meeting of stockholders. S. J. and R. D. Webb had in the meantime attended to the business of the company and with brilliant success. At that meeting resolutions were adopted to the following effect:

First. A resolution changing the name of the corporation to that of Webb Press Company, Limited; the charter and business of the company to remain unchanged and unaffected.

Second. A resolution transferring to the corporation the assets of the partnership of S. J. Webb & Bro., by which the business had been conducted previous to the organization of the corporation.

Third. A resolution levying an assessment upon the stockholders in proportion to their holding, so as to produce a sum of \$5,000; each stockholder to furnish for his share of the assessment his note falling due March 1, 1897.

The stockholders did not meet again until the 29th of January, 1901, which meeting was very important, and will be duly noticed. The only meetings of the board of directors were in February, March, and December, 1898. At these meetings, the following resolutions were adopted:

First. A resolution ratifying certain contracts entered into by the president and the secretary of the company.

Second. A resolution fixing at \$3,700 and \$3,000, respectively, the salaries of S. J. and R. D. Webb, "reserving all inventions or discoveries to themselves, same as if not employed by the company."

Third. A resolution authorizing S. J. Webb "to place new presses as he thought best."

The regular stockholders' meetings of January, 1897, 1898, 1899, 1900, and 1901, were not held, owing to the absence of a majority of the stock; i. e., of S. J. Webb, or of the stock held by him. During all this time the affairs of the company under the management of S. J. and R. D. Webb continued highly prosperous.

During this same time S. J. Webb had made numerous improvements to the compress, and had utilized them in the business of the company; and finally he had invented what he considered to be a new compress, known in this case as the "80-inch press," to distinguish it from the patented press known as the "90-inch press." Out of these inventions, or as a result of them, have

grown, in the main, the differences between the parties, who have been unable to agree what amount, if any, the Webbs should charge the corporation for the use of their inventions.

Some of the improvements were put on in the very first year of the company's business; that is to say, in 1896. Others were added as made. The Crichtons would not admit that the use of these improvements was beneficial to the company, nor that the charges made for them by the Webbs were reasonable; but the Webbs had the business of the company in hand, and went on using the improvements, and the questions of the right to use them and of the proper amount to charge for their use remained open.

In 1899 the Webbs solicited and obtained the consent of the Crichtons that the company should build one of the 80-inch presses, as an experiment; the Webbs agreeing to hold the company harmless against any loss. The result proved highly satisfactory, and demonstrated the superiority of the 80-inch press over the 90-inch.

The record does not show at what time of the year 1899 the first 80-inch press was built, but by the 1st of January, 1900, the time for the regular meeting of the stockholders, three 80-inch presses had been built; and it had become evident to the Webbs, who had entire and exclusive charge of the company's business, that the 80-inch press would have to supersede the 90-inch entirely. In fact, after the trial and demonstrated success of the 80-inch press, the company built only one 90-inch press, and the record does not show whether the contract for it had not been entered into previously.

The invention of this new press brought an unforeseen complication in the business of the company. The Crichtons were part owners of the 90-inch patent, for the lease of which the company was under contract to pay \$5,000 per press, and they owned no interest in the new invention; and naturally the Webbs, owners of the new invention, wanted to be paid for the use of it. They had not yet obtained a patent, and did not obtain one until December 16, 1902, seven months after the institution of this suit, which was filed May 3, 1902; but, all the same, the thing was theirs, and they were not disposed to let the company have the use of it without payment. They demanded the same rental which the company was under contract to pay for the use of the 90-inch patent. The Crichtons insisted that the 90-inch patent was a good press, which had practically driven all competitors from the field, and that the company should go on using it. They objected to the use of the 80-inch invention, and especially objected to paying so large a rental. The 67 L. R. A.

Webbs, on their side, insisted that the 80-inch press was a better press in every way, stronger, safer, and cheaper, and that if it was not adopted by the company they would have to dispose of it to others, and that it would easily drive the 90-inch press out of the market; and we may mention here that the testimony leaves no doubt that such was the fact. Also, we may say here, as well as later, that their right to exact payment for the use of their invention cannot be doubted. It was theirs, and, of course, they could exact payment for the use of it. Not only there is nothing in the patent law that could prevent their doing so, but § 4899, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 3387, impliedly recognizes a right of ownership in an unpatented invention.

The net profits on the three 80-inch presses erected in 1899, after deduction of the \$15,000 rental to the Webbs and the proportionate share of these three presses in the general expenses of the company, such as salaries, etc., was \$3,380.63. The net profit on the six 90-inch presses erected in the same year, after deduction of \$6,000 for royalties on improvements, and the proportionate share of these six presses in the general expenses of the company, such as salaries, etc., was \$21,381.23.

It is thus seen that the profits from the 80-inch press were very much larger; that the 80-inch press yielded a profit of \$1,126.88 per press, after deduction of \$5,000 per press by way of royalty, whereas the 90-inch press yielded a profit of only \$3,563.54 per press after a deduction of only \$1,000 per press by way of royalty. So that, if the owners of the 90-inch patent had held the company to the payment of the \$5,000 agreed to be paid for the lease of the patent, the company, by building the 90-inch presses, would have been operating at a net loss of \$1,436.46 for every press it would have sold. The difference between the parties, then, could not be, and was not, in connection with the relative merits of the two presses, nor in regard to which press it was to the best interest of the company, as a company, to adopt and advocate, but it was simply and purely in view of the fact that the Crichtons were part owners of the 90-inch press and had no interest in the 80-inch invention, and that while the company, as a company, would lose \$1,436.46 per press by building the 90-inch presses, and, *per contra*, gain \$1,126.88 per press by building the 80-inch press, they (the Crichtons) would individually gain more if the company would adhere to the 90-inch pattern.

By the time the 1st of January, 1900, came around, when the regular annual meeting of the stockholders should take place, the question of using the 80-inch press

in the business of the company and what charge should be made for it had reached the acute stage. Unfortunately S. J. Webb, the main party in interest, was absent, and no final agreement could be arrived at in the matter. All that could be done was to adopt a *modus vivendi* until his return. He was to be back by March 1st; that is to say, in two months. It was agreed that the Crichtons should then be let out of the company, on a full and final settlement of the 90-inch press business, and that in the meantime the company should go on selling and advocating the sale of both presses, and the business of the two presses be kept separate on the books as far as possible, and the Webbs take all the profits of the 80-inch press business.

But S. J. Webb did not return by the 1st of March, as expected, nor until the following January, being busy at the foundries seeing to the construction of presses and traveling over the country selling presses. During the year 1900, owing to sharp competition, the profits of the company on the 80-inch press business had fallen below \$5,000 per press, so that there could no longer be any question of paying to the Webbs that amount per press for the use of their invention, and the necessity of arriving at some definite and final agreement in the matter had become all the more imperative.

The regular meeting of the stockholders of January 1, 1901, failed for the same cause which had prevented the meeting of the previous January,—the absence of S. J. Webb. But a meeting was called for January 29, 1901, and the Crichtons were duly notified to attend. Knowing, however, what business it was proposed to bring up before the meeting, and also knowing that they would be outvoted by the Webbs, they stayed away. The meeting took place without them. Important matters were voted on, but not the question of superseding the 90-inch press by the 80-inch press in the business of the company. That question was left for a subsequent meeting, which was called for the 9th of February, and the Crichtons were again duly notified to attend. The meeting was duly held, and again the Crichtons kept away.

At the first of these meetings, that of January 29th, the following resolutions were adopted:

First. A resolution directing that the certificates of stock to which each stockholder was entitled be issued to him.

Second. A resolution approving and directing the secretary to pay an account of J. S. Webb for \$6,821.30, without stating what the account was for; also, an account of S. J. Webb & Bro. of \$520, for tools, tackle, etc., and \$7,000 "for profit made on the press sold in Cleburne, Texas."

Third. A resolution approving and directing the secretary to pay the account of S. J. Webb & Bro. of \$26,000 for royalties for use of improvements in twenty-three 90-inch presses.

Fourth. A resolution approving and directing the secretary to pay the account of S. J. Webb & Bro. of \$15,000 for royalties on three 80-inch presses erected in 1899.

At the meeting of February 9th the following resolutions were adopted:

First. A resolution reading as follows: "The question of the company selling, building, using, and making contracts for the 80-inch compresses and other inventions and improvements other than presses covered by U. S. patent 539,496, issued May 21, 1895 (the 90-inch press patent), was discussed. It was unanimously voted to continue this year, selling, building, using, and making contracts for the 80-inch press and other inventions and improvements, and pay to S. J. Webb & Bro. all the profits made from this part of the business of the company."

Second. A resolution reading as follows: "It was unanimously resolved to pay to S. J. Webb & Bro. all the profits of the business of the year 1900, last year, that accrued from selling, building, using, and making contracts for the 80-inch compress and other inventions and improvements, exclusive of presses covered by the U. S. patent 539,496 (90-inch press), issued May 21, 1895, to S. J. and R. D. Webb, and to pay to the owners of the latter patent all the profits that may accrue from selling, building, using, and making contracts for compresses under same."

Third. A resolution disposing of a few matters of business detail, as to which there was, and is now, no dispute.

By these resolutions the Webbs, holding a majority of the stock, decided in their own favor every issue between them and the Crichtons. Anticipating such a result, and foreseeing that there would no longer be any profits for them, the Crichtons had asked to be let out of the company upon a settlement which would leave out of computation the amounts claimed by the Webbs for royalties on their improvements and for the use of the 80-inch invention, which amounts the Webbs, as managers of the company, had caused to be charged up against the company on the books. The Webbs were willing to let the Crichtons retire from the company, but they insisted that the settlement should be made according to the books of the company; that is to say, including the disputed charges. They were willing, in addition, to allow the Crichtons \$1,200 for their interest in the discredited 90-inch patent. In the alternative, they were willing to sell to the Crichtons an interest in the 80-inch

invention corresponding with that which they held in the 90-inch patent. They fixed the price at the same figure of \$50,000 at which the 90-inch patent had been valued. This would have removed the bone of contention and ended all controversy. The Crichtons refused to buy such an interest, assigning as their reason that they would have no assurance that S. J. Webb would not produce some new invention to supplant the 80-inch press, which, in turn, they would have to buy, and so on *ad infinitum*.

Not succeeding in obtaining an amicable settlement, the two Crichtons brought a suit for the appointment of a receiver to manage the affairs of the company. That suit was filed on October 26, 1901. The petitioners alleged that the Webbs voted enormous and exorbitant salaries to each other, and voted and paid over to S. J. Webb and to Webb & Bro. large sums of money by way of royalties for the use of so-called improvements, which allowances were unauthorized and unjustifiable under the charter, but were grossly excessive; and that all this was done for the sole purpose of absorbing the revenues of the company and defrauding the petitioners.

They alleged, further, that the Webbs were holders of a majority of the stock of the company, and had the management of its affairs entirely in their own hands, as well as all the funds of the company, and were so conducting the business of the company as to divert to themselves all the profits of the company, which were large, and so as to defraud the petitioners of their rights, all of which amounted to gross mismanagement of the affairs of the company and made the appointment of a receiver necessary.

The Webbs denied these allegations, and averred that they had managed the affairs of the company well, and with the consent and approval of the plaintiffs, and in accordance with the charter, and finally averred as follows: "Your respondents aver that there is no necessity for a receiver to be appointed, and that the complainants have legal recourse in other ways, if legal means are necessary for settlement, which your respondents deny, and aver that, if a receiver is appointed, it will ruin the business of the company and prostrate the most flourishing compress corporation in the world, and destroy assets of great value to your respondents, without any benefit to the plaintiffs."

That suit resulted in a judgment in favor of defendants. The plaintiffs appealed to this court, but the appeal was dismissed for informalities. That was in February, 1902.

The present suit was filed May 3, 1902. As already stated, it is for a dividend, and 67 L. R. A.

incidentally for a settlement of the affairs of the corporation up to date, with a view of ascertaining what the amount of this dividend should be, and also for the annulment of certain contracts made by the majority with themselves, and also of certain allowances of expense accounts and salaries and royalties by the majority to themselves.

The allegations are virtually the same as in the suit for the appointment of the receiver. The nullity of the allowances is claimed on the ground that the majority could not vote to themselves the property of the company, or could not make contracts with themselves to the detriment of the company.

Exceptions were filed to the form of the proceeding, but they are not now insisted on; the defendants seeming to be willing that the court should, as far as possible, pass upon the merits of the controversy.

The Webbs, as a matter of course, deny that the allowances of salary are too large, or that the charges for royalties for use of the improvements and of the new 80-inch press invention are excessive; and they insist that the action of the stockholders at the meetings of January 20, and February 9, 1901, is conclusive, and that the Crichtons have neither in law nor in fact any ground of complaint. They contend that the Crichtons consented to the arrangement by which all the profits of the company arising from the exploitation of the 80-inch invention, or of the other inventions or improvements, should go to them (the Webbs), and they contend that up to the filing of the present suit the Crichtons had made no claim to participation in these profits.

At the request of the plaintiffs the court appointed experts to make a statement of the financial position of the company as appearing on the books. The report of these experts is in the record, and is conceded to be a correct statement from the books. The disputed items, having been charged upon the books, are included in the report, and affect its totals and balances, so that, if any of them are rejected, the figures will have to be recast. 14585

Under these facts and under the pleadings the questions arising are, first, as to whether the court should order a dividend; second, in case a dividend is ordered, what should be the amount thereof; third, as to the salaries of the Webbs for managing the affairs of the company; fourth, as to their expense accounts; fifth, as to what amount should be allowed them for royalties on the improvements to the 90-inch press; sixth, as to the resolution allowing S. J. and R. D. Webb \$5,000 per press on the three 80-inch presses erected in 1899; seventh and last, as to whether they should be allowed

to take the entire profits of the business of the 80-inch press, and, if not, then how much they should be allowed for the use of their invention.

Preliminary to taking up the discussion of these matters, it is necessary to dispose of the contention of defendant that all these points have already been finally decided by the corporate authorities.

That contention is evidently without force. Evidently a person cannot be judge in his own case, cannot be on both sides of a contract, cannot vote to himself the money of his associates in a corporation. Defendants admit that this is so in the case of a director, but contend that it is not so in the case of a stockholder, because the same trust relation which exists between a director and the corporation in which he is director, precluding him from acting for the corporation in any matter in which his interest is adverse to that of the company, does not exist between the stockholder and the company. Undoubtedly no trust relation ordinarily exists between the stockholder and the corporation; but the reason is that ordinarily the stockholder is a stranger to the management of the affairs of the corporation, which is the province of the directors. If, however, in any particular case the stockholders have authority to manage the affairs of the corporation,—in other words, to discharge the functions of directors, and undertake to do so,—they, for all the purposes of the affairs thus managed, become directors in fact, and occupy, for the purposes of such affairs, precisely the same relation of trust which directors ordinarily hold towards the corporation. This trust relation is not a matter of statutory law, or of technical law, but is simply the logical consequence of the impossibility of being judge in one's own case, or of being on both sides of a contract.

It is therefore a question of no importance whether the stockholders of this company had, or had not, authority under the charter to manage the affairs of the company. The stockholders and the directors were the same five persons, and it is a perfectly plain proposition that they could not assume, or devert themselves of, this trust relation towards the company as they might change their coats. As a matter of fact, however, the stockholders did not have authority to manage the affairs of the company. It is a fundamental principle of the law of corporations that stockholders have no mandate to act for the corporation. 101 Cyc. Law & Proc. 700; Cook, Corp. 4th ed. p. 34. § 11. A corporation whose affairs could be managed indifferently by its stockholders or by its directors would be a non-descript and highly anomalous corporation. 67 L. R. A.

Of course, the charter might so provide; but no charter would be so interpreted unless a construction more in consonance with what ordinarily obtains were impossible. In the present case the charter does contain a clause which, taken literally, expresses that idea; but the context of that clause shows that its purpose was merely to regulate the proportion of vote that should be required at the meetings of stockholders to decide the different questions with which the stockholders might have to deal, and also, if taken literally, it would conflict with another clause by which it is provided that the affairs of the company are to be conducted by the directors. However, the question, we repeat, is of no importance since the Webbs, no more as stockholders than as directors, could be final judges in their own case, and vote to themselves the money of the corporation, over the objection and protest of their associates in the corporation.

In justice to the Messrs. Webb, we hasten to add that the implication of moral wrong attaching to the act of voting on a matter in which one has a personal interest does not arise in this case, inasmuch as they constituted a majority both of the stockholders and the directors, and were sole managers of the affairs of the company, and therefore had to pass upon all questions pertaining to the business of the company, including those in which they had a personal interest. Necessarily, however, their decision, on all questions where their personal interest came in conflict with that of the corporation, was made subject to review by a court of equity at the suit of their complaining associates, as in the present case.

Proceeding to adjudicate upon the disputed points, the court finds that a dividend should have been declared, and should now be ordered. The company began business with a capital of \$26,000, to which was added the notes of the stockholders to the amount of \$5,000. Its profits, according to the report of the experts, amounted in November, 1902, to \$294,683.55. While the business of the company has increased very largely, and the actual cash in bank is very low, yet the court thinks a dividend of \$50,000 could be safely declared, and the court will so order.

The court finds that the general expenses, amounting to \$38,864.55, are charged in lump sums without detail of items. The court is morally convinced that the charges are legitimate; but there is no evidence of the fact beyond the charge itself. On this point the case will have to be remanded, with instructions to the lower court to require detailed accounts to be furnished, and with further instructions that unless, upon inspection, these accounts are found to be

grossly exaggerated, there will be no ground for interference by the court.

The royalties for the use of the improvements to the 90-inch press are overwhelmingly shown to be just and fair, and are approved, and the \$5,000 per press allowed on the three 80-inch presses erected in 1899 is not so far out of the way as to justify the court in interfering with the action of the stockholders. There was still left to the company a fair margin of profit.

The salaries as fixed are not too large, but the resolutions fixing them can, as a matter of course, have operation only for the future. There cannot be any retroactive increase of salary, or voting of back pay.

We do not think the Webbs have established their claim to take the entire profits of the 80-inch press business. This would mean the entire profits of the company from and after the demonstrated success of this 80-inch invention in 1899; for, thereafter, as we have stated, the company built only one 90-inch press, and the building of presses was the company's only source of profit. R. D. Webb testifies, and counsel for defendant says, that there were other profits; but what was, or could have been, their source we are not told. Counsel refers to certain exhibits in the record as showing \$14,000 of other profits; but, so far as we can see, these exhibits show only what collections the company has made on notes given for presses sold in previous years and what property it has on hand. If profits appear on these exhibits, we are not sufficiently skilled in bookkeeping to be able to distinguish them from among the other items. If the Webbs were permitted to take all the profits of the 80-inch press business, the situation would be that the company had been operating solely for their interest from and after the beginning of 1900, barring what interest the Crichtons might have had in the liquidation of the 90-inch press business. Of course, the Crichtons might have made an agreement to that effect; but we do not find that they did.

The only agreement which we find they made was the one entered into at the meeting of January, 1900, to the effect that they should be settled with on the return of S. J. Webb in the following March, and be let out of the company, and that in the meantime the company should exploit both presses, and all the profits of the business of the 80-inch press go to the Webbs. True, this agreement seems to have been permitted to stand until the return of S. J. Webb in the following January; and just before the meeting of January 29, 1901, the Crichtons were still willing to retire from the company on a fair settlement, and take no share in the profits of the 80-inch press business; but

the agreement was not in itself a settlement, or even a definitive or unconditional agreement or contract, but merely a tentative measure towards the settlement, a plan of settlement, and it was never carried out. Taking out of this agreement, as the present contention of the Webbs would do, the provision for a settlement and a letting out of the company, and it reduces itself to the proposition that the Crichtons consented that the company should be operated for the sole and exclusive benefit of the Webbs, and they to get absolutely nothing in return.

We do not find that the Crichtons ever intended anything of that kind. Their idea was to be settled with and let out of the company. As we read their conduct, it was that of intelligent business men, recognizing the logic of the situation, and indisposed to make unnecessary trouble, but at the same time insisting upon the full measure of their substantial rights, and not relinquishing or waiving one iota thereof.

The situation was that this invention belonged exclusively to the Webbs, and the Webbs had adopted it into the business of the company, and were fully resolved to continue with it, and they had the power to do so, and for the use of it were demanding \$5,000 per press, and not a cent less; that is to say, something more than the total profits of the company per press. So that it would be a mere question of keeping up that state of things long enough for all the accumulated profits of the company, as well as all its original capital stock, and all else it might possess, to pass to, and become the exclusive property of, the Webbs. Under this condition of affairs, the Crichtons had not much choice. It was either to be let out of the company on a fair settlement of the 90-inch press business, or a lawsuit. As sensible men they chose the former, and they hoped for it until the meeting of February, 1901, the majority by formal resolution committed the company to doing business for the exclusive benefit of the Webbs; and then they had recourse to the other alternative, and instituted the receivership suit.

If the Crichtons were consenting unconditionally and unqualifiedly, as contended, to these profits going to the Webbs, it is not apparent why they kept away from the meeting of February 9, 1901, where the resolution voting these profits to the Webbs was to be passed, and was actually passed. All the other disputed points had been settled at the meeting of January 29th, and this meeting of February 9th was for the purpose of settling this 80-inch press business, and of disposing of some matters as to which there was no dispute. The very fact that the Webbs thought it necessary to pass this formal resolution, notwithstanding the ab-

sence of the Crichtons, shows that they did not consider that the matter had been finally settled by any definitive agreement. The adoption of that resolution in the absence of the Crichtons means that the Webbs intended that the matter should be settled and put at rest by force of a vote of the stockholders. So true is this that we find their counsel contending before this court that the resolution did have that effect; that, there being no trust relation between the stockholders and the corporation, the Webbs could thus vote to themselves all the profits of this 80-inch press business; and that their act in doing so was final and binding on the Crichtons.

As proof of the agreement of the Crichtons to relinquish their right to participate in the profits of this 80-inch press business, counsel for defendant points with great confidence to the attitude of the Crichtons in the receivership suit. Now, if the renunciation of the Crichtons to such participation was not more unequivocal previous to that suit than it was in or by that suit, the Webbs have little indeed to stand upon in their present contention. The allegations of that suit were that the Webbs were managing the affairs of the company in their own private interest, and that a receiver was necessary to manage the affairs of the company in the interest of all the stockholders; and the prayer was that a receiver be appointed to manage the affairs of the company for the benefit of all the stockholders. There was not one word of disclaimer of the right to participate in the profits of the 80-inch press business. The company had then been exploiting the 80-inch press exclusively for nearly two years. The answer to the suit was that the appointment of a receiver was unnecessary, because the "affairs of the company were being conducted for the benefit, advantage, and profit of the stockholders, without preference or favor to any one," and that the appointment of a receiver would "prostrate the most flourishing compress company in the world;" that is to say, that the company, as a company, was "the most flourishing compress company in the world," and was being administered for the benefit of all the stockholders without discrimination. Now, if the company, as a company, was taking no part of the profits of the business it was conducting, but the Webbs were taking them all, how could it, as a company, be "the most flourishing compress company in the world?" And if the Webbs were taking all the profits of this business, and the Crichtons none of it, how could it be said that the company was being administered "for the benefit of the stockholders, without preference or favor to any one of them."

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It was pending that suit that the resolution of January 17, 1902, was adopted, upon which, also, defendant's able counsel places much reliance. That resolution reads as follows: "Moved by Robert D. Webb, and seconded by J. E. Crichton, that the company proceed at once to collect by law, if necessary, the Bierce note for \$2,500, and interest thereon; it being fully understood and agreed that, as this note is a part of the assets of the company (made before the date of this note) in which all the stockholders are interested, and that Bierce threatens to claim damages to amount of \$10,000 under contract with him, and if he should sustain his claim *in toto* or in part the said damages and expenses of said suits be paid out of said assets in which all the stockholders are interested. The motion unanimously adopted."

In our opinion, however significant that resolution might be if standing alone, it proves nothing against the Crichtons, when read in the light of the surrounding circumstances. Pending this receivership suit, the business of the corporation had to go on, and there was but one basis on which it could proceed, and that was the basis which the majority of the stockholders had established. The Crichtons were not bound to sulk in their tents, and refuse to participate in the business of the company. The resolution might have been worded more guardedly, but we do not think that it must necessarily be construed into approval by the Crichtons of a situation against which they were judicially protesting. It recognizes the existence of a certain state of things, but does not necessarily agree to, or approve, or ratify, it.

On the question of what amount the company should be required to pay to the Webbs for the use of this 80-inch invention, the court has hesitated long, realizing that it is a delicate thing to dictate to the owners of this invention what they shall have to accept for the use which the company has been making of it. They were unwilling to accept from the company less than \$5,000 per press, and now the court is compelling them to accept less. But, under the circumstances, no other course is open; since the other alternative would be that the Webbs would be left to decide their own case, to vote to themselves the money of the corporation,—an alternative totally inadmissible.

In estimating this amount the court has not the benefit of such proof as was administered in connection with the value of the use of the improvements to the 90-inch press. There, under the evidence, the court had no hesitation; here, the court finds itself compelled to grope its way to an equitable decision.

The court would remand the case if it had reason to suppose that any good could be accomplished thereby. But the situation is not the same as in the matter of the improvements to the 90-inch press. There, after payment of the royalties demanded by the Webbs, a wide margin of profit was still left to the company. Here, if the royalty demanded were paid, there would be little, if any, profit left to the company. Possibly there would not be enough to pay the royalty. Under these circumstances, there is nothing for the court to do but to fix, as best it can, what proportion of the profits x should go to the owners of the invention and what proportion to the company for exploiting it.

The facts to be taken into consideration are, on one side, that the Webbs were under no obligation, legal or moral, to let the company have the benefit of this invention, but were at perfect liberty to dispose of it to others, or to organize another company to exploit it, or to retire from the management of the affairs of the company and exploit it themselves; and that any one of these courses, especially that of retiring from the management of the affairs of the company and exploiting the invention themselves, would have been fatal to the company, so that they were in a position to dictate terms to the company.

The facts on the other side are that it was of very great advantage to the Webbs to exploit this invention by and through the company, rather than to undertake to start a new business. The company had been carrying on a prosperous business, extending to every part of the cotton-growing region, and was widely and favorably known, and was operating with a large capital. Its reputation, business standing, credit, and good will was worth a great deal to the Webbs in undertaking to exploit this 80-inch invention. All the capital of the Webbs was invested in the company, and could not be available to them for a new business until after liquidation of the existing company and settlement with the Crichtons. They themselves were owners of 83 per cent of the company, and were very largely interested, therefore, in not breaking it up.

The question is, what amount the parties, respectively—the Webbs representing both their interest in the invention and their interest in the company, and the Crichtons representing their interest in the company—would likely have been willing to agree to, under the circumstances; or, rather, what amount it would have been equitable for them to agree to. The Webbs furnished the invention, and the company furnished all else, including the services of the Webbs themselves, who as the salaried employees
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of the company owed to it their time and their business capacity and energies.

Under all the circumstances, those mentioned here and all others weighing more or less in the case, the court has concluded that a division of the profits of the 80-inch press business on the basis of one third to the company and two thirds to S. J. and R. D. Webb would be fair and equitable. By "profits" is meant "net profits."

The court takes into consideration the fact that the stockholders of the company receive the additional benefit of a liquidation of the 90-inch press business through the instrumentality of the company and in due course of business, instead of by, a judicial, or other more or less expensive mode of, liquidation.

It goes without saying that the court cannot and does not make a contract for the parties, but only deals with the situation in so far as it is an accomplished fact, and that this apportionment of the profits is to operate only so long as the present situation shall continue; either the company or the Webbs being at liberty to put an end to it at anytime by ceasing to use the 80-inch invention in the company's business.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be set aside; that the case be remanded for further trial in accordance with the views hereinabove expressed on the question of the expense accounts of S. J. Webb and R. D. Webb, as managers of the affairs of the corporation; that the profits realized from the 80-inch press business, exclusive of the three 80-inch presses built in 1899, be divided between the company and S. J. and R. D. Webb in the proportion of one third to the former and two thirds to the latter; that the resolutions fixing the salaries of S. J. Webb and R. D. Webb be made to operate only from their respective dates; that the board of directors of the corporation are hereby ordered to declare at once and pay to the stockholders, in the proportion in which they are entitled to same, a dividend of \$50,000; that the report of the experts as found in the record be recast, so as to conform to the present opinion and judgment, and to such judgment as may hereafter be rendered upon the items of the expense accounts of S. J. Webb and R. D. Webb, and in all other respects it be approved; and that the defendant corporation pay the costs of this suit.

Breaux, Ch. J., concurs in the decree.

Petition for rehearing overruled June 29, 1904.

GEORGIA SUPREME COURT.

NASHVILLE, CHATTANOOGA, & ST.
LOUIS RAILWAY, *Plff. in Err.*,

v.

J. T. MILLER.

(.....Ga.....)

- *1. The fact that a person other than the wrongdoer, as a mere gratuity, pays to one injured as the result of his negligence a sum of money equal to the amount he would have earned had he been able to work during the period of disability, will not mitigate the damages due by the wrongdoer to the injured party for lost time.
- *2. The rule just stated is applicable, though the person making the payment is the employer of the injured party.

*Headnotes by COBB, J.

NOTE.—Mitigation of damages for personal injury by fact that injured person has received from some source other than the wrongdoer money because of the injury.

- I. In actions by injured person.
- Insurance money, 87.
 - Wages, 89.
 - Other gratuities, 90.
- II. In actions for wrongful death.
- Property received from deceased, 91.
 - Insurance money, 92.
 - Pensions and subscriptions, 94.
 - Remarriage, 95.
- III. Payments made at instance of wrongdoer, 95.

- I. In actions by injured person.
- Insurance money.

Perhaps the provision by the injured person himself against the consequences of an accident by contracting for insurance most fully tests the principles on which the wrongdoer might claim a mitigation of damages because of payments by a stranger of any of the conditions under which the claim might be made. The theory of the recovery is to compensate the injured person for the loss inflicted upon him by the injury. He has no right to make a profit out of his misfortune, and can only claim to be made whole. Therefore if, because of insurance money paid him under a contract which he himself made, he has suffered no pecuniary loss, a superficial consideration might lead to the conclusion that he could not require the wrongdoer to answer for a loss which he had in fact not suffered, and that the extent of the recovery would be compensation for the physical suffering and for the pecuniary loss, including premiums paid for the insurance, from which should be deducted the money paid on the policy. Further consideration will indicate, however, that the question involved is the duty of the wrongdoer to answer for the damage wrought by his wrongful act. That damage is represented by the whole loss so caused, and it is no concern of his how the loss shall be divided among persons who are strangers to him. The law entitles the one upon whom the injury is inflicted to maintain the action against him, and to recover for

3. *Quære*, whether the wrongdoer can plead the payment to diminish the amount of his liability, when, under the terms of the contract of employment, the injured party had a legal right to demand it.
4. When a petition in an action for personal injuries contains allegations which in a general way show that the plaintiff has lost time, and evidence which fixes the time lost and the value of such time with certainty is admitted without objection, a charge that plaintiff is entitled to recover for lost time such an amount as the evidence authorizes will not be held to be erroneous, though there is in the petition no distinct claim for damages on account of lost time.
5. None of the evidence objected to was inadmissible for any of the reasons assigned.
6. An allegation in a petition that the

all the loss inflicted, and the wrongdoer cannot investigate the contract or other relations existing between the injured person and third persons, or take advantage of the fact that, as between themselves, they have agreed to apportion the burden in such a way that the wrongdoer's payment will not reach to one on whom the loss will ultimately fall.

In *Regan v. New York & N. E. R. Co.* 60 Conn. 134; 25 Am. St. Rep. 306, 22 Atl. 503, which was an action to recover for the negligent destruction of property by fire set out by defendant, defendant claimed the right to have the damages reduced by the amount of insurance which had been received by the property owner. That class of cases is not within the scope of this annotation, but the remarks of the court are so pertinent that they throw sufficient light upon the subject under discussion to warrant reference to them. The court says: "If the defendant is entitled to have the insurance money deducted from the amount otherwise due, it must be because it owns or has some legal claim to the money. How happens it that the defendant is entitled to this money? Not because it ever paid the premium or any part of it, nor because the policy was intended for its benefit, nor upon its request, nor because there is any privity between it and the insurance company. . . . How, then, can the defendant claim, as it does, the exclusive benefit of the insurance? It came to the plaintiff from a collateral source wholly independent of the defendant, and which as to him was *res inter alios acta*. The defendant, in our judgment, has no more claim to the insurance money than it would have to money obtained upon a subscription paper which the friends of Regan (the property owner) may have procured to make good his loss."

So in *Harding v. Townshend*, 43 Vt. 536, 5 Am. Rep. 304, which was an action for an injury caused by a defect in a highway, defendant claimed to have the amount received by plaintiff on an accident insurance policy deducted from the recovery, but the court says: "There is no technical ground which necessarily leads to the conclusion that the money received by the plaintiff of the accident insurance company should operate as a defense, or inure to the benefit of the defendant. The insurer and the defendant are not joint tortfeasors or joint debt-

plaintiff "has suffered and will continue to suffer great pain" is sufficient to authorize the admission of evidence that mental pain has been suffered, and, when such evidence is admitted, there is no error in charging the jury that, in assessing the damages, they may take into consideration the mental pain suffered by the plaintiff.

7. The charge as a whole was free from error. The verdict was warranted by the evidence, and was not excessive. No sufficient reason has been shown for reversing the judgment.

(June 10, 1904.)

ERROR to the Superior Court for Dade County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to

ors, so as to make a payment or satisfaction by the former operate to the benefit of the latter. Nor is there any legal privity between the defendant and the insurer, so as to give the former a right to avail itself of a payment by the latter. The policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff and at his expense, and to the procurement of which the defendant was in no way contributory. It is in the nature of a wager between the plaintiff and a third person, the insurer, to which the defendant was in no measure privy, either by relation of the parties, or by contract, or otherwise. It cannot be said that the plaintiff took out the policy in the interest or behalf of the defendant; nor is there any legal principle which seems to require that it be ultimately appropriated to the defendant's use and benefit." And, in answer to the objection that plaintiff was not entitled to more than one recovery, the court said defendant was not in a position to raise that question, since it was primarily liable for the injury.

In *Bradburn v. Great Western R. Co.* L. R. 10 Exch. 1, 44 L. J. Exch. N. S. 9, 31 L. T. N. S. 464, 23 Week. Rep. 48, in which the claim was made that the amount received on an accident-insurance policy must be deducted from the recovery, *Bramwell, B.*, said, one is dismayed at this proposition. And it is further said that the plaintiff is entitled to retain the benefit for which he has paid, in addition to the damages which he recovers on account of defendant's negligence. And *Pigott, B.*, says he does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it.

In *Hicks v. Newport. A. & H. R. Co.* 4 Best & S. 403, note, there had been an intimation that, in actions by the personal representative, money received as accident insurance should be deducted. And the court in *Bradburn v. Great Western R. Co.* L. R. 10 Exch. 1, 44 L. J. Exch. N. S. 9, 31 L. T. N. S. 464, 23 Week. Rep. 48, distinguishes the *Hicks* Case on the ground that in that case the recovery was not by the injured person, but by his next of kin, and that in such case it was quite correct to deduct the insurance. It is further said, if the person claiming 67 L. R. A.

have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Payne & Tye, R. J. McCamy, and J. McCamy for plaintiff in error.

Messrs. Rosser & Brandon, for defendant in error:

The sums paid by the United States government to its injured employees incapacitated for work is in the nature of insurance. Such a sum received from the government would be immaterial in determining the amount that the plaintiff ought to recover from the railway company in this case.

Western & A. R. Co. v. Meigs, 74 Ga. 857; *Missouri P. R. Co. v. Jarrard*, 65 Tex. 560; *Ohio & M. R. Co. v. Dickerson*, 59 Ind. 317; *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3

damages was put by the death of his relative into possession of a large estate, there was no loss; he was a gainer by the event; and, similarly, whatever comes into possession of the family who have suffered by the death of their relative, by reason of his death, must be taken into account.

It is now well settled that money received on accident-insurance policies by injured persons does not diminish the amount of the recovery against the wrongdoer. *Missouri, K. & T. R. Co. v. Rains* (Tex. Civ. App.) 40 S. W. 635; *Missouri, K. & T. R. Co. v. Flood* (Tex. Civ. App.) 79 S. W. 1106; *Carroll v. Missouri P. R. Co.* 88 Mo. 239, 57 Am. Rep. 382; *Louisville & N. R. Co. v. Carothers*, 23 Ky. L. Rep. 1673, 65 S. W. 833, 66 S. W. 385.

So money received from an accident insurance policy for a personal injury is not *pro tanto* a discharge of the liability of the one responsible for the injury. *Pittsburg, C. & St. L. R. Co. v. Thompson*, 56 Ill. 138.

But in *Congdon v. Howe Scale Co.* 66 Vt. 255, 29 Atl. 253, evidence that plaintiff held accident-insurance policies was allowed to be brought out upon the cross-examination, where he took the stand for the purpose of proving the extent of his injuries. This, however, was not placed upon the ground that such fact might be considered in mitigation of damages; but it is said that it is not shown that the evidence was not admissible for some purpose.

Where the employee of one person is injured by the negligence of another for whom the employer is performing labor, and receives benefits under a policy obtained by his employer, which are expressly agreed to be without prejudice it is not an exercise of an option given by statute to pursue either the employer or the person causing the accident, but not both. *Oliver v. Nautilus Steam Shipping Co.* 72 L. J. K. B. N. S. 857 [1903] Weekly Notes, 132.

Of the same character as insurance money proper are the sick benefits and other aid received from benefit societies, fraternal societies, and other organizations of that class.

Therefore, sick benefits received by plaintiff from a source other than defendant are not to be considered in assessing the damages. *Baltimore City Pass. R. Co. v. Baer*, 90 Md. 97, 44 Atl. 992.

Whether or not the relief received from a department organized or maintained by the one responsible for the accident shall be deducted

N. E. 874; *Klein v. Thompson*, 19 Ohio St. 569; *The D. S. Gregory*, 2 Ben. 226, Fed. Cas. No. 4,100; *Cunningham v. Evansville & T. H. R. Co.* 102 Ind. 478, 52 Am. Rep. 683, 1 N. E. 800; *Alston v. Stewart*, 2 Monaghan (Pa.) 51; 2 Rorer, Railroads, p. 859, § 8; 1 Sutherland, Damages, 3d ed. p. 406, § 158.

Mr. Ben J. Conyers also for defendant in error.

Cobb, J., delivered the opinion of the court:

Miller was a railway mail clerk, and received injuries as the result of a collision between the train upon which he was working and another train. He brought his action for damages against the railway company, and

from the recovery depends upon the contract; and the cases will be found in subd. III. *infra*.

b. Wages.

The principles which have been applied to cases of insurance would seem to control the determination of the question whether or not the fact that the wages of the injured person have not in fact been stopped during his disability should be considered in mitigation of damages. The weight of authority is represented by NASHVILLE, CHATTANOOGA & ST. L. R. CO. v. MILLER in holding that it should not be. But the courts are not unanimous upon this question.

If plaintiff is not injured to such an extent that he is prevented from continuing his employment and earning his full salary, of course no allowance can be made for loss of time. *Louisville & N. R. Co. v. Carothers*, 23 Ky. L. Rep. 1673, 65 S. W. 833, 66 S. W. 385.

And in *Lee v. Western U. Tele. Co.* 51 Mo. App. 375, which was an action for damages for the erroneous transmission of a telegram, by reason of which plaintiff was compelled to perform a fruitless journey, the court held that he could not recover for lost time when his salary was paid by his employer during the whole time; but the evidence tended to show that the business was that of the employer, and that the right of action was in him, and not in the plaintiff.

However, the New York court of appeals has directly committed itself to the proposition that no allowance can be made for lost time if the wages were not stopped.

In *Drinkwater v. Dinsmore*, 80 N. Y. 390, 36 Am. Rep. 624, it was held that no recovery could be had for the loss of time if plaintiff had been paid his wages during the period of his disability. The court says plaintiff was entitled to recover only his pecuniary loss. Before the plaintiff can recover for the loss of wages he is bound to show that he lost the wages in consequence of the injuries, and how much they were. Defendant has a right to show that he was under contract with his employer, that his wages went on without service, or that his employer paid his wages from mere benevolence. In such case plaintiff cannot claim that defendant wrongfully caused him to lose his wages, and the loss of wages would form no part of his damages. So no recovery can be had for the expense of a 87 L. R. A.

at the trial it was conceded that he was entitled to recover; the sole issue in the case being as to the amount of damages which should be awarded him. The jury returned a verdict for \$4,000. The defendant made a motion for a new trial upon numerous grounds, and complains that the court erred in overruling the same.

1-3. Error is assigned upon the following charge: "It is immaterial whether the government paid the plaintiff anything or not. That would not affect the rights of the plaintiff in this case to recover against the railroad company." Error is further assigned upon the refusal of the judge to give in charge a written request which was as follows: "Plaintiff admits in his testimony that he received from the government his

nurse where such services were rendered gratuitously; so with the doctor's bill.

The court thereby reversed the decision of the lower court, 16 Hun, 250. There the court says: "The plaintiff is entitled as a part of his damages, to the value of the time he lost. Can this be reduced by showing that he received this amount from some other hand? We think not. The law imposed this part of the plaintiff's damages upon the defendant, as a consequence of the injury he caused him, and no mitigation of the amount can come to him from any mere voluntary payment of a portion by a third party not in the interest of the defendant. The plaintiff must recover his loss and the defendant must pay it. He can take no benefit from the gratuity of others. He has caused an injury and consequent loss, and he must pay, no matter how benevolent others have been."

In *Montgomery & E. R. Co. v. Mallette*, 92 Ala. 210, 9 So. 363, where it appeared that time had actually been lost because of the injury, but there was nothing to show that the wages of the injured person were not paid, or were diminished to any extent, during that period, the court held that no allowance for lost time could be made. The court says *non constat* but that during this period, and notwithstanding the disability, he received fully as much as he would have done had he not been disabled at all. Yet the trial court assumed that he was personally damaged by this loss of time, and authorized the jury to include in their verdict the time so lost. The court continues: "This part of the charge was manifestly bad;" and the only cure would have been in its withdrawal from the jury.

So the court of appeals of Missouri held that where mere compensation for loss caused by a personal injury is sought, no recovery can be had for loss of time if the wages of the injured person are paid during the time he is incapacitated from work. *Ephland v. Missouri P. R. Co.* 57 Mo. App. 147.

But that decision is overruled by a later one in the supreme court, which held that the fact that the salary of an injured person is continued by his employer during the time of his inability to perform services is no ground for diminution of the damages to be paid by the one who caused the injury. *Williams v. St. Louis & S. F. R. Co.* 123 Mo. 573, 27 S. W. 387.

The fact that the salary of the injured person went on during the time he was disabled without

regular salary during the time he did not work on account of his injury. This being so, I charge you that he cannot recover anything on this account for time lost, as claimed in his declaration." King, an assistant division railway mail superintendent, testified as follows: Plaintiff "returned to work about June 10, 1903,—about the time his year expired. If he had not gone back to work he would have been granted further time, but his pay would have stopped. The government pays them for one year when they are disabled from work. This is done on the physician's certificate for no period longer than sixty days consecutively, and not to exceed one year in total." The amount thus received by the plaintiff was \$1,400. While the statute or

regulation of the Postoffice Department under which this payment was made does not appear in the record, nor is it cited in the briefs of counsel, the payment was evidently made under the provisions of § 1424 of the postal laws and regulations, which reads as follows: "Whenever a railway postal clerk shall be disabled while in the actual discharge of his duties by a railroad or other accident beyond his power to control, he shall send to the division superintendent a certificate of his attending physician or surgeon sworn to before an officer authorized to administer oaths, who has an official seal, setting forth the nature, extent, and cause of his disability, and the probable duration of the same; and such further evidence as to the character

abatement is no ground for reduction of damages to be allowed against the recovery. *Ohio & M. R. Co. v. Dickerson*, 59 Ind. 317. The court says in such cases damages are assessed according to uniform principles, and are not to be affected by the mere accidental business relations of the person injured. The liberality of his employer offers no reason why he should not be compensated for the injury he has sustained.

In *Elmer v. Fessenden*, 154 Mass. 427, 28 N. E. 299, which was an action for slander, the court held that plaintiff was not prevented from recovering the value of time lost because of defendant's wrongful act because a stranger saw fit to pay him for the same time, either by way of gift, or upon consideration.

The fact that the wages of the injured person are continued, either because of his contract, or as a matter of grace, does not entitle the defendant to a mitigation of damages. *Missouri P. R. Co. v. Jarrard*, 65 Tex. 560; *International & G. N. R. Co. v. Haddox* (Tex. Civ. App.) 81 S. W. 1036.

It thus appears that the New York and Alabama courts are out of harmony with the trend of the decisions elsewhere.

c. Other gratuities.

The courts have experienced some difficulty in case of other gratuities besides the voluntary payment of wages, so that there is a conflict of opinion with reference to the allowance in this class of cases as well as in the other. It would seem that if, under the general rules of law, one who inflicts a personal injury upon another is bound to restore him as nearly as possible to his former condition, the liability would include nurses and doctor's bills; and that the wrongdoer could not take advantage of the fact that the injured person had been fortunate enough to have such services rendered gratuitously. The basis of recovery is fixed by general principles, and not by the accidental circumstances which may exist in a particular case. And so the majority of the courts have held that the fact that the injured person had not actually been compelled to pay for doctors' and nurses' services could not be considered in mitigation of damages.

In an action to recover damages for assault and battery it appeared that the township had gratuitously paid for the services rendered in the treatment of plaintiff's injuries, and it was
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contended that plaintiff could not, therefore, recover the amount from defendant; but the court said: "We do not think the payment by the trustees inured to the benefit of defendant, or can be held to diminish his liability. It was not intended as a satisfaction of any part of plaintiff's claim against him, and we think it ought not to be held to have that effect." It is true that there may be no legal duty resting upon plaintiff to return the money expended for his benefit; but the court continues: "We see no good reason why he ought not to be allowed to recover from the party whose wrong caused the loss, and thus be placed in possession of the means to enable him to return the money voluntarily if in conscience he should see proper to do so." *Klein v. Thompson*, 19 Ohio St. 569.

The fact that nursing and care were gratuitously bestowed upon the injured person does not prevent an allowance for their value as damages against the one causing the injury. *The D. S. Gregory*, 2 Ben. 226, Fed. Cas. No. 4,100; *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874; *Brosnan v. Sweetser*, 127 Ind. 1, 26 N. E. 555.

So the fact that services of a physician are rendered gratuitously to an injured person is no ground for withdrawing from consideration the value of such services as an element of damages to be awarded for the injury. *Indianapolis v. Gaston*, 58 Ind. 224; *Ohliger v. Toledo*, 20 Ohio C. C. 142.

So defendant cannot take advantage of the fact that plaintiff's doctor's bill and expenses were paid by a beneficial society. *Alston v. Stewart*, 2 Monaghan (Pa.) 51.

In *Varnham v. Council Bluffs*, 52 Iowa, 698, 3 N. W. 792, the court, in deciding that the value of nurses' services were not rendered non-recoverable by the fact that they were gratuitous, says it does not follow that plaintiff could not recover because the services were rendered gratuitously. The defendant ought not to benefit by the generosity of the daughter (who rendered the service), or on account of the relation between the plaintiff and her nurses.

And the principle of that case was followed in *Berlinger v. Dubuque Street R. Co.* 118 Iowa, 135, 91 N. W. 931; and *Yeager v. Spirit Lake*, 115 Iowa, 593, 88 N. W. 1095.

That the brothers of a person injured by the negligence of another pay her nurses and doctor's bills does not prevent her from receiving their value from the one responsible for the

of the disability as may be necessary shall be furnished. The division superintendent will forward the certificate, with his recommendation, to the general superintendent of the railway mail service, who will submit the matter to the Postmaster General, who may, in his judgment, the facts justifying such action, grant such disabled clerk leave of absence with pay for periods of not exceeding sixty days each, and not exceeding one year in all."

In considering whether the assignments of error under consideration are well taken, it is necessary to determine whether the payment referred to in the testimony was of such a character as to preclude the plaintiff from claiming compensation for lost time against the railway company. When one en-

gaged in any calling or avocation from which he derives a pecuniary benefit is compelled to give up for a time the performance of his duties, as the result of an injury inflicted upon him by a wrongdoer, he is entitled, as a general rule, to demand compensation for the time thus lost at the hands of the wrongdoer who inflicted the injury. The general rule is that, where a wrongdoer causes time to be lost, he will not be heard to say that the person injured has suffered no pecuniary loss, because he has received, as a direct result of being injured, contributions which in amount aggregate more than what would have been earned during the time; nor will his liability be diminished to the extent of contributions which were less than what would have been earned. If, from

injury. *Denver & R. G. R. Co. v. Lorentzen*, 24 C. C. A. 592, 49 U. S. App. 81, 79 Fed. 291. The court says the liability of the defendant for the expenses in question rested upon the ground that they were rendered necessary by its neglect of duty, and that this liability was not altered, no matter what arrangement plaintiff might have made for their payment.

Money raised by charitable subscription, and paid to the injured person, is not to be taken into consideration in assessing his damages. *Norristown v. Moyer*, 67 Pa. 356.

And in *McLaughlin v. Corry*, 77 Pa. 109, 18 Am. Rep. 432, it is assumed, for purposes of argument, that donations of friends and neighbors cannot be taken into consideration in assessing damages for negligent injuries.

But in *Goodhart v. Pennsylvania R. Co.* 177 Pa. 1, 55 Am. St. Rep. 705, 35 Atl. 191, it is held that no recovery can be had for nursing and attendance by the members of the household of the injured person, unless they are hired servants. The court says: "The care of his wife and minor children in ministering to his needs involves the performance of the ordinary offices of affection which is their duty; but it involves no legal liability on his part, and therefore affords no basis for a claim against a defendant for expenses incurred."

It would seem that in that case the court wholly missed the point of the controversy. It was the duty of the wrongdoer to provide the nurse, and the members of the household of the injured person owed it no duty in that regard. It could not require them to serve it gratuitously, and it had no concern with how the allowance which the law required it to make for such service should be distributed as between the injured person and those rendering the service.

In *Peppercorn v. Black River Falls*, 89 Wis. 38, 46 Am. St. Rep. 818, 61 N. W. 79, the court, without extending discussion, held that a minor child injured through defendant's negligence was not entitled to recover for moneys paid out or expenses incurred by her brother in her behalf for medical attendance and medicines in consequence of the injury. The court says that it may be that the physician so in attendance and the person so furnishing medicine might have recovered therefor as for necessities, but these things give her no right of action for moneys voluntarily paid and liabilities voluntarily incurred by her brother or her father.

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In that case, also, it would seem that the court relieved defendant of a burden which rightfully belonged to it merely because those interested in the welfare of the injured child had seen that it was supplied with needed attention.

II. In actions for wrongful death.

a. Property received from deceased.

Under the statutes which permit the widow and children, or next of kin, of a person killed by the negligence of another to maintain an action to recover the damages for the injury inflicted upon them by such death, the recovery is usually limited to the loss which they can show that they have sustained. Among the elements of loss which the jury are usually permitted to consider is the amount of future accumulation of which plaintiffs may be supposed to have been deprived by the premature death of their relative. Under these circumstances, it has been insisted on behalf of defendants in such actions that the property which is presently placed in possession of the plaintiffs because of the death should be considered in mitigation of damages. This contention has, however, not prevailed with the courts.

So it is held that the fact of inheritance of an estate from a deceased person is not to be considered in assessing the damages. *Stahler v. Philadelphia & R. R. Co.* 199 Pa. 386, 85 Am. St. Rep. 791, 49 Atl. 273.

In *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302, 34 Am. Rep. 1681, the court, in holding that the poverty of plaintiffs in an action for damages for negligently killing their intestate was not a proper matter for consideration, says if, immediately after this disaster, the plaintiffs had by inheritance from other sources become at once wealthy, it would not have abated one cent from the amount of their lawful demand in the case.

One negligently causing the death of another is not, in an action by the next of kin of deceased, entitled to have the damages reduced by the amount which plaintiff has received from the estate of deceased. *Terry v. Jewett*, 17 Hun. 305, Affirmed in 78 N. Y. 338.

In *Illinois C. R. Co. v. Barron*, 5 Wall. 90, 18 L. ed. 591, exception was taken to the refusal of the trial court to instruct the jury that, if they believed that the plaintiffs for whose benefit the action was brought had received, in consequence of decedent's death, and out of the

motives of affection, philanthropy, or as the result of a contract, the plaintiff has received from one other than his employer any sums, the reception of which are directly attributable to the fact that he has been injured, the person causing the injury will not be allowed to urge the payment of such sums in mitigation of the damages claimed against him. Thus, it has been held that the damages will not be reduced by any amount of insurance received in consequence of the wrongdoer's act. See *Western & A. R. Co. v. Meigs*, 74 Ga. 857 (5); *Cunningham v. Evansville & T. H. R. Co.* 102 Ind. 478, 52 Am. Rep. 683, 1 N. E. 800. Nor will the fact that medical attention and nursing have been rendered gratuitously preclude the injured party from recovering the value of

such services (*Brosnan v. Sweetser*, 127 Ind. 1, 26 N. E. 555; *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874; *Varnham v. Council Bluffs*, 52 Iowa, 698, 3 N. W. 792), though it has been held that no recovery can be had for the value of services of this character rendered by members of the family, unless an agreement to pay for them be shown (*Goodhart v. Pennsylvania R. Co.* 177 Pa. 1, 55 Am. St. Rep. 705, 35 Atl. 191). Ought the rule to be different where the employer, from motives of humanity, sympathy, business interest, and the like, pays to the injured employee, as a mere gratuity, for a given time, an amount which he would have been authorized to demand if he had performed the services of his employment, but which he had no right to demand unless

estate inherited by them from him, a pecuniary benefit greater than the maximum amount of damages which would have been allowed under the statute, then, as matter of law, they have received no pecuniary injury for which compensation can be recovered in the action. The Supreme Court of the United States affirmed the judgment without expressing opinion upon the refusal to give this instruction, thereby indicating that in its opinion it was without force.

Conversely, in an action under the civil damage act for making the plaintiff's intestate intoxicated, by reason of which he wandered into danger and was killed, the fact that deceased had accumulated property which went to plaintiffs upon his death is no ground for mitigation of damages. *Houston v. Gran*, 38 Neb. 687, 57 N. W. 408.

To illustrate the interpretations which have been placed upon the statutes, attention is called to *Blake v. Midland R. Co.* 18 Q. B. 95, which was an action by a widow of a merchant to recover for his death. The trial judge instructed the jury to take so much per annum as the wife might be supposed to enjoy of his fixed income from the benefits of his business and from his investments, consider this as an annuity, find its present worth, and deduct from it the gross amount which she would receive as her share in his estate, and award the balance as compensation under the statute. The decision in the case was reversed because it was not confined strictly to compensation, but permitted the recovery of a *solatium*, and nothing was said by the court in bank upon the phase of the case in which the receipts of the widow were deducted as shown above.

There is a qualification of the above rule in case the sole income of decedent was from an invested estate.

So it is held that, if the only aid plaintiffs have received from decedent has come from the income of the invested estate, the fact that the estate upon the death of the deceased devolved upon plaintiff may be considered in mitigation of damages. *San Antonio & A. P. R. Co. v. Long*, 87 Tex. 148, 24 L. R. A. 637, 47 Am. St. Rep. 87, 27 S. W. 113. There is language in that case which would lead to the conclusion that, in the opinion of the court, if the plaintiff has received a greater benefit by the death than he would have received from the continuation of the life, there can be no recovery. The court says: "It will not do to say, as some of 67 L. R. A.

the courts have said, that to permit a defendant in a case of this character to show that the plaintiff had received a pecuniary benefit resulting from the death of the deceased would enable a wrongdoer to protect himself against the consequences of his wrong. Except for willful misconduct or gross negligence, exemplary damages are not allowed by the statute. In other cases actual damages only are given, and the recovery is free from any element whatever of a penal nature. The argument is not a legitimate application of the principle that a wrongdoer cannot take advantage of his own wrong. Its main support rests upon a sentiment,—a consideration which should not be resorted to in order to change the provisions of the written law. The statute is intended, in case of mere ordinary negligence, to give compensation for a pecuniary loss; and the question is, What is the amount of this loss, if any?" Reversing (Tex. Civ. App.) 26 S. W. 114, which held that the acquisition of property by plaintiffs on account of the death of their mother cannot be shown in diminution of damages because the property would have ultimately vested in plaintiffs had the mother died a natural death. But the case was limited to its particular facts in *Gulf, C. & S. F. R. Co. v. Younger*, 90 Tex. 387, 38 S. W. 1121.

However, the next of kin, who, upon the death of their intestate, receive the property which he had accumulated, cannot increase their recovery from one who negligently caused his death by any sum which would represent accumulations which he might have made because of increase from such property. Having received the property, the responsibility as to accumulations must rest upon them. *Demarest v. Little*, 47 N. J. L. 28.

And in *Pym v. Great Northern R. Co.* 4 Best & S. 396, 32 L. J. Q. B. N. S. 377, it was held that, if the income of deceased was drawn wholly from an estate which upon his death descended to the plaintiffs, they are not deprived of their right of action if, because of the death, the income is distributed in a different manner than formerly so that some of the plaintiffs suffer from the loss of the ancestor.

b. Insurance money.

Some confusion was thrown into this branch of the subject by an early English case.

In *Hicks v. Newport, A. & H. R. Co.* 4 Best & S. 408, note, Lord Campbell, in charging the

the services were performed? In Texas it has been held that an amount paid by an employer, whether paid as the result of a direct undertaking or as a mere gratuity, cannot be pleaded in mitigation of damages. *Missouri P. R. Co. v. Jarrard*, 65 Tex. 560. In an Indiana case the same rule was laid down, though it does not appear distinctly whether the payment was made as the result of a contract or as a gratuity. *Ohio & M. R. Co. v. Dickerson*, 59 Ind. 317. It has been held by the courts of last resort of New York and Alabama, and by intermediate courts in Missouri, that where an employer pays to his employee, during the period of his disability, an amount which would be equal to his wages earned if he had been at work, the employee cannot seek

compensation for lost time against a wrongdoer who causes the time to be lost. See *Drinkwater v. Dinamore*, 80 N. Y. 390, 36 Am. Rep. 624; *Montgomery & E. R. Co. v. Mallette*, 92 Ala. 210, 9 So. 363 (6); *Lee v. Western U. Teleg. Co.* 51 Mo. App. 375 (6), 385; *Ephland v. Missouri P. R. Co.* 57 Mo. App. 147 (4), 160. A ruling to the same effect seems to have been made by Lore, Ch. J., on circuit in Delaware. *Ohlinsky v. Hoopes & T. Co.* 1 Marv. (Del.) 273, 40 Atl. 1127 (6). None of these cases seem to lay any stress upon the question as to whether the payment was a gratuity, or was required by the contract of employment. The cases referred to above are cited in the different text-books on Damages. These text writers do not agree as to what is the correct rule,

jury in a *nisi prius* case, told them to deduct from the damages allowed any sum received upon the policy insuring against the accident which caused the death; but that in case of general insurance the reduction would be only in respect to the premiums that would be paid by the family, or which would be paid by himself if this fatal accident had not happened.

The doctrine that any insurance money should be deducted has not been generally followed; but the courts have not been able to free themselves entirely of the idea that some attention should be given to it.

Thus, in *Grand Trunk R. Co. v. Jennings*, L. R. 13 App. Cas. 800, 37 Week. Rep. 403, the court, after stating that, if the income of the widow was from property which had been settled upon her by the deceased, and which she would have received in any event, she cannot be considered as injured so far as such income is concerned, and that money received from a policy on his life is different. The pecuniary benefit which accrued to her upon his death from such money consists in the accelerated receipt of a sum of money the consideration of which had already been paid by him out of his earnings. In such case the extent of the benefit may fairly be taken to be represented by the use or interest of the money during the period of accumulation. And this benefit might be compensated by comparing the probable earnings with the premiums which would have been paid for the maintenance of the policy.

In *Grand Trunk R. Co. v. Beckett*, 16 Can. S. C. 713, Appx., the court affirmed a judgment of a divided court (13 Ont. App. Rep. 174) holding that insurance upon the life of deceased should not be deducted from the damages awarded. In the lower court Chief Justice Hagarty argued, however, that the statute says that, if death is caused by wrongful act, the one responsible therefor must pay the widow and children the pecuniary injury sustained by them, and that, if the benefit exceeds the injury, there was nothing to recover. So that, if a large increase of fortune accrues to plaintiff as a result of the death, it must be taken into account in the estimate of the damages. But Burton, J., said that, if that view is correct, then the insurance has in fact been effected for the benefit of the one to whose negligence the death is attributable, and the family lose the payments and interest which have been expended to procure that result.

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In *Ladd v. Foster*, 31 Fed. 827, where the attempt was made to reduce the amount of recovery for the negligent killing of a person by the amount which the estate received for life insurance, it appeared that the recovery was one under a statute making the amount to be recovered a part of the estate, and that the estate would be increased by the amount paid by the insurance, so that it would in fact profit to that extent by the death. The court says that it understands that the claim of the set-off had been abandoned by counsel so that it was disallowed, but it discusses the question to some extent, showing that the English cases permitted the deduction, while the American courts have taken another view of the matter; and the court doubts whether the principle applicable in case of insurance paid to the injured person himself, and which it states the Supreme Court of the United States had refused to set off against his claim for damages for personal injuries, was applicable in case the recovery was sought by, and the set-off claimed against, the estate of the injured person.

But the American courts have uniformly held that insurance money should not be considered or deducted.

In *Sherlock v. Ailing*, 44 Ind. 184, which is among the earliest cases in which the question arose, the court said that the argument urged in support of allowing a deduction of insurance money from the amount to be awarded as damages is that the damages are recoverable for the death, and when that death brings money which might not otherwise come to the party, a pecuniary benefit to the extent of the amount received has accrued to the party from the death; that, if the wrongful act causing the death, has been the occasion of pecuniary benefit, the pecuniary damage cannot be ascertained without deducting from the whole damage the pecuniary benefit. If the argument is sound, it would apply to a case where the pecuniary benefit resulted by descent or devise. It proposes to use, as a defense to damages resulting from the wrongful act of the defendants, by way of set-off, recoupment, or in mitigation of such damages, pecuniary benefits received by the injured party, to which the defendants had not contributed, and not resulting from, or connected with, the act causing the death,—benefits which it is fair to presume would have been realized at a future day without the aid of their wrongful act. To allow such a defense would defeat actions under

but Mr. Watson distinctly takes the position that the sounder view is that which would preclude the wrongdoer from taking advantage of the employer's having, from reasons satisfactory to himself, paid to his injured employee an amount which would have been equal to his wages if he had performed the services for the period during which he was disabled. See Watson, *Damages for Personal Injuries*, § 479; 1 Sutherland, *Damages*, 3d ed. § 158; 2 Rorer, *Railroads*, p. 859; 1 Joyce, *Damages*, § 231; Voorheis, *Damages*, p. 61. See also the article written by Mr. Watson, the author of the work above cited, in 8 Am. & Eng. Enc. Law, 2d ed. p. 649. We think the view taken by Mr. Watson, and which seems also to be concurred in by Mr. Sutherland and Mr. Rorer, is sounder

than that which appears to be approved by the other text writers. The wrongdoer may show, in defense to a claim for lost time, that no time has been lost; and this, of course, is right and just, because, if no time has been lost, no compensation is due from anybody on account of lost time. But if time has been lost as the result of a tort, sound sense, common justice, and, it may be, public policy would demand that the tortfeasor be prohibited from making a defense founded upon the proposition that he has been guilty of a wrong,—it may be, a grievous and outrageous wrong,—but that some third person, not only not in sympathy with the wrongdoer, but despising him and his act, has, from some worthy motive, paid to the injured person an amount which, if it

the law, when the party killed had, by his prudence and foresight, made provision or left means for the support of his wife and children, and the wrongdoer would thus be enabled to protect himself against the consequences of his own wrongful act. No case has been found recognizing the doctrine claimed, and we are not willing to be the first to sanction it.

And the rule is that insurance money cannot be deducted. *Galveston, H. & S. A. R. Co. v. Cody*, 20 Tex. Civ. App. 520, 50 S. W. 135; *Houston & T. C. R. Co. v. Weaver* (Tex. Civ. App.) 41 S. W. 846; *Kellogg v. New York C. & H. R. R. Co.* 79 N. Y. 72; *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. 431, 26 Am. Rep. 384; *Coulter v. Pine Twp.* 164 Pa. 543, 30 Atl. 490; *North Pennsylvania R. Co. v. Kirk*, 90 Pa. 15; *Lipscomb v. Houston & T. C. R. Co.* 95 Tex. 5, 55 L. R. A. 869, 93 Am. St. Rep. 804, 64 S. W. 923; *Illinois C. R. Co. v. Prickett*, 210 Ill. 140, 71 N. E. 435, *Affirming* 109 Ill. App. 468, where the court says it is a novel proposition, unsupported by law or justice, that a widow's pecuniary loss on account of the death of her husband through the negligence of his employer is to be gauged by the amount of insurance which he had been considerate enough to provide.

And this is true of accident insurance as well as general life insurance. *Tyler S. E. R. Co. v. Rasberry*, 13 Tex. Civ. App. 185, 34 S. W. 794. The court says: "The deceased provided, in case of accidental death, for certain sums of money to be paid to his wife and mother, for the insurance of which he paid a sum equal to the risk. Ought these sums to be set off against the damage caused by the negligent act of the appellant? Suppose that, on account of the death of her husband, some relative bound for her support should provide for it by payment to her of a sum of money at once. Would it be contended that such sum should be set off against admitted damages? It is not believed that advantages incidental to the death ought to be set off against such damages as would naturally flow from the delinquent act causing the death; there are no equities in favor of the wrongdoer, and it cannot be regarded in any other light than a set-off."

The damages which a widow is entitled to recover for the negligent killing of her husband should not be reduced by an insurance on his life, received by her. *Western & A. R. Co. v. Meigs*, 74 Ga. 857. The court says, if her re- 67 L. R. A.

covery could be thus reduced, it might be insisted that, where the husband's life was insured for more than she was allowed to recover under the law as its actual cash value, the defendant could claim a balance against the family of the deceased on the idea that the killing of the husband and father was a positive pecuniary benefit to them.

A mother suing for damages for the negligent killing of her son is not bound to allow as a set-off money which she had received from an insurance company because of his death. *Clune v. Ristine*, 36 C. C. A. 450, 94 Fed. 745. The court says, when an action is brought against a wrongdoer he is not entitled to have the damages consequent upon the commission of his wrongful act reduced by proving that the plaintiff has received compensation for the loss from a collateral source wholly independent of himself.

In *Althorff v. Wolfe*, 22 N. Y. 355, where an action was brought against a property owner for throwing snow from the roof of his dwelling into the street in such a manner that it struck and killed plaintiffs intestate, the defendant requested an instruction that, if the jury should find for plaintiff, they should take into consideration the money received by plaintiff as insurance on the life of deceased, which was refused. The question of the correctness of this refusal is not discussed at length by the court, but it is covered by the general statement, "It is not contended that there are any other available exceptions in the case," after the court finished the discussion of the principal point involved as to the responsibility of the defendant for acts of his servant; *Affirming* 2 Hill. 344, where the court says: The widow was entitled to the whole amount of the policy of insurance. It was for her benefit alone; and it was secured for the payment of a premium to which defendant did not contribute. The benefits growing out of the right of action here sought to be enforced are not given to her by the statute, but are given to the widow and next of kin, and do not arise upon the common-law liability. They are therefore *res inter alios acta*.

c. Pensions and subscriptions.

In an action for the benefit of the widow and children of a man negligently killed, evidence is not admissible as to possible pensions which may be received because of services rendered by decedent to the Federal government. *St. Louis,*

had come from the wrongdoer, would have equaled the damages which would have been assessed against him. There is nothing in the record to show that the government, in its contract of employment with railway postal clerks, stipulates for the payment of salary during periods of disability; and, so far as the record discloses, when such an employee is disabled from work, he cannot, as a matter of right, demand anything from the government by way of compensation during the period of disability. There is nothing in the testimony of the witness King to indicate that payments are made in such cases otherwise than as a matter of grace. If we look at the postal law or regulation above quoted, it is perfectly clear that the payment is a mere gratuity on the part of

the government. We are therefore not confronted in the present case with the necessity for deciding the question as to what would be the rule in the event that the injured employee, under his contract of employment, had a right to demand of his employer the amount which he would have earned as wages during the period he was disabled. On this question we now make no authoritative ruling, but we do rule that where an employer pays to an injured employee, as a matter of grace, the amount which he would have earned as wages if he had not been disabled, a wrongdoer who brings about the disability has no concern with this transaction between the employer and the employee, and the amount so paid is not to be regarded as in any sense com-

I. M. & S. R. Co. v. Maddry, 57 Ark. 306, 21 S. W. 472. The court says that, if the right to the pensions affected the issues in the case, it should have been brought to the attention of the jury by instructions from the court, and not by the testimony of witnesses. But the court states that it is of opinion that there was no error in the statement by the trial court, in connection with the ruling on the evidence, that the jury would be instructed that, in considering the damages, they should not take into consideration any pensions which they might have received from the government in consequence of the loss of life of their intestate.

So the amount of a pension which the widow of a deceased fireman receives because of his death cannot be taken into consideration in mitigation of damages for negligently causing the death. *Geary v. Metropolitan Street R. Co.* 73 App. Div. 441, 77 N. Y. Supp. 54.

4 *Sutherland, Damages*, § 1265, cites *Grey-mouth-Point, E. R. & C. Co. v. McIvor*, 16 New Zealand, L. R. 258, as holding that neither the probability at the time of the death, that a fund would be raised by public subscription for the benefit of the family, nor the fact that since the death and before action brought a more or less definite trust of the fund has been created, under which plaintiffs will, in all probability, participate, can be considered in estimating damages to be allowed to the family of a deceased for his negligent killing.

d. Remarriage.

The loss which may result to one because of the deprivation of the services of his or her wife or husband as the case may be is regarded as a proper element of damage. And it has been argued that it was no longer available if the loss had been supplied by another person's voluntarily filling the place of the deceased person. But this contention has not prevailed.

In an action by an administrator for the benefit of the husband and children of a wife negligently killed, the damages cannot be mitigated by the fact that the husband had taken a new wife, who rendered the services in the family for the loss of which the action is being prosecuted. *Davis v. Guarnieri*, 45 Ohio St. 470, 4 Am. St. Rep. 548, 15 N. E. 350. The court says the only loss to be repaired is pecuniary loss, and the only theory of redress is that supplied by the statute, which does not seem to admit of any 67 L. R. A.

theory of set-off or compensation with which the wrongdoer is in no manner connected.

In case of the death of a wife the fact that another woman has taken her place in the home is not a ground for diminution of damages. *Gulf, C. & S. F. R. Co. v. Younger*, 90 Tex. 387, 38 S. W. 1121.

The facts that the widow has remarried, and that her second husband is alive, cannot be taken into consideration in mitigation of damages for the killing of the first one. *Philpott v. Pennsylvania R. Co.* 175 Pa. 570, 34 Atl. 856; *Georgia R. & Bkg. Co. v. Garr*, 57 Ga. 277, 24 Am. Rep. 492.

So it is not competent to show that plaintiff is engaged to be married again. *Dimmey v. Wheeling & E. G. R. Co.* 27 W. Va. 32, 55 Am. Rep. 292.

III. Payments made at instance of wrongdoer.

In some instances money has been paid to the injured person at the instance, or by procurement, of the wrongdoer, or from a source organized or maintained by him. In such cases the right to deduct the payments will depend principally upon the purpose of their payment or manner in which it was made. The further element of who is plaintiff in the action may have to be taken into consideration.

Thus, money paid for the care of the injured person during his life by the one causing the injury is not to be considered in assessing the damages to be paid the next of kin under the statute. *Murray v. Usher*, 46 Hun, 404, 11 N. Y. S. R. 789, Affirmed in 117 N. Y. 542, 23 N. E. 564.

So the facts that defendant paid the nurse's and doctor's bills and funeral expenses, and took a collection for the benefit of the injured person, cannot be considered in diminution of the damages to be paid to his widow. *Linden v. Anchor Min. Co.* 20 Utah, 134, 58 Pac. 355.

The defendant cannot relieve himself from statutory liability by continuing wages as a gratuity.

Thus, with respect to wages paid by the person himself whose negligence caused the injury, the court, in *Chandler v. Smith* (C. A.) 68 L. J. Q. B. N. S. 909 [1899] 2 Q. B. 506, said that the statute making the employer liable only in case injuries had been such as to cause at least two weeks loss of wages did not have reference to the wages which were continued out of feelings of generosity and compassion.

pensation for lost time. Hence there was no error in the charge complained of, nor in refusing the instruction requested.

4. Complaint is also made that the court's charge in reference to lost time was erroneous, for the reason that there was no allegation in the petition claiming compensation for lost time. The petition did not in terms ask damages for lost time. It did allege that the plaintiff "was confined to his bed for many weeks;" that he was "earning \$1,400 at the time of his injury;" that "his capacity to labor has been largely and permanently impaired." He claimed damages in the sum of \$500 for doctor's bills, medicine, and nurse hire; laying the aggregate damages which he claimed to have sustained in the sum of \$10,000. Under these general allegations the plaintiff offered evidence to show that he had lost time, and the evidence set forth with certainty the time lost, to wit, one year, less two days. In *Savannah, F. & W. R. Co. v. Holland*, 82 Ga. 258, 14 Am. St. Rep. 158 (4), 10 S. E. 200, it was held that it was not necessary that punitive damages should be claimed *eo nomine* in a petition; that it was enough if the facts alleged and the proof be such as to warrant the as-

essment. In the present case the general allegations of the petition were sufficient to show that time had been lost, and any defect in reference to specific details should have been taken advantage of by special demurrer. The evidence in reference to lost time having been admitted without objection, there was no error in the charge that plaintiff was entitled to recover for lost time if the evidence authorized it. In *Western & A. R. Co. v. Patillo*, 99 Ga. 97, 24 S. E. 958, there was neither allegation nor evidence in reference to lost time, and it was therefore manifest error to instruct the jury on the subject. In the present case there was ample evidence admitted without objection, and the allegations of the petition, though general, were sufficient to cover the subject in the absence of a special demurrer.

5. In four grounds of the motion for a new trial, complaint is made of rulings of the court on the admission of evidence. In two of them it is alleged that it was error to admit certain evidence in reference to the character of the injuries sustained by the plaintiff, on the ground that there was no allegation to authorize the admission of such evidence. In another ground the evi-

The facts that a municipal corporation had procured an accident insurance policy for one of its firemen, for which it had paid out of funds furnished by insurance companies as provided by statute, and that the amount of it was paid to his widow when he was killed through the negligence of the municipality, does not absolve it from liability for the injury caused to her by its negligence. *Kansas City v. McDonald*, 60 Kan. 481, 45 L. R. A. 429, 57 Pac. 123.

The bulk of the cases under this branch of the subject have arisen out of payments made by relief societies which were departments of, or connected in some way with, the corporation causing the injury. In such cases the contract under which the payment was made has usually fixed the question of the liability of the corporation.

A relief association which is an adjunct of a railway system may stipulate in its contracts that in case benefits are claimed from it the liability of the railway company for negligent injuries forming the basis of the claim shall be waived. *Owens v. Baltimore & O. R. Co.* 1 L. R. A. 75, 35 Fed. 715; *Pittsburgh, C. C. & St. L. R. Co. v. Hosea*, 152 Ind. 412, 58 N. E. 419.

And if, as a condition to receiving aid from a benefit department of the corporation which caused the injury, plaintiff signs a release of all liability for the injury, he cannot afterward maintain an action against the corporation for the injury. *Graft v. Baltimore & O. R. Co.* (Pa.) 6 Cent. Rep. 633, 8 Atl. 206.

But if the action for the negligent killing of a person is, under the statute, to be brought by his personal representative for the benefit of his next of kin, the defendant cannot claim a mitigation of damages because one of the beneficiaries has received a benefit from a relief department maintained by it, since the question of the right of the beneficiary to share in the recovery must be determined at the time the distribution is

made. *Boulden v. Pennsylvania R. Co.* 205 Pa. 264, 54 Atl. 906.

And where an injured employee received from a benefit society connected with the railroad company which caused his injury, but which was a distinct organization, a benefit during the time of his disability, it was held that the railroad company was not entitled to have the amount deducted from the damages in an action by the next of kin of the injured person, who died from his injuries, and held it responsible for the injury. *Farmer v. Grand Trunk R. Co.* 21 Ont. Rep. 299. The court in that case made a distinction between such benefit and accident insurance, holding that the latter should be deducted.

Where by the state laws the action for negligent killing is to be brought by the personal representative for the benefit of the widow, children, and next of kin, the signing of a release by the widow as beneficiary in a contract with a relief department of the corporation responsible for the accident, as required by the terms of the contract before a benefit will be paid under it, will not defeat the right to recover against the corporation for the tort in her capacity as administratrix for the benefit of the beneficiaries named in the statute. *Cowen v. Ray*, 47 C. C. A. 352, 108 Fed. 320; *Pittsburgh, C. C. & St. L. R. Co. v. Hosea*, 152 Ind. 412, 58 N. E. 419. In the latter case the ground for this ruling is expressly stated to be that the right of action of the injured person, and that created by the statute for the benefit of his family, are distinct. And the court says, it follows, therefore, that, whatever may be said with regard to the power of the intestate to contract away his right of action against the wrongdoer, he surely had no power to bargain away his family's right of action, given by statute against the one wrongfully causing the death.

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dence objected to was by a witness that the plaintiff complained of a great deal of pain, the objection being that it was hearsay; and, in still another ground, evidence of the plaintiff's wife was objected to, to the effect that the plaintiff returned home from his first trip after the injury, and immediately went to bed, and that she had to rub him quite often. The allegations of the petition were sufficiently broad to authorize the admission of the evidence first above referred to, and the other evidence was not inadmissible for any reason assigned in the motion for a new trial.

6. The judge charged the jury that, in determining the damages to be assessed, they could take into consideration the mental suffering that the plaintiff had undergone as a result of the injury. Objection is made to this charge on the ground that there were no allegations in the petition to authorize any charge on the subject of mental pain. The petition alleges that the plaintiff was confined to his bed for many months on account of the injury, and that "he has suffered and will continue to suffer great pain." This allegation in reference to pain was sufficiently broad to authorize the introduction of evidence in regard to mental pain, and, evidence to this effect having been introduced, there was no error in charging on the subject.

7. The motion for a new trial contains numerous exceptions to the charge, but, when the extracts excepted to are considered in the light of the entire charge, we do not think they were erroneous for any reason assigned, nor was any error committed which required the granting of a new trial. The charge, taken as a whole, seems to have fairly and fully submitted the issues to the jury. If the judge did not go into detail as fully as defendant's counsel desired, this should have been made the subject of special requests, or at least the attention of the judge should have been called thereto. We find no error of law which in our opinion would authorize a reversal of the judgment. The remaining question grows out of that ground of the motion which complains that the verdict is excessive. Under the view we have taken of the case, the evidence authorized a finding of \$1,400 for lost time. The evidence also authorized a finding for the physical suffering which the plaintiff underwent, and this would itself be sufficient to justify the remainder of the verdict, even if nothing was allowed for mental suffering, and the jury had determined the issue in reference to permanent disability in favor of the company.

Judgment affirmed.

All the Justices concur.

MISSOURI SUPREME COURT.

Edward GANNON *et al.*, *Respts.*,
v.

William ALBRIGHT, *Appt.*

(.....Mo.....)

1. The use of the word "heirs" in conveying an interest by will after the statute has made the use of such word unnecessary to convey a fee-simple estate does not cast a doubt upon the intention of the deviser to devise a fee simple.
2. The use of the word "bequeath" in making a devise of real estate does not indicate an intention to convey less than the fee-simple estate when used in connection with the word "devise."
3. Following a devise of real estate in terms broad enough to convey a fee simple with a provision that the land shall not be sold, "at least not before" the devisee becomes of age, gives a power of alienation, at least by implication, and renders a subsequent limitation over of the estate void.
4. A devise to certain persons named,

"and unto their heirs and assigns forever," is not cut down, either expressly or by implication, from a fee simple to a fee tail by a subsequent declaration that, if either should die without "issue," his share should go over to others.

5. A fee-simple estate devised to one with contingent limitation over in case he should die without issue becomes absolute and incontestable in his assignee upon his death leaving children surviving him.
6. If the devise of a fee tail is to be implied from the limitation over of the estate in the event that the devisee should "die without leaving any issue" the words must be taken as referring to an indefinite failure of issue, which will render the limitation over void for remoteness.
7. Under a statute providing that, in case of a limitation over in a devise upon the death of the first taker without issue, the word "issue" must be taken to mean issue living at the death of the person named; an estate tail by implication cannot be created by a limitation over after such failure of issue, but, in case the first taker has issue living at his death, his estate in fee is absolute.
8. Where, because of a statutory provision that a limitation over in a de-

NOTE.—For other cases in this series as to what is necessary to create an estate tail, see *Pennington v. Pennington*, 3 L. R. A. 816, and *Hertz v. Abraham*, 50 L. R. A. 361.
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vise in case of the death of the first taker without issue shall be referred to the time of the first taker's death, no estate tail can be implied from such a provision in the devise, the right of the first taker to the fee simple in case he dies leaving issue is not affected by further statutory provisions abolishing fee tails, and providing that, in cases where by the common law such estate would exist under the terms of the instrument, the first taker should have a life estate, and the next in succession a fee simple.

9. If a will making a limitation over after the death of the first taker without issue is susceptible of a construction that will make it apply to a definite failure of issue at the time of his death, such construction will be adopted in preference to one requiring an indefinite failure of issue.
10. The word "remainder" in a statute providing that, in case of the limitation of a remainder upon failure of issue, the word "issue" must be construed as issue living at the death of the life tenant, is broad enough to include an executory devise which is to take effect upon such failure of issue.

(Brace, Marshall, and Valliant, JJ., dissent.)

(June 7, 1904.)

APPEAL by defendant from a judgment of the Circuit Court for St. Louis County in favor of plaintiffs in an action brought to recover possession of certain real estate. *Reversed.*

The facts are stated in the opinions.

Mr. T. E. Skinker, for appellant:

The will conferred upon the two sons, Michael, Jr., and Joseph, a fee simple, coupled with an absolute power of alienation. For this reason the devise over is void.

4 Kent, Com. 10th ed. *270; 2 Washb. Real Prop. 6th ed. 667; Tiedeman, Real Prop. § 398; *Jackson ex dem. Brewster v. Bull*, 10 Johns. 19; *Jackson ex dem. Livingston v. Robins*, 15 Johns. 169, 16 Johns. 537; *Helmer v. Shoemaker*, 22 Wend. 137; *Van Horne v. Campbell*, 100 N. Y. 287, 53 Am. Rep. 168, 3 N. E. 316, 771; *Ide v. Ide*, 5 Mass. 500; *Melson v. Doe*, 4 Leigh, 408; *Riddick v. Cohoon*, 4 Rand. (Va.) 547; *Cook v. Walker*, 15 Ga. 457; *Pickering v. Langdon*, 22 Me. 413; *Ramsdell v. Ramsdell*, 21 Me. 288; *Jones v. Bacon*, 68 Me. 34, 28 Am. Rep. 1; *Rona v. Meier*, 47 Iowa, 607, 29 Am. Rep. 493; *McKenzie's Appeal*, 41 Conn. 607, 19 Am. Rep. 525.

At the least, the will conferred upon the two sons, Michael, Jr., and Joseph, a fee simple, determinable, as to each, upon his dying without issue living at the time of his death; and, as they both died leaving issue, after having conveyed the land, their issue, the plaintiffs, have no interest in the land, and cannot recover.

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Gen. Stat. 1866, § 5, p. 442; *Yocum v. Siler*, 160 Mo. 281, 61 S. W. 208; *McRee v. Means*, 34 Ala. 349; *Newsom v. Holesapple*, 101 Ala. 682, 15 So. 644; *Couch v. Gorham*, 1 Conn. 36; *Alfred v. Marks*, 49 Conn. 473; *Morgan v. Morgan*, 5 Day, 517; *Russ v. Russ*, 9 Fla. 105; *Gibson v. Hardaway*, 68 Ga. 370; *Harris v. Smith*, 16 Ga. 545; *Mattheus v. Hudson*, 81 Ga. 120, 12 Am. St. Rep. 305, 7 S. E. 286; *Daniel v. Daniel*, 102 Ga. 181, 28 S. E. 167; *Summers v. Smith*, 127 Ill. 645, 21 N. E. 191; *Strain v. Sweeney*, 163 Ill. 603, 45 N. E. 201; *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1029; *Jones v. Miller*, 13 Ind. 337; *Smith v. Hunter*, 23 Ind. 580; *Pate v. French*, 122 Ind. 10, 23 N. E. 673; *Boling v. Miller*, 133 Ind. 602, 33 N. E. 354; *Ross v. Ross*, 135 Ind. 367, 35 N. E. 9; *Hart v. Thompson*, 3 B. Mon. 482; *Daniel v. Thomson*, 14 B. Mon. 662; *Mitchell v. Campbell*, 94 Ky. 347, 23 S. W. 656; *Coleman-Bush Invest. Co. v. Figg*, 95 Ky. 403, 25 S. W. 888; *Webb v. First Baptist Church*, 90 Ky. 117, 13 S. W. 362; *Crozier v. Cundall*, 99 Ky. 202, 35 S. W. 546; *Buck v. Paine*, 75 Me. 582; *Hersey v. Purington*, 96 Me. 166, 51 Atl. 865; *Dallam v. Dallam*, 7 Harr. & J. 220; *Hilleary v. Hilleary*, 26 Md. 274; *Gambrill v. Forest Grove Lodge*, 66 Md. 17, 5 Atl. 548, 10 Atl. 595; *Deveomon v. Shaw*, 70 Md. 219, 16 Atl. 645; *Backus v. Presbyterian Asso.* 77 Md. 50, 25 Atl. 856; *Anderson v. Brown*, 84 Md. 261, 35 Atl. 937; *Richardson v. Noyes*, 2 Mass. 56, 3 Am. Dec. 24; *Ide v. Ide*, 5 Mass. 500; *Brightman v. Brightman*, 100 Mass. 238; *Jordan v. Roach*, 32 Miss. 481; *Eaton v. Straw*, 18 N. H. 320; *Downing v. Wherrin*, 19 N. H. 9, 49 Am. Dec. 139; *Pinkham v. Blair*, 57 N. H. 226; *Den ex dem. Harris v. Taylor*, 5 N. J. L. 413; *Den ex dem. Sinickson v. Snitcher*, 14 N. J. L. 53; *Seddel v. Wills*, 20 N. J. L. 223; *Wilson v. Wilson*, 46 N. J. Eq. 321, 19 Atl. 132; *Den ex dem. Van Middlesworth v. Schenk*, 8 N. J. L. 29; *Drummond v. Drummond*, 26 N. J. Eq. 234; *Den ex dem. Wurdell v. Allaire*, 20 N. J. L. 6; *Groves v. Coa*, 40 N. J. L. 40; *Fosdick v. Cornell*, 1 Johns. 440, 3 Am. Dec. 340; *Jackson ex dem. Burhans v. Blanshan*, 3 Johns. 292, 3 Am. Dec. 485; *Wilkes v. Lion*, 2 Cow. 333; *Heard v. Horton*, 1 Denio, 165, 43 Am. Dec. 659; *Miller v. Macomb*, 26 Wend. 229; *Hill v. Hill*, 4 Barb. 419; *Hatfield v. Sneden*, 54 N. Y. 280; *Pendleton v. Pendleton*, 6 N. C. (2 Murph.) 82; *Jones v. Spaight*, 4 N. C. (1 Car. Law Repos.) 544; *Taylor v. Maris*, 90 N. C. 619; *Buchanan v. Buchanan*, 99 N. C. 308, 5 S. E. 430; *Kelly v. Williams*, 113 N. C. 437, 18 S. E. 693; *Wright v. Brown*, 116 N. C. 26, 22 S. E. 313; *Parish v. Ferris*, 6 Ohio St. 563; *Niles v. Gray*, 12 Ohio St. 320; *Durfee v. MacNeil*, 58 Ohio St. 238, 50 N. E. 721; *Row-*

land v. Warren, 10 Or. 129; *Hauer v. Sheetz*, 2 Binn. 532; *Toman v. Dunlop*, 18 Pa. 73; *Hill v. Hill*, 74 Pa. 173, 15 Am. Dec. 545; *Mangum v. Piester*, 16 S. C. 316; *Gordon v. Gordon*, 32 S. C. 563, 11 S. E. 334; *Lewis v. Claiborne*, 5 Yerg. 369, 26 Am. Dec. 270; *Booker v. Booker*, 5 Humph. 505; *Stones v. Maney*, 3 Tenn. Ch. 731; *Brown v. Brown*, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640; *Armstrong v. Douglass*, 89 Tenn. 219, 10 L. R. A. 85, 14 S. W. 604; *Randall v. Josselyn*, 59 Vt. 557, 10 Atl. 577; *Bells v. Gillespie*, 5 Rand. (Va.) 23; *Randolph v. Wright*, 81 Va. 608; *Tomlinson v. Nickell*, 24 W. Va. 148; *Jackson ex dem. St. John v. Chew*, 12 Wheat. 153, 6 L. ed. 583; *Jackson ex dem. Kip v. Kip*, 2 Paine, 366, Fed. Cas. No. 7,138; *Lippett v. Hopkins*, 1 Gall. 454, Fed. Cas. No. 8,380; *Abbott v. Essex Co.* 18 How. 202, 15 L. ed. 352; *Pells v. Brown*, Cro. Jac. 590; *Barker v. Suretees*, 2 Strange, 1175; *Porter v. Bradley*, 3 T. R. 143; *Roc ex dem. Sheers v. Jeffery*, 7 T. R. 589; *Doe ex dem. Barnfield v. Wetton*, 2 Bos. & P. 324; *Doe ex dem. King v. Frost*, 3 Barn. & Ald. 546; *Ex parte Davies*, 9 Eng. L. & Eq. 88.

Mr. Henry T. Kent for respondents.

Gantt, J., delivered the opinion of the court:

This is an action of ejectment. Michael J. Gannon is the common source of title to the lot in suit. Upon the construction of the fourth clause of the will of Michael J. Gannon the rights of both sides to this controversy depend. The said clause is in these words: "Fourth. I give, devise, and bequeathe unto my two sons, Michael J. Gannon, Jr., and Joseph E. Gannon, and unto their heirs and assigns forever, my farm lying and being in the county of St. Louis and state of Missouri, which lies in the southern limits of Kirkwood, containing 80 acres, be the same more or less. It is my will that the same shall not be sold,—at least, not before the younger of the two, that is, Joseph E. Gannon, becomes of lawful age; and, should either of them die without issue, then the survivor, his heirs and assigns, to take, own, and have the part and portion hereby bequeathed to the one so dying. And in the event both should die without leaving any issue, then it is my will that my surviving heirs (with the exception of my son, John T. Gannon, who has had his share) shall have such property like and like." Following the cardinal rule of construction, it is our duty to ascertain, if possible, the intention of the testator, and in so doing mere technical rules must yield to the obvious intent and purpose of the testator. Among the more important canons of construction that have uniformly found

favor in this court is the rule that, when the words of a will at the outset clearly indicate a disposition by the testator to give the entire estate absolutely to the first donee or devisee, the estate will not be cut down to a less estate by subsequent or ambiguous words inferential in their intent. *Small v. Field*, 102 Mo. 104, 14 S. W. 815. There are some propositions in the construction of this will that are, or ought to be, free of doubt. First, by the words, "I give, devise, and bequeathe to my two sons, Michael J. Gannon, Jr., and Joseph E. Gannon, and unto their heirs and assigns forever, my farm," etc. In the absence of qualifying words or subsequent limitation, a fee simple absolute was given by these two sons to the tract in question. This is so by the most rigid technical rules of the common law, and everywhere recognized by the English and American courts, and, unembarrassed by technical rules and refinements, the ordinary man would unhesitatingly say that this was the plain meaning of the testator. On this proposition we are all agreed, and, indeed, it is not seriously controverted by counsel. It is true that it is urged that these words, "and unto his heirs and assigns forever," were not necessary, since our statute has dispensed with the use of the word "heirs" in conveying or devising an estate of inheritance, and it is argued that by the use of these unnecessary words the testator evinces a lack of confidence in the force of the words previously used, and for that reason casts a doubt on their meaning. We are unable to concur in such a view. While it is true that our statute no longer requires the word "heirs" to pass a fee simple, the use of these words in no manner casts any doubt upon the intention of a grantor or deviser who uses them to grant or devise a fee simple. It is doubtful whether any competent or skilful conveyancer ever dispenses with them in conveying a fee. Why should the use of words so long approved, and so absolutely necessary at common law to effectuate such a purpose, indicate a different purpose merely because the statute permits other and less words to have the same effect? Notwithstanding our statute has dispensed with the word "heirs" in devising a fee, this court has often commended its use. In *Chew v. Keller*, 100 Mo., *loc. cit.* 370, 13 S. W. 395, Judge Black, speaking for this court, held that the words "to them and their heirs forever" created a fee simple; saying: "Stronger language could not have been used to show and disclose a purpose and intent to confer upon Levin Baker and the other named persons an absolute and unconditional fee. The estate is given to 'them and their heirs forever.' This expression, though unnecessary to create a fee, is

an appropriate one for that purpose, and that the word 'heirs' is here used in its ordinary legal sense as one of limitation only cannot be doubted." When, in addition to the words, "unto them and their heirs forever," the testator adds the significant words "and assigns," it seems to us that, instead of suggesting a doubt of his intention, no more suitable language could have been chosen by Michael Gannon to give his said sons an absolute fee simple, and they emphasize his intention to give them his whole estate in said tract. *Wolfer v. Hemmer*, 144 Ill. 554, 33 N. E. 751. Neither does the use of the word "bequeath" in any manner weaken the force of the other words. "Bequeath" has been judicially construed by many of the ablest courts of this country to be synonymous with "devise" when used with reference to a gift of real estate. *Dow v. Dow*, 36 Me. 211; *Laing v. Barbour*, 119 Mass. 523, and cases cited. In this court it has been so held. *Shumate v. Bailey*, 110 Mo. 411, 20 S. W. 178; *Yocum v. Siler*, 160 Mo. 281, 61 S. W. 208. In *Greenwood v. Verdon*, 1 Kay & J. 74, before Sir W. P. Wood, Vice Chancellor, the gift was to his son, John Verdon, and to his heirs and assigns forever, and from and after the death of John without issue, then over to the surviving legatees. The vice chancellor said: "There are several points about this will which do not admit of question. First, there is clearly an estate in fee simple limited to John Verdon, in remainder after the death of the testator's wife, in the first part of the will; for the limitation is not merely to him and his heirs, but to him and 'his heirs and assigns forever.' . . . The first limitation here being not only to the son 'and his heirs,' which has often been restrained to a particular line of heirs, but the limitation is in the largest words to him, 'his heirs and assigns forever.' I could not, however, rely upon those words alone; but, as they are used, and I have to consider whether or not the estate so limited is cut down to an estate tail, I have to construe the effect of those words upon the subsequent gift on the death of John Verdon without issue." After reviewing many English cases, the vice chancellor summed up as follows: "The answer to this special case must be that under the will of John Verdon, John Verdon the son took an estate in fee simple, subject to be defeated by an executory devise in the event of his dying without issue living at the death of the last surviving legatee, and, there being issue living at that period, the estate in fee became absolute." These views sufficiently indicate our opinion that the first sentence of the fourth clause of the will clearly and in unambiguous language devised a fee in this tract to

the two sons. So that we must reject the argument that a fee simple was not created by these words.

But it is argued with great earnestness by counsel that, while these words, standing alone, might be sufficient to create a fee simple, yet, when considered in connection with the subsequent words of the will, they in fact create a fee tail. Let us consider, then, the words "unto them and their heirs and assigns forever" with the subsequent clauses of this fourth item of the will. Did the testator intend to give his said two sons an absolute fee or a fee defeasible upon the death of both without issue, or did he intend to create an estate tail? Two views are maintained by defendant. The first is that by the gift of an absolute fee in most appropriate language in the first instance, and understanding and intending thereby that they had the absolute power of alienating the land thus devised to them, then he added the clause, "it is my will that the same shall not be sold, at least, not before the younger of the two, Joseph E. Gannon, becomes of age," he gave and intended to give an additional power to sell when Joseph reached his majority. Keeping in mind, as we do, that he had already granted an estate to them, in which the power of sale attached as a necessary incident, and that he understood that he had done so, and that it was therefore his intention to do so, the clause restraining the sale until Joseph arrived at age must be construed and read as if he had said, "I give my said sons full power to sell and convey said land when Joseph, the younger of the two, becomes of lawful age." To our minds it seems absolutely clear that he understood he had already granted them a fee simple with the power to sell, and he only desired the land should not be sold during the minority of Joseph, but after that it was his will that no restraint should exist on their power to sell and convey. It is to be observed in this connection that the restriction is not to the sale of a mere life estate, but to a sale of the land itself. No such restriction was necessary if he had given them a mere life estate. We understand it is settled law that, where an estate is devised to one and his heirs and assigns forever, and there is added, either by express words or by implication, an absolute power of alienation, the limitation over is void. In our opinion, the words of this restraining clause give an express power to sell, but, if not, there is clearly given such power by implication.

In *Redfield on Wills*, vol. 2, p. 277, it is said: "It is a settled rule of American as well as English law that where the first devisee has the absolute right to dispose of the property in his own unlimited discre-

tion, and not a mere power of appointment among certain specified persons or classes, any estate over is void as being inconsistent with the first gift." Void as a remainder because of the preceding fee, after which a remainder cannot be limited; void as an executory devise because a valid executory devise cannot subsist under an absolute power of disposition in the first taker. Thus Chancellor Kent says (vol. 4, p. 270): "If, therefore, there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A in fee, and if he dies possessed of the property without lawful issue, the remainder over, or remainder over of the property which he, dying without heirs, should leave, or without selling or devising the same,—in all such cases the remainder over is void as a remainder because of the preceding fee, and it is void by way of executory devise because the limitation is inconsistent with the absolute estate or power of disposition expressly given or necessarily implied by the will." *Jones v. Bacon*, 68 Me. 34, 28 Am. Rep. 1; *McKenzie's Appeal*, 41 Conn. 607, 19 Am. Rep. 525; *Rona v. Meier*, 47 Iowa, 607, 29 Am. Rep. 493; *Kelley v. Meins*, 135 Mass. 231, and cases cited; *Howard v. Carusi*, 109 U. S. 725, 27 L. ed. 1089, 3 Sup. Ct. Rep. 575; 2 Washb. Real Prop. 6th ed. 667; *Roth v. Rauschenbusch*, 173 Mo. 582, 61 L. R. A. 455, 73 S. W. 664; *Wolfer v. Hemmer*, 144 Ill. 554, 33 N. E. 751; *Ball v. Hancock*, 82 Ky. 107; *Combs v. Combs*, 67 Md. 11, 1 Am. St. Rep. 359, 8 Atl. 757; *Hossey v. Hossey*, 37 N. J. Eq. 21; *Wead v. Gray*, 78 Mo. 59; *Van Horne v. Campbell*, 100 N. Y. 287, 53 Am. Rep. 166, 3 N. E. 316, 771.

If we are right in this position, plaintiffs cannot recover. Let us next inquire whether an estate in fee tail was intended to be created in these two sons and the heirs of their body; and, first, Was there an estate tail created by express words? The contention is that the word "heirs," expressed or implied, is just as essential to the creation of an estate tail as of an estate in fee simple, the difference being that in the creation of a fee tail a particular class or line of heirs must be indicated, while in fee simple it is to the heirs general. As understood by all lawyers, what are known as "fee-tail estates" had their origin in the statute 13th Edw. I., chap. 1 (1285). The name "fee tail" was borrowed from the feudists, amongst whom it signified any mutilated or truncated inheritance from which the heirs general were cut off, or, as some say, because ownership of the subject was cut in two parts, one going to the donee and the heirs of his body, and the other remaining as a reversion in the donor. 2 Bl. Com. 112, note (M); 1 Thomas's Co. Litt. 512-525 (6). 67 L. R. A.

The familiar forms of creating such estates were: "Grant to A and the heirs of his body," or "grant to A and the heirs male of his body," or "grant to A and the heirs male of his body on Mary, his now wife, to be begotten." 2 Bl. Com. 113, 114; 2 Minor, Inst. 80. In conveyances *inter vivos* the word "heirs" was necessary to create the estate, whereas in wills any words manifesting the testator's intent were sufficient. Thus, a grant by deed to a man and his issue of his body, or to his issue, or to his offspring, would pass only a life estate, for want of proper words of inheritance, whereas in a will the same words would create an estate tail. 2 Bl. Com. 114, 115. In all of the foregoing examples it is to be observed that the grant or devise is to the heirs of the body, or to the issue or offspring, and these are cases wherein by express words a fee tail is created. Leaving out for the present any consideration of the creation of estates tail by implication, it is too obvious for serious discussion that there is no express gift by the testator to the heirs of the bodies of Michael J. Gannon, Jr., and Joseph, nor to their issue. But the contention is that the word "heirs" is explained by the subsequent use of the word "issue," and they must be read together, and, so used, they are synonymous with "heirs of his or their bodies," and, thus interpreting the words "unto them and their heirs and assigns" as "heirs of their bodies," an estate tail is created by express words. To us this seems a most unnatural and forced construction of the words "unto their heirs and assigns forever;" words which, we have already seen, have a settled meaning in the law, and carry on their face a clear, unambiguous intention of passing or creating a fee simple.

In order to reach this conclusion the word "assigns" in said clause must be stricken out of the will and utterly disregarded, in the face of the settled rule that in construing any document, deed, or will we must give effect to every word, if it be possible without contravening the intention of the grantor or devisor. In addition to striking out the word "assigns," we must interpolate the words "heirs of his or their bodies," and both to reach an intention in conflict with a plain, unambiguous, intention to devise a fee simple to these two sons. To accomplish this, the first devise given to the natural objects of the testator's bounty is made secondary to the ulterior and contingent devise over found in a subsequent clause. We do not question that courts may transpose the words of a will if necessary to reach the true intention of the testator, but we insist that it must be presumed that the testator used the words he intended to use in their plain and ordinarily

accepted legal sense, and we are not justified in interpolating other words, and words of entirely different import. By resorting to such a course we import an ambiguity in the will, and then substitute words which the testator did not use to remove that ambiguity. We submit there is no occasion for resorting to such refinements to avoid the force and effect of a plain devise of a fee simple to the two sons, and hence we say that there in nothing the language of this will to justify the construction that an estate tail was limited by express words. Such a construction is only reached because the plain and ordinary signification of the words "to them, and their heirs and assigns forever," puts them in a supposed conflict with the subsequent contingent disposition of the land in suit. But there is no such conflict. The obvious purpose was to give the two sons a fee simple in the land, defeasible if they should die without issue or children living at the death of the survivor of the two sons named, and, if they should die leaving no issue living at the death of either or both, then an executory devise over to the other heirs of the testator,—a disposition entirely legal, if the testator had not already annexed to the fee devised to them the absolute power of disposal; but, as that contingency never happened, and never can happen, because both of said sons left children, the plaintiffs in this case, surviving them, the fee simple became absolute in the two sons and their grantees, the defendant and others, even if the power of sale was not superadded.

But we are now brought to the further contention that a fee tail was devised by implication. We conceded that under the statute *de donis* a fee tail may be created by implication, and in this case, if a fee tail is to be implied, it must be by construing the words "dying without issue" to mean an indefinite failure of issue, and consequently the executory devise over is void for remoteness. Such was the case of *Farrar v. Christy*, 24 Mo. 453. That was the construction of a deed made in 1832, in which the grant was "to have and to hold the premises aforesaid, with all the appurtenances thereunto belonging to them and their heirs forever, upon condition that, should either of the grantees herein named die without leaving legal heirs of their body, the survivor shall inherit the whole of the property hereby conveyed: and should both grantees die without leaving legal heirs as aforesaid, the property hereby conveyed shall revert to the other legal heirs of the said William and Martha T." It was conceded that these words, "should die without legal heirs of their body," created a fee tail by implication under the statute *de donis*. At the date of 67 L. R. A.

that decision, moreover, § 6 of chapter 32, Rev. Stat. 1845, had not been enacted, and the words "dying without issue," without further limitation, at the time were held and construed by both the English and American courts to mean an indefinite failure of issue, and by implication to create a fee tail in the first taker or ancestor named. It is too plain for discussion that the majority of the court in *Farrar v. Christy*, did not and could not have had § 6 of chap. 32, Rev. Stat. 1845, under consideration in deciding that cause. Judge Leonard dissented.

Harbison v. Swan, 58 Mo. 147, is also relied on as controlling the construction of this will. It is true that the will in that case was made in 1846, and the testator died in 1852, but it is to be observed that this court, in deciding that case, based its decision on *Farrar v. Christy*, and the common law, and made no reference whatever to § 6 of chap. 32, Rev. Stat. 1845, and it cannot be said that said section was construed by the court. The will was construed with reference to the common law and the act of 1825 alone, and the attention of the court was not called to the act of 1845 by counsel in the case. Moreover, there were no words in that will from which a power to sell could be implied, and in that respect it differs materially from the will under consideration. Conceding that prior to the act of 1845 the words "dying without issue" had been construed to mean an indefinite failure of issue at any time, and that many of the courts of England and of this country held these words created an estate tail by implication, what effect is to be given those words since the act of 1845 (Rev. Stat. 1845, chap. 32, § 6) went into effect? Obviously, they were enacted to settle forever the construction to be placed upon the words "dying without heirs" or "without issue" in the future by our courts, and that they should not be construed in deeds and wills thereafter made to mean an indefinite failure of issue, and by implication to create estates tail, but henceforth they should be construed to mean "heirs of issue" living at the death of the person named as ancestor. Granting that, if § 5, chap. 32, of the act of 1845, stood alone, those words would create an estate tail under the statute *de donis*, and that the case of *Farrar v. Christy*, falling under the act of 1825, was properly decided, still it was competent for the legislature to pass the act of 1845, and thereby modify the act of 1825, and, in effect, command that, whereas these words had been held by the courts prior to the act of 1845 to create a fee tail, yet in the future those words should no longer be held to mean an indefinite failure of issue, but a failure of issue living at the death of the ancestor named,

and thereafter their use should not have the effect of creating a fee tail by implication, but that an executory devise over after these words should be good. If this is not its meaning, what effect is to be ascribed to this statute? The section on its face shows it was the work of a trained lawyer, familiar with the conflicting views of the courts of England and this country as to the meaning of the words "dying without issue," and evinces a determination to settle by positive statutory enactment the meaning of those words in all future deeds and wills in this state, and that thereafter, when the question arose as to whether these words created a fee tail under the statute *de donis*, they should be construed to mean "issue living at the death of the ancestor" named, and no implication of a fee tail should arise to be at once destroyed by converting it into a life estate. If we do not so construe this § 6 of chapter 32 of the act of 1845, we in effect deny its authority, which we have no right or power to do. But we are told that fee tails never have existed in this state, having been abolished in 1816, when Missouri was a territory, and therefore we are not to inquire whether these words create an estate in fee tail in Missouri since the act of 1845, as there can be no estates tail in Missouri, but whether by the common law it was a case wherein the devisees would have been seised in fee tail. Chancellor Kent, in his Commentaries, vol. 4, p. 280, states that in Virginia, by statute in 1819 (1 Rev. Code 1819, chap. 99, § 26, p. 369), and in Mississippi Rev. Code 1824 (chap. 104, § 26, p. 458), and in North Carolina by statute in 1827 (1 Rev. Stat. 1837, chap. 43, § 3, p. 259), the rule in the construction of devises as well as deeds, with contingent limitations depending upon the dying of a person without heirs or without heirs of the body, or issue or issue of the body, or children, was declared to be that the limitation should take effect on such dying without heirs or issue living at the time of the death of the first taker, or born within ten months thereafter; and says it is further declared "that, when a 'remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the word 'heirs' or 'issue' shall be construed to mean heirs or issue living at the death of the person named as ancestor.'" The great chancellor then adds: "These provisions sweep away at once the whole mass of English and American adjudications on the meaning, force, and effect of such limitations. The statute speaks so peremptorily as to the construction which it prescribes, that the courts may not, perhaps, hereafter feel themselves at liberty to disregard its direction, even though other parts

of the will should contain evidence of an intention not to fix the period of the devisee's death for the contingency to happen, and that the testator had reference to the extinction of the posterity of the devisee, though that event might not happen until long after the death of the first taker. They might be led to regard any such other intent collected from the whole will if such a case should happen not to be consistent with the positive rule of construction given by the statute to the words 'heirs and issue.' Yet when we consider the endless discussions and painful learning, and still more painful collisions of opinions, which have accompanied the history of this vexatious subject, it is impossible not to feel some relief, and to look even with some complacency, at the final settlement in any way of the litigious question by legislative enactment." Accordingly we have a statute in this state almost *in totidem verbis* with the statutes mentioned by Chancellor Kent, and it seems impossible to escape the logic of that distinguished jurist and chancellor that the courts are bound by this statutory construction; and accordingly when we find a devise as in this case of a fee simple to the first taker by apt, appropriate, and long approved words, and thereafter a gift over on condition that he die without issue. "Dying without issue" must be held to mean "dying without issue living at his death" and therefore a definite failure of issue is provided, and the executory devise over is good, and the first taker takes a fee defeasible upon his dying without issue living at his death. If he die with such issue living, the estate in fee is absolute. If he die without issue living at his death, it goes over to the executory devisee to whom it is limited. It is true that estates tail have never existed in this state, as they were abolished in 1816 by the territorial act of that year, and the act of 1825 (Rev. Stat. 1825, p. 216) provided "that in cases where by the common law any person or persons who would then be or might hereafter become seised in fee tail," such person was to have a life estate only and the remainder pass in fee simple to the one next in line; and the act of 1845 practically continued that provision, but correctly referred estates tail to the statute *de donis*. The estates tail disposed of by those enactments were such as were defined by the statute *de donis*; but surely it will not be contended that legislative power was exhausted by those acts. By the same legislative power it was entirely competent by subsequent enactment to declare what meaning should be given by the courts to certain words when thereafter used in wills and deeds, and this is what was done by § 6, chap. 32,* of the act of 1845, passed contemporaneously with the enact-

ment of § 5, for the first time commanding and directing that, if the words "dying without heirs or heirs of the body" or "issue" should be used, those words should be construed to mean "dying without issue living at the time of the death of the person named as ancestor." If the legislature had the power to pass that statute,—and this will not be questioned,—the courts must read that statute into all instruments executed since its passage and containing those words. The only question left for the courts to determine is whether an instrument construed as the legislature has directed that it shall be done would create an estate tail under the statute *de donis* if so read. By all the canons of construction §§ 5 and 6, chap. 32, of the act of 1845 (now §§ 4592, 4593, Rev. Stat. 1890), must be read together, and when so read they direct that, in cases "where by the common or statute law of England any person or persons would now or might hereafter become seised in fee tail such person shall only have a life estate with remainder in fee simple to the one next in line;" but the courts, in determining whether an instrument would have created a fee tail at common law, shall construe the words "dying without issue," when used in such instrument, to mean "dying without issue living at the death of the person named as ancestor." There is no conflict between the two sections, and both can be made effective. The one abolishes estates tail, and the other prescribes the meaning and construction of certain words for the government of our courts in determining whether an estate tail by implication is created by the instrument to be construed. In this connection it is well to note that other states have adopted provisions similar to ours in this respect, notably New York, New Jersey, and Michigan.

Jarman on Wills, vol. 1, p. 521, discussing the creation of estates tail in England by implication from the use of the words "dying without issue," says: "No implication of an estate tail can arise from words importing a failure of issue, in a will made or republished since the year 1837, unless an intention to use the phrase as denoting an indefinite failure of issue be very distinctly marked, as Stat. 1 Vict. chap. 26, § 29, provides that such words shall be held to mean a failure of issue in the lifetime or at the death of the person referred to, unless a contrary intention shall appear by the will. . . . Under this clause, coupled with the preceding section, which makes a devise confer an estate in fee without words of inheritance, it will generally happen, in cases in which, according to the old law, the prior devisee would have been tenant in tail, by the effect of words devising over the prop-

erty on the failure of his issue, that he will, under the new rule of construction, take an estate in fee simple, subject to an executory devise in the event of his dying without leaving issue at his death; and this, no doubt, was the effect contemplated and designed by the legislature."

Underhill on Wills, vol. 2, p. 870, after a full discussion of the same subject, says: "The doctrine of the creation of an estate tail by implication, above explained, has no application whatever where an estate is a fee simple, with a limitation over upon failure of issue, and it appears either from the will itself, or where the common-law rule is modified by statute, that the failure of issue referred to is the failure of issue living at the death of the first taker. If the primary devisee has an estate in fee which is defeasible upon a definite failure,—i. e., of issue living at his death, it becomes indefeasible in him on his having issue who survive him, and he may provide for such issue by devising the fee to them."

Accordingly we hold that the statute of 1845 read into this will renders it impossible that the words "dying without issue" should have the effect of creating an estate tail, and thereby cutting down the estates of Michael J. Gannon, Jr., and Joseph to life estates only; remainder in fee to plaintiffs, their children.

But, independently of the statute, there is much room for holding that, even under the English and American decisions, the will contains enough to show an intention on the part of the testator that the words "dying without issue" referred to issue living at the death of the survivor of said two sons. If the language of the will is susceptible of a construction that will make it apply to a definite failure of issue, that construction should be adopted. The first limitation is to the survivor of these two sons, meaning clearly issue living at the death of the one of these two sons who should die first, and the next limitation is, "and in the event both should die without leaving any issue, then it is my will that my surviving heirs (with the exception of my son, John T. Gannon, who has had his share) shall have such property like and like." Surviving when? Manifestly when both die without leaving any issue. The words "leaving" and "surviving" refer in point of time to the death of the survivor of the two sons. Then, too, John T. Gannon, who was living at the time the will was made, is excluded from participation; showing in this additional manner the time in the mind of the testator.

But it is also said that the word "remainder," in chap. 32, § 6, Rev. Stat. 1845, is a technical word, and does not include an executory devise. We think this is too nar-

row a construction to place upon this word in the connection in which it is used. The preceding § 5 in that act refers alike to "conveyances or devises," and § 6 speaks of remainders limited by deed or "otherwise." The word "remainder" is often used by text writers to include an "executory devise," and this court has construed this word, in this identical § 6 of the act of 1845, to have that significance. *Fearne on Remainders*, p. 150, says: "The term 'remainder' is sometimes used in a lax sense to denote any kind of subsequent interest or the limitation thereof." Chancellor Kent, in his *Commentaries*, vol. 4, p. 274, says: "A devise in fee, with remainder over upon an indefinite failure of issue, is an estate tail, and, in order to support the remainder over as an executory devise, and to get rid of the limitation as an estate tail, the courts have frequently laid hold of slender circumstances in the will to elude or escape the authority of adjudged cases." Blackstone uses the words as synonymous. 2 Bl. Com. 173. But in *Sherman v. Sherman*, 3 Barb. 385, the statute of New York (Rev. Stat. 1829, § 22, p. 724), which our legislature evidently adopted when it enacted chap. 32, § 6, Rev. Stat. 1845, came before the court for construction, and it was held that the word "remainder" included "executory devise," and the limitation over was held to be a good executory devise, and, moreover, that the statutory definition, and not the common-law meaning, of the words "dying without heirs of his body or without issue" should control. That statute was afterwards adopted by Michigan, and in *Mullreed v. Clark*, 110 Mich. 229, 68 N. W. 138, 989, came under review by the supreme court, and it was held to give an executory devise; and that decision is peculiarly applicable here, because in that case the devise was to James Phillips, but, if he should die without heirs, then over, and the court held that "James Phillips took a fee defeasible at his death without issue living at that time." If he had issue then living, the fee became absolute. If none then living, it went over to the devisees named in the will. But the point is that the word "remainder" applied in full force to executory devises. But in *Faust v. Birner*, 30 Mo. 417, in construing the will of John Birner, this court held that the words "dying without issue" must, in this state, since the Revised Statutes of 1845 went into effect, be construed to mean dying without issue living at the death of the ancestor named, and that act applied to executory devises; saying: "This is a good executory devise to the brothers." Again, in *Naylor v. Godman*, 109 Mo. 550, 19 S. W. 56, this court, through Judge Sherwood, quoted this identical § 6, chap. 32, of 67 L. R. A.

the act of 1845, and held it applied to an executory devise; and it was so held in *Yocum v. Siler*, 180 Mo. 289, 61 S. W. 208.

To sum up, then, we hold that the will of Michael J. Gannon does not create an estate tail by express words; that there is no express limitation therein to "the heirs of the body," or to the issue of the two sons, Michael and Joseph; that it does not create an estate tail by implication, because, both by the language of the will, and especially by the positive command of the statute of 1845, the words "die without issue" mean dying without issue living at the death of said Michael and Joseph, and therefore mean a definite failure of issue, and hence no fee tail can be implied from their use; and, finally, that by the said fourth clause of the will the said two sons took a fee simple, subject to be defeated upon their dying without issue living at their death, and, as both died leaving children, the plaintiffs herein, the contingency upon which their fee simple was to be defeated, never happened, and never can happen, and their estate in fee became absolute, and their warranty deeds conveyed defendant's grantors the fee-simple title. A different conclusion was reached in the construction of this same clause in the will of Michael J. Gannon by division No. 1 of this court, in *Edward Gannon et al. v. Gustave Pauk et al.*, at the October term of this court (not yet officially reported); but, upon reconsideration of the said clause in this case by the court in banc we are not satisfied with the opinion of division No. 1 construing said clause, and must decline to accept it as the proper construction of this will, and the judgment of the Circuit Court must be, and is, reversed.

Robinson, Ch. J., and Burgess and Fox, JJ., concur.

Valliant, J., dissenting.*

Being unable to concur in the interpretation placed by the opinion of the majority of the court upon the clause of the will of Michael J. Gannon, deceased, which is involved in the discussion of this case, and in the interpretation therein given to our statutes relating to fee-tail estates, I

*Two cases were brought to recover land devised by the will construed in the above case,—the above case against Albright and one against Gustave Pauk. The appeal in the Pauk Case was heard by the first division of the supreme court and decided in favor of the plaintiffs on March 17, 1904. The opinion in that case was filed by the judges of the first division as a dissenting opinion in this case, and is published herewith. Moreover, a petition for rehearing was filed in the Pauk Case, which was overruled by the divisional court October 27, 1904. The divisional judges therefore seem to assume the attitude of adhering to their former ruling in defiance of the opinion of the court in banc.

consider the subject of sufficient importance to set out my views of the law.

This is a suit in ejectment. Michael J. Gannon, the common source of title, died in 1870, leaving a will devising the land in question to his two sons, Michael and Joseph, in the following words: "Fourth. I give, devise, and bequeathe unto my two sons Michael J. Gannon, Jr., and Joseph E. Gannon, and unto their heirs and assigns forever, my farm lying and being in the county of St. Louis and state of Missouri, which lies in the southern limits of Kirkwood, containing eighty (80) acres, be the same more or less. It is my will that the same shall not be sold,—at least, not before the younger of the two, that is, Joseph E. Gannon, becomes of lawful age; and, should either of them die without issue, then the survivor, his heirs and assigns, to take, own, and have the part and portion hereby bequeathed to the one so dying. And in the event both should die without leaving any issue then it is my will that my surviving heirs (with the exception of my son, John T. Gannon, who has had his share) shall have such property like and like." It is stipulated that whatever title Michael J. Gannon, Jr., and Joseph E. Gannon took under the will was conveyed by them, and has passed by mesne conveyances to the defendant Gustave Pauk. Michael J., Jr., died in 1887, leaving children living at the time of his death; and Joseph E. died in 1893, also leaving children living at the time of his death. These children of Michael J., Jr., and Joseph E. are the plaintiffs in this suit.

The decision in the case will turn on the construction to be given to the clause in the will above quoted. The plaintiffs contend that the estate devised was what by the common law would be an estate tail, which, under our statute, is reduced to an estate for life in the first taker, with the remainder in fee to the next in line. The defendants contend that the estate devised to the two sons of the testator was a fee, determinable as to each upon his dying without issue living at the time of his death; and, as both died, leaving issue, after having conveyed the land, the contingency on which the fee was to determine never occurred, and the estate became absolute. The trial court took the plaintiffs' view of the case, and entered judgment accordingly, from which judgment the defendants appeal.

If the first sentence of this clause was all there was of it, there could be no question about it. In language more expressive of a purpose to give an absolute fee, than necessary, the testator makes the devise in the first sentence, and concludes it with a period. Whether, by the use of the words

"and unto their heirs and assigns forever," the testator intended to emphasize a purpose to give an absolute fee, is a question that we can answer only after reading the whole clause,—perhaps the whole will. The mere use of such words unnecessarily does not always indicate such a purpose. In fact, it not unfrequently suggests a lack of knowledge of words necessary to express a given purpose; it often evinces a lack of confidence of the writer in the force of the words previously used, and for that reason casts a doubt on their meaning. One who knows his own purpose, and knows how to express it, is less liable to multiply his words than one less informed. The consequence is that when we see words unskilfully used, especially technical words, we are less certain of the meaning intended than we would be if the words were used with skill. That is the reason that we are required, when we come to construe a will, to give less force to the forms of expression than we do in construing some other instruments, and to gather, if we can, in spite of the sometimes inappropriate use of technical words, the real purpose of the testator. The words, "I give . . . and bequeathe unto my two sons, Michael J. Gannon, Jr., and Joseph E. Gannon, . . . my farm lying and being in the county of St. Louis," etc., were sufficient, if left alone, to carry a fee simple to the devisees. If that was the design of the testator, then the addition of the words "and unto their heirs and assigns forever" really gives no force to the preceding sentence, and only suggests that the testator was not sure as to the meaning of the words already used, or even of the words unnecessarily added. Those words in this will are just as apt to an estate tail, if that was the intention, as they are to an estate in fee, if that was the intention. The word "heirs," expressed or implied, is as essential to the creation of an estate tail, as of an estate in fee simple; the only difference being that, in the one, particular heirs must be indicated, while in the other general heirs are meant. Did the testator intend to give his sons an absolute fee, or a fee determinable upon the death of both without issue, or did he intend to create a fee tail?

It is not contended by the respondents that the testator intended to give an absolute fee, but the argument is that, having granted an estate in fee, and conferred with it the power of absolute disposal of the property, an absolute estate was thereby created, and the attempted limitation over was void. The legal principle announced in that proposition is correct, and the authorities cited by the learned counsel sustain it. "If, therefore, there be an absolute power of disposition given by the will to the first taker,

as if an estate be devised to A in fee, and if he dies possessed of the property, without lawful issue, the remainder over, or remainder over of the property, which he, dying without heirs, should leave, or without selling or devising the same, in all such cases the remainder over is void as a remainder, because of the preceding fee; and it is void by way of executory devise, because the limitation is inconsistent with the absolute estate, or power of disposition expressly given or necessarily implied by the will." 4 Kent, Com. 14th ed. p. 270; 2 Washb. Real Prop., 6th ed. 667; *Yocum v. Siler*, 160 Mo. 281, 61 S. W. 208; *Roth v. Rauschenbusch*, 173 Mo. 582, 61 L. R. A. 455, 73 S. W. 664. To apply that doctrine to this will, however, we would have to assume, first, that the estate devised to the first takers was an estate in fee simple, which is one of the main points in dispute; and, second, that the language of the will, expressly or by necessary implication, confers an absolute power of disposal of the property on the two sons. Passing for the present over the first point, let us see if the power of disposition is expressly or by implication conferred. Taking the text just quoted, wherein the rule is correctly stated, we see that the power of disposition referred to is not that which might be implied as an attribute of the estate granted, but, in order to have the effect of cutting off the executory devise, it is a power given by the will in addition to the estate. A power of disposition is implied in every grant of a fee simple, yet the power so implied will not render void an otherwise valid executory devise; but, when the fee is granted, and, besides that, the power of disposition is added, then there can be no limitation over. There is no such added power in this will. The most that can be claimed for the language used in reference to that point is that it indicates that the testator understood that the power to sell was incident to the estate already granted, and he aimed to restrict that power. The language is: "It is my will that the same shall not be sold,—at least, not before the younger of the two, that is, Joseph E. Gannon, becomes of lawful age." There is therefore no such power of disposition given, in addition to the estate given, as would render void an attempted executory devise. If it is a determinable estate by the words of its own creation, it has not been made absolute by the words affecting the power of sale.

A determinable fee is defined to be "an interest which may continue forever; but the estate is liable to be determined without the aid of a conveyance by some act or event circumscribing its continuance or extent." 4 Kent, Com. 14th ed. p. 9. It is an estate to continue until the event named occurs. 47 L. R. A.

Then it is to cease. In this case, according to respondents' theory, it was an estate in fee simple in the two sons of the testator, determinable on the death of both of them without issue then living; and, since they both left issue living when they died, the event, on the occurrence of which the estate was to determine, became of impossible occurrence, and the estate became a fee simple absolute. But to build their case on that theory, respondents must assume that the two sons took an estate in fee simple in the first instance, because, if they took only an estate in fee tail, it would not be increased to a fee simple by the occurring of the event upon which it was to cease. In other words, if the will had said, *in totidem verbis*, "I devise to my two sons, Michael and Joseph, and to the heirs of their bodies, respectively, in fee tail, forever," the land in question, "but, if they both die without leaving issue living at the time of the death of the one last living, then I will that the land go to my heirs," it would make no difference, so far as the interest that Michael and Joseph personally took, whether they had issue or not. If they had no issue, the executory devise would carry the fee to the heirs of the testator; and, if they had issue, the estate would go to their issue in fee tail, but in either event it would not affect a title derived by deed from the two sons. There is nothing on the face of the will to suggest that the testator intended to say that the estate was to be a fee tail if his sons had children, and a fee simple, with a limitation over in the form of an executory devise, if they had none. If this will gave to the two sons a fee-simple estate, determinable only on the death of both without issue, then, since they both left issue living, their deed conveyed an absolute title, and the plaintiffs are not entitled to recover, but, if the will gave only an estate in tail, then, by force of our statute, the sons took only a life estate; and it makes no difference whether we construe the contingency on which the executory devise depended to be a definite or an indefinite failure of issue, or whether the executory devise was valid or void, for in either event the land belongs to the plaintiffs. An executory devise may be created to take effect as well on a condition that will terminate an estate tail as one that will terminate an estate in fee simple. The mere fact, therefore, that an executory devise is created to take effect on the happening of an event which would cause the preceding estate to determine does not give character to that estate. We are now talking about an estate tail which appears in express words or by natural intendment in the instrument creating it, and independent of the inference to be drawn from the limita-

tion over in the nature of an executory devise.

In interpreting the statute under which estates tail were created, the English courts were very technical in their reasoning, and placed much value on the use of certain words. The words "heirs of his body," or their equivalent, were deemed essential to the creation of an estate tail. In 2 Preston on Estates, p. 473, it is said: "The same rule which requires the limitations to be to the feoffee and his heirs, either by express words, or by words of direct and immediate reference, in order to the transfer of an estate in fee by deed at common law, also requires that, in order to the creation of an estate tail by deed, the gift shall, either by express words, or by words of direct and immediate reference, be to the donee and his heirs. So a gift to a man and his heirs, *viz.*, his heirs of his body, will, by reason of the qualification, be an estate tail. . . . The nature and qualities of estate tail admit of one case peculiar to these estates. As an estate even in a deed may, contrary to the general rule of law, arise from necessary implication. Thus a gift to a man without any limitation to his heirs, but with a provision that the land shall revert to the donor, or remain to another, if the donee shall happen to die without heirs of his body, will afford ground for construction that the donee is to have the land to him and his heirs of his body, because the land is not to revert or remain over until there shall be a failure of these heirs. . . . The true reason is that the intent of the donor appeared in express words in the deed, and the implication was a necessary one. . . . Words of reference in limitations of estates tail operate in the same way as words of reference in limitations of estates in fee. By the reference they have the effect of the very words to which the reference is made, and are precisely of the same import as these words." After quoting from a number of cases, the author (p. 528) says: "From all these cases it may be assumed, as a general proposition, that, though the word 'heirs' stands general and uncorrected in one sentence, it may, by the clause of another sentence, which introduces an ulterior gift, be corrected and explained, if the word 'heirs' generally in the first clause is by the words of the second clause explained to mean heirs of the body." In the text quoted the law writer has mentioned two kinds of cases in which estates tail may be created otherwise than in *totidem verbis*: One which he distinguishes as peculiar to the nature and qualities of estates tail; that is, where the grant is in words indicative of an estate either for life or in fee simple, with no other words in direct reference either to en-

large or qualify their meaning, yet followed with a provision that the land revert or remain over if it should happen that the donee die without heirs of his body, in which case, by implication, the life estate is enlarged, or the fee is cut down to a fee tail. The other is where words in the first instance are used, which, if unexplained or unqualified by direct reference, would indicate an intention to create a fee simple, yet which, before the donor finishes the subject, are so explained or qualified as to show that he meant to use them in the sense that would create an estate tail. Then an estate tail is directly created, which is not an estate in fee simple cut down by implication, but an estate tail by force of its own creative words. A grant to A and his heirs forever, but, if he should die without heirs of his body, then to B and his heirs forever, is an example of an estate tail by implication. But a grant to A and the heirs of his body forever is an estate tail by direct words, and equally so, even though more clumsily expressed, if it be to A and his heirs forever, to have and hold unto the said A and the aforesaid heirs of his body forever, or words equally significant of an intention from first to last to create an estate tail. When we have to deal with a case under the first class referred to, it is important to know if the deed refers to a definite or to an indefinite failure of issue, but, when we have a case under the second class, that is immaterial.

The above quotations are taken from what the law writer said on the subject of estates tail created by deed, but, as to such estates created by will, he said (p. 534): "Let it be remembered that in wills that strictness of the law which, in regard to deeds, requires that the limitation should be to the heirs by that word, and not by circuitous expression (except in the cases of a gift in frank-marriage, and in cases of direct and immediate reference), and that these heirs shall, in the case of limitations in tail, be distinguished by words of procreation, descriptive of the body from which the heirs are to issue, or the person by whom they are to be begotten, is relaxed. . . . Though, in construing wills, the words which in a deed would create an estate tail will give a like estate, this rule does not apply when reversed, for words which in a deed pass an estate in fee, and, again, words which in a deed give only an estate for life, may, in a will, pass an estate tail. Thus a feoffment to a man and his heirs male, without any context, conveys an estate in fee. In this case the word 'male' is rejected as surplusage. In a will the word 'males' will be retained, and a devise in these words will pass an estate tail, for the law in favor of the intention of the testator will supply the words

'of the body.' So, if a feoffment be to a man and his heirs, and, if he shall die without issue (giving no direction that the issue shall be of his body), then over, the feoffee will have an estate in fee. In a devise by these words, the devisee will have an estate tail. Thus the law is that, when we are required to ascertain the character of a gift in view of the statute *de donis* whether it be under a deed or a will, the main object is to discover the intention of the donor, and adjudge the character of the gift by that intention, yet, when it is a deed that we are dealing with, we are under more restraint than when it is a will. Under a deed, if the word 'heirs' is used in the granting clause, it may be cut down to mean heirs of the body of the donee, provided the words of procreation are used in the context, directly referring to the former word, as if it should say 'to him and his heirs; that is, heirs of his body,' or if it should say 'to him and his heirs,' and then, in a sentence closely following, and referring to the gift, say 'to the aforesaid heirs of his body.' But in case of a will, words of direct reference are not necessary. If, taking the whole instrument as expressing his intent, we find that the testator really intended to limit the estate to his sons and their descendants in a direct line, then we should say that the will creates what at common law would have been an estate tail."

Let us, under the light of these rules of construction, search for the testator's intention in this fourth clause of his will. The words employed show that the testator was not sure that he knew what words were necessary to express his idea, and the technical words he did use were not used with precision. The word "bequeathe" was inappropriate, and the words "heirs and assigns forever" were at least unnecessary, if the intention was to give an estate in fee simple. If the intention, however, was to limit an estate to the sons and the heirs of their bodies forever, the word "heirs" was not unnecessarily used. Our statute which renders the word "heirs" unnecessary in the grant of an estate in fee, under certain conditions, has no reference to estates tail. They are to be judged by the law as it came to us from England. The inappropriate or unnecessary use of those words, however, signifies nothing more than that the document was not written with technical precision. They do not tend to obscure the meaning, but they admonish us not to adhere too closely to the technical meaning of the words used. The testator did not intend to give his two sons an absolute fee in the property. This is shown by the fact that immediately following the words of grant are conditions and

restrictions. First, the property is not to be sold until the younger comes of age; and, second, if either should die without issue, the other should have the estate. The purpose to create cross remainders is thus shown. If the word "heirs" had not been used in the first sentence, there would, perhaps, have never arisen a question but that the estate granted in that sentence was qualified by the grant of cross remainders in the sentence next following. But, as we have seen from the authorities quoted, the word "heirs" in the first sentence is explained by the word "issue" in the sentence following, and those words are to be taken together. The two sentences, coming together, and relating to the same subject, show that, when the testator used the word "heirs" in reference to his sons, he meant their children; he used the words "heirs" and "issue" as synonymous, and, taken together, they mean heirs of their bodies. That is the natural interpretation to put on his language, and the interpretation that we are authorized by the law to put upon it. Interpreting the word "heirs" in the first sentence to mean heirs of the bodies of the testator's sons, we have an estate tail, and we render all parts of the clause in harmony. He intended that, if his two sons had children, the estate should be limited to them and their children, to descend in that line, but, if either of his two sons should die without leaving a child then living, the estate should pass to the other son and his heirs; and he used the word "heirs," in that connection, in the same sense that he used it in the first sentence,—that is, as meaning child or children,—and his intention was that the estate should be kept in that line of descent. The limitation to the surviving son was a good remainder, and would have been good as such in a deed, because a remainder may be limited on an estate tail. 2 Fearn, Remainders, 192; 2 Washb. Real Prop. 6th ed. 1539. But it would not have been good as a remainder if the first estate granted had been a fee simple, because a remainder cannot be limited after a fee. The next expression of the testator's wish was that if both of his sons should die without issue,—that is, if the estate he had somewhat clumsily, yet with sufficient precision to indicate his intention, created, should fail because of a failure of heirs of the bodies of his sons,—then it should revert to his general heirs. In the remainder to the one son on the death of the other, the period at which it was to take effect was at the death of the other without issue then living. This is so, not by any artificial rule of construction, but by the facts of the case itself. The two brothers were both living, and the remainder was to the one who should survive if the condition then

existed. But if they should both die without issue, then the estate should return to the heirs of the testator.

Respondents contend that this last limitation was an executory devise; that it was good only in the event the two sons had died without issue living at the time of the death of the one last dying, in which event it would have cut down the fee in the first takers, and converted it into an estate tail, but that, since both the first takers left children living when they died, the executory devise became void, and the estate remained a fee simple. We do not construe the will to be a devise of an estate in fee simple in the first instance, and therefore we do not hold that the estate derives its character as an estate tail by being cut down by the limitation of the executory devise. We hold that, by the use of the word "heirs" in connection with the word "issue," the testator intended to give the estate to his two sons and the heirs of their bodies, and thereby created in the first instance what would have been at common law, or by the statute *de donis*, an estate tail. But, even if it be construed to have been an estate in fee simple in the first instance, we would feel constrained, by the weight of authorities and the former rulings of this court, to hold that, by the clause declaring that in case of the death of both sons without leaving issue the estate was to revert to the heirs of the testator, the fee was cut down to a fee tail. *Farrar v. Christy*, 24 Mo. 467; *Harbison v. Swan*, 58 Mo. 149; *Thompson v. Craig*, 64 Mo. 312; *Wood v. Kice*, 103 Mo. 329, 15 S. W. 623. The doctrine laid down in the earlier of those cases, and followed or approved in the later ones, is that where a devise to one in terms sufficient, if standing alone, to give an estate in fee simple, is followed by a clause providing that, if the devisee should die without issue, the estate should revert to the heirs of the testator, or go over to another as an executory devise, the estate to the first devisee is, by implication, cut down to an estate tail. But in *Yocum v. Siler*, 160 Mo. 281, 61 S. W. 208, this court, per Gantt, J., said (*loc. cit.* 296, 160 Mo., page 215, 61 S. W.): "Yet when it is considered that this conclusion was only reached by holding that these words 'dying without issue' meant an indefinite failure of issue, and this postponed the vesting of its executory limitation so long that it violated the rule against perpetuities, and was therefore void, as our statute of 1845 gave a different meaning to those words, and directed they should be construed as meaning heirs or issue living at the time of the death of the ancestor named, no such implication can longer be raised from their use in this state." What is there said is

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the main foundation for the position taken by respondents, and it does justify them in saying that by force of the statute of 1845 (now § 4593, Rev. Stat. 1899), under the case above stated, the words "dying without issue" mean dying without issue living at the time of the death of the ancestor, and that if at the death of the ancestor there is issue living the executory devise is extinguished, and the estate in fee in the first taker remains unimpaired. The interpretation put upon the will in the case of *Yocum v. Siler* did not depend on the aid of that statute, as there construed, for there was on the face of the will itself sufficient to show that the words "if my said son dies without legal issue" meant issue living at the time of the son's death. The limitation over in that case was not, as in the case at bar, to the indefinite heirs of the testator, but to individuals named who were then living; showing, without resort to rules of construction, that the testator intended to say issue living at the time of his death. The writer of this opinion concurred in the opinion in that case, and has no thought now to question the correctness of the conclusion reached; but, after a second study of the subject, he is of opinion that the statute of 1845 did not apply to the facts of that case. Estates tail never existed in this state. They were abolished by act of the general assembly of the territory of Missouri in 1816 (Sess. Acts 1815, 1816, p. 32). And again by act of the general assembly of the state in 1825 it was enacted "that in cases where by the common law any person or persons would now be, or might hereafter become, seised in fee tail" such person was to have a life estate only, and the remainder pass in fee simple to the one next in line. Rev. Stat. 1825, p. 216. That has continued to be substantially the statute law to the present time, the language of the present statute being: "Sec. 4592. In cases where by the common or statute law of England any person might become seised in fee tail of any lands," etc., he shall have only a life estate, and the remainder in fee simple pass to the person next in line. The estates tail there disposed of were such as were then defined by the rules of the common law and the statute *de donis*, not such as might be affected by any other rules. The statute treated only of estates that had the characteristics which by the common law or the statute *de donis* appertained to estates tail, and it says, in effect, that whenever an estate shall be created, having those characteristics, it shall be a life estate to the first, and a fee simple to the second. That had been the law for more than twenty years when the act of 1845 was passed, and its language in that particular has not

changed. If we say the act of 1845 shall apply, then we may have a grant which under the common law or the statute of England would be an estate tail, yet we cannot give to it the effect that the act of 1825 says it must have, and we rob that act of its force. We do not think the act of 1845 was intended to apply to such case. That act is now § 4593, Rev. Stat. 1899, and is as follows: "Where a remainder in lands or tenements, goods or chattels, shall be limited, by deed or otherwise, to take effect on the death of any person without heirs or heirs of his body, or without issue, or on failure of issue, the words 'heirs' or 'issue' shall be construed to mean heirs or issue living at the death of the person named as ancestor." That statute, by its terms, relates only to remainders. An executory devise is not a remainder. 4 Kent, Com. 14th ed. p. 270; 2 Washb. Real Prop. 6th ed. §§ 1743-1746. It would be applicable in this case, if necessary to a construction, to the contingent remainder to the survivor of the testator's two sons, but not to the executory devise to his indefinite heirs. That section was first inserted in our law in the revision of 1845. That revision was not hastily prepared during a session of the general assembly, and was not the work of laymen, but was the work of a commission of distin-

guished lawyers and jurists, extending over a period of two years. They did not use technical words loosely or without understanding. They did not mean an executory devise when they said "remainder." In *Harbison v. Swan*, 58 Mo. 147, the will was very similar in form to the will in the case at bar. That case arose after the statute of 1845 went into effect, yet the court construed the will under the act of 1825 without reference to that of 1845; and the opinion was rendered by Judge Napton, who was one of the commission that made the revision of 1845.

We hold that, under the fourth clause of the will of Michael J. Gannon, such an estate in the land in suit was devised to Michael J. Gannon, Jr., and Joseph E. Gannon, as would, under the common law and the statute *de donis*, have been an estate tail to them and the heirs of their bodies, which, by force of our statute (§ 4592), became a life estate in the two sons, Michael J., Jr., and Joseph E., with the remainder in fee to their children, the plaintiffs in this case. As that was the view the learned trial court took of the case, its judgment ought to be affirmed.

Brace and Marshall, JJ., concur with the writer in this opinion.

SOUTH CAROLINA SUPREME COURT.

J. B. GWYNN, *Respt.*,

v.

CITIZENS' TELEPHONE COMPANY,
Appt.

(.....S. C.....)

1. A telephone company is bound to furnish service on equal terms to all applying for it.
2. That a patron of a telephone company has broken his agreement not to make use of the lines of a rival company gives the former no right to refuse to grant him further service.
3. Damages accruing to a telephone company for breach of contract by a patron not to make use of rival lines may be set up as a counterclaim, in an action to hold it liable for withdrawing its service from him, under a statute permitting to be filed as a counterclaim a cause of action connected with the subject of the principal action.

NOTE.—As to right of telephone company to impose, as condition of extending its facilities to one desiring them, an agreement not to use a rival system, see, in this series, *State ex rel. Gwynn v. Citizens' Teleph. Co.* 55 L. R. A. 139, a case between the same parties as those in the case above, in which a mandamus was sought to compel the furnishing of telephone facilities.

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4. A contract by a patron of a telephone company not to engage service from a rival company is void as contrary to public policy.
5. That a telephone company has not the means to supply service to one applying for it may be shown in mitigation of damages for refusal to comply with its duty in that regard, but not in justification thereof.
6. Belief in the existence of a legal right to refuse telephone service to one applying for it, although erroneous, and refusal to furnish service for the purpose of protecting the rights of the telephone company, will prevent the imposition of punitive damages for such act.

(July 23, 1904.)

A PPEAL by defendant from a judgment of the Common Pleas Circuit Court for Spartanburg County in plaintiff's favor in an action brought to recover damages for alleged wrongful refusal to furnish plaintiff with telephone service. *Reversed.*

The facts are stated in the opinion.

Messrs. Simpson & Bomar, for appellant:

While agreements in general or total restraint of trade are void, agreements in

partial restraint of trade, limited both as to time and territory, and founded on a valuable consideration, are valid.

2 Pom. Eq. Jur. § 934; *Carroll v. Giles*, 30 S. C. 418, 4 L. R. A. 154, 9 S. E. 422; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 35 L. ed. 97, 11 Sup. Ct. Rep. 490.

A tort committed by mistake in the assertion of a supposed right, or without any actual wrong intention, and without such recklessness or negligence as evinces malice or conscious disregard of the rights of others will not warrant the giving of damages for punishment, where the doctrine of such damages prevails.

2 Sutherland, Damages, p. 1093, § 393; Thomas, Neg. p. 476; *Avinger v. South Carolina R. Co.* 29 S. C. 271, 13 Am. St. Rep. 716, 7 S. E. 493; *Kibler v. Southern R. Co.* 62 S. C. 270, 40 S. E. 556; *Fort v. Southern R. Co.* 64 S. C. 423, 42 S. E. 196; 16 Am. & Eng. Enc. Law, pp. 392, 395; *Brasington v. South Bound R. Co.* 62 S. C. 335, 89 Am. St. Rep. 905, 40 S. E. 665; *Pickens v. South Carolina & G. R. Co.* 54 S. C. 507, 32 S. E. 567; *Watts v. South Bound R. Co.* 60 S. C. 75, 38 S. E. 240; *Oliver v. Columbia, N. & L. R. Co.* 65 S. C. 42, 43 S. E. 307.

Messrs. Sanders & DePass, for respondent:

Defendant's claim for damages does not arise out of the same transaction as plaintiff's claim. Plaintiff's cause of action is a refusal to put in and furnish a telephone. Defendant's cause of action is a breach of contract on plaintiff's part.

Simkins v. Columbia & G. R. Co. 20 S. C. 258; *Jenkins v. Bennett*, 40 S. C. 393, 18 S. E. 929; *Humbert v. Brisbane*, 25 S. C. 506; *McKay v. Ohio River R. Co.* 34 W. Va. 65, 9 L. R. A. 132, 26 Am. St. Rep. 913, 11 S. E. 737.

Telegraph companies must have sufficient facilities to transact all business offered to them at all points at which they have offices.

Leavell v. Western U. Teleg. Co. 116 N. C. 211, 27 L. R. A. 843, 47 Am. St. Rep. 798, 21 S. E. 391; *Western U. Teleg. Co. v. Henderson*, 39 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419.

Common carriers must provide sufficient facilities.

Hutchinson, Carr. §§ 292, 293.

A telephone company can only be allowed reasonable time within which to comply with the demand for the use of one of its phones.

State ex rel. Gwynn v. Citizens' Teleph. Co. 61 S. C. 83, 55 L. R. A. 139, 85 Am. St. Rep. 870, 39 S. E. 257; *Avinger v. South* 67 L. R. A.

Carolina R. Co. 29 S. C. 265, 13 Am. St. Rep. 716, 7 S. E. 493; *Doty v. Strong*, 1 Pinney (Wis.) 313, 40 Am. Dec. 773.

Gary, A. J., delivered the opinion of the court:

The complaint alleges that on or about the 8th day of February, 1900, the plaintiff applied to and demanded from the defendant the use of the Citizens' telephone in plaintiff's store in said city, and for proper connections with all of defendant's subscribers, but that the defendant negligently and wilfully failed and refused plaintiff the use of said telephone unless plaintiff would consent to a prohibition against the joint use of the Bell telephone of the Southern Bell Telephone & Telegraph Company, which prohibition plaintiff refused to consent to; that plaintiff was thereby deprived of the use of said telephone, and was cut off from telephonic connection with many of his customers, who had said Citizens' phone only, thereby losing their custom, and was otherwise injured, to the great annoyance, trouble, loss, and damage of plaintiff in the sum of \$2,000. The defendant denied the allegations of negligence and wilfulness, and set up as a defense substantially the allegations which were also pleaded as a counterclaim. The defendant also alleged that at the time demand was made upon it to put in another telephone for the plaintiff its switchboard and lines were so crowded, and there were so many demands upon it, that it could not at that time have complied with plaintiff's demands, even upon the terms upon which the original agreement was made.

The counterclaim was as follows: "For further answer to the complaint herein, and as and for a counterclaim against the plaintiff, the defendant alleges that some time prior to February 8, 1900, the plaintiff, for value received, made and entered into a written contract with this defendant, whereby the plaintiff agreed, in consideration of the low rate charged for the use of defendant's telephone and telephone service, that he would for five years from the date of said contract take and use the telephone and the service of this defendant exclusively in his place of business, and would not during the time of the existence of said contract use any other telephone in connection therewith; that for a time the plaintiff complied with the terms of the said contract, but that shortly before the said 8th of February, 1900, the said plaintiff wilfully, wantonly, and maliciously, and with the intention of causing injury to the defendant, rented and began the use of another telephone in his place of business, in violation of the terms of his said contract, and

continued to rent and use the same, and willfully refused to comply with the terms of said contract,—all of which tended to the disorganization of defendant's business, causing it great annoyance, inconvenience, and loss, and that because and by reason of the said acts and conduct of plaintiff this defendant suffered damage in the sum of \$2,500, and for this sum defendant sets up a counterclaim herein."

The plaintiff moved to strike out the allegations of the answer on the ground that they were irrelevant and redundant, and interposed a demurrer to the counterclaim on the ground that it did not state facts sufficient to constitute a counterclaim. His honor the presiding judge ruled that the allegations set up as a defense should not be struck out, as they contained allegations properly to be considered by the jury in mitigation of damages. He sustained the demurrer to the counterclaim. The jury rendered a verdict in favor of the plaintiff for \$400.

The defendant appealed upon the following exceptions:

"(1) In holding that the portions of defendant's answer referred to in the plaintiff's notice to strike them out did not constitute a defense in this action, in that the defendant was a common carrier, and was bound upon demand to furnish the plaintiff a telephone, and, having failed to do so, was liable for damages therefor; and that the previous failure of the plaintiff to keep his contract constituted no ground for the defendant's failure to furnish him a phone, and no ground in this action to defeat plaintiff's right to damages for such default to the defendant; when he should have held that the defendant, under the Constitution and laws of the state of South Carolina, was not and is not a common carrier; and that it had the right, if plaintiff had failed to keep his contract with the defendant, to refuse further to furnish him one of its telephones.

"(2) In holding that the portion of defendant's answer referred to in the plaintiff's demurrer thereto did not constitute a cause of action as a counterclaim against the plaintiff, and in sustaining the demurrer to that portion of the answer. (a) If the plaintiff had previously made a contract with the defendant, and he had broken his contract, the defendant had a right of action against him for damages therefor. (b) Having such right of action against the plaintiff, the defendant had a right to set it up as a counterclaim in this action, as such cause of action arose out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, and was 67 L. R. A.

connected with the subject of the plaintiff's action.

"(3) In holding that the plaintiff had the right to show by testimony that the defendant threatened to take the telephone out of plaintiff's residence, when there was no allegation in the complaint to which this testimony was responsive, and in not sustaining the defendant's objection to the plaintiff's testimony with reference thereto.

"(4) In holding that the defendant did not have the right to show by the evidence, in justification of its contract with the plaintiff and others for the exclusive use of its telephones, the kind and character of the competition it then had with the Bell Telephone Company, and the financial strength of said company; and in sustaining the plaintiff's objection to the testimony of H. B. Carlisle, one of the directors of the defendant company, with reference to this matter.

"(5) In holding that the defendant did not have the right to show by testimony, in support of the allegation in its answer that it did not have the means to supply telephones to the plaintiff and others then desirous of using them, that other persons besides the plaintiff were unable to get instruments from the defendant at that time for that reason, and in sustaining the plaintiff's objection to the testimony of J. R. Bain tending to show these facts.

"(6) In not sustaining the defendant's motion for a nonsuit on the grounds upon which it was based, to wit: (a) That, so far as compensatory damages were concerned, there was no evidence tending to show that the plaintiff had suffered any damage or loss whatsoever in the matters complained of in the complaint. (b) That, so far as vindictive damages were concerned, there was no evidence tending to show that the defendant had been guilty of any malicious, wilful, or wanton conduct in refusing the use of one of its telephones to the plaintiff. For these reasons the defendant insisted upon its motion for a nonsuit, and insists here that it was error for the circuit judge to refuse it.

"(7) In charging the jury that it was utterly immaterial, so far as actual defenses or justification was concerned, whether the plaintiff, Gwynn, had broken his contract or not, as such conduct upon his part was no justification for the refusal of the defendant to further furnish one of its telephones, but that the defendant was a common carrier, and was bound to furnish such telephones, irrespective of plaintiff's previous conduct; when we submit he should have charged the jury that the defendant was not a common carrier, and had the le-

gal right to furnish its instruments to, or withhold them from, the plaintiff, or any other persons, at its will and pleasure. In this connection, defendant alleges error: (a) In charging plaintiff's first request to charge 'that a telephone company incorporated under the laws of this state for the purpose of transmitting intelligence for the use of the public is a common carrier of intelligence.' (b) And in charging his second request to charge 'that a common carrier of intelligence, such as a telephone company, is bound under the law to furnish a citizen the use of one of its telephones within a reasonable time after the pay for such use is tendered and demand made upon it for such telephone.'

"(8) In charging the jury, as requested by the plaintiff's fifth request to charge, as follows: 'If a telephone company intentionally does an act with an intent to deprive a citizen of the right to use one of its telephones after tender of pay and demand upon it for such use, then such company is guilty of such wilfulness or wantonness as would warrant a verdict against it for vindictive or punitive damages;' the error being: (a) That such instruction was a charge upon the facts, in violation of the Constitution of the state of South Carolina, in that it took away from the jury the question whether the refusal to furnish the telephone in this case was or was not such wilfulness or wantonness as would warrant a verdict for punitive damages, if such refusal was with the intent to deprive the plaintiff of the right to use such telephone. (b) That for the defendant to refuse the use of one of its telephones to the plaintiff under the belief that it had a legal right to do so, and for the sole purpose of protecting its own rights, would not be such wilfulness or wantonness as would warrant a verdict for punitive damages, even though such act on its part was with an intent to deprive the plaintiff of its telephone; that is to say, to exercise its legal right to withhold such telephones from him. Wilfulness and wantonness, which would warrant a verdict for punitive damages, must include some element of intent to deprive another of a right to do him a wrong knowing that he had the right, or knowing that it was a wrong, and must be something more than the mere assertion by one of what is conceived to be his legal right.

"(9) In charging the jury as follows: 'Now, from what I have said, you see that every citizen has a right to the use of a common carrier of intelligence upon showing a willingness to comply with the terms required with everyone else. Such use and privilege must be given him, and, if it is not, he has a cause of action against the

common carrier, in which action he may recover compensatory damages, and, if it is done wilfully and maliciously, then, in addition to compensatory damages, vindictive and punitive damages. If the common carrier has had a financial loss, and cannot carry out its obligations to the public, the public are not concerned whether the corporation is in straits.' Therefore the law says: 'You carry in accordance with the requirements of the law. That is no excuse. You must carry all alike;' and, if it wilfully and maliciously refuses to do so, then it is liable for vindictive damages. If it holds itself out as a common carrier,—exercises the right of a common carrier,—the law says the duty upon it is not whether you are poor, or whether you are rich, or whether your stock is worth 30 cents or \$100. That is not it. The law says that it does not affect the responsibility to the party. As long as they are common carriers, they are responsible for their obligations to carry all alike. If it be in a financial strait, it might come in as mitigation, but not in justification; nor is it a defense. As long as they are exercising the rights of a common carrier, and take obligations upon themselves, benefits and burdens coming together, they hold themselves out to the public, and the law says they are common carriers; therefore persons have a right to consider them common carriers and they must carry as required by the law, fulfilling their obligations just as an ordinary citizen. The same obligations rest upon him to carry out his obligations. It may repel the idea of wilfulness, wantonness, or maliciousness by showing its condition; but so long as it holds itself out as a common carrier it must discharge the obligations of a common carrier, and treat all alike. The error being: (a) This instruction to the jury took away from the jury and utterly destroyed the defendant's defense that at the time the demand was made upon it by the plaintiff for one of its telephones the financial condition of the defendant and the physical condition of its plant was such that the defendant was utterly unable, even if it had been so disposed, to furnish such instrument to the plaintiff. (b) That even if, under the law, the defendant was a common carrier, and was bound to treat all its patrons alike, it had the right, if its financial and physical condition was such to demand it, to refuse the use of the telephone to the plaintiff or any other person; and this instruction to the jury took away from the defendant the right to show that such was its condition, was one of the reasons why the telephone was not furnished to the plaintiff when demanded. (c) The charge quoted was, we submit, in conflict with the deci-

sion of the supreme court in the case of *State ex rel. J. B. Gwynn against Citizens' Telephone Co.*, in which case, under the opinion of the supreme court, the defendant had the right, if it could, to justify its refusal to furnish a telephone by showing that it was unable to do so.

"(10) Because the circuit judge erred in refusing the motion for a new trial on the grounds upon which such motion was based, and in finding and holding in connection with such motion as follows: (a) That after the decision of the supreme court in the case of *State ex rel. J. B. Gwynn against Citizens' Telephone Company* the law in relation to the questions involved in this litigation was settled, and that such decision settled all issues in this action, and deprived the defendant of the right to make any defense thereto other than to show what facts it could in mitigation of plaintiff's damages. (b) That the defendant set up and had no real defense to this action, when he should have held that the defendant had the right to establish, and did establish, by the great preponderance of the evidence, a complete defense thereto in the following respects: That no actual damage whatsoever was suffered by the plaintiff, and therefore the verdict should have been in favor of the defendant as to actual damages. That no wilful or malicious conduct was shown, and therefore the verdict should have been in favor of the defendant as to vindictive damages. That, in addition to all its other defenses, the defendant was utterly unable at the time the demand was made upon it to furnish to the plaintiff the telephone as demanded, and therefore the verdict should have been in favor of the defendant. The appellant submits that the verdict of the jury in respect to these matters of defense was not only against the great weight of the testimony, but was without any evidence to sustain it, and therefore the refusal of the circuit judge to grant a new trial was error of law."

The first exception is disposed of by the case of *State ex rel. Gwynn v. Citizens' Teleph. Co.* 61 S. C. 83, 55 L. R. A. 139, 85 Am. St. Rep. 870, 39 S. E. 257. Permission was granted the appellant to review this case, but this court sees no satisfactory reason for receding from the principles therein announced.

In passing upon the second exception we will first consider whether the counterclaim was obnoxious to § 171 of the Code of 1902, which permits a counterclaim when it arises out of one of the following causes of action: "(1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim or connected with the subject of the 67 L. R. A.

action." The counterclaim unquestionably was connected with the subject-matter of the action, for it was the foundation upon which the defendant based its refusal to allow the plaintiff the further use of the telephone.

We will next consider whether the contract alleged in the counterclaim was void on the ground that it was in restraint of trade and against public policy. The modern doctrine is that contracts between individuals are not void on the ground that they are in restraint of trade, unless the provisions thereof are unreasonable. 24 Am. & Eng. Enc. Law, p. 850. But, as is said in 9 Cyc. Law & Proc. pp. 533, 534: "The reasonableness of contracts in restraint of trade as between the parties is the sole test in those cases only where the public interests are not also involved. Although the contract may be fair and reasonable as between the parties, yet if it is so injurious to the public interest that public policy requires that it should not be enforced it will be held void." In the case of *Foule v. Park*, 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep. 658, the court said: "Public welfare is first considered; and if it be not involved, and the restraint upon one party is not greater than protection to the other requires, the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is or is not unreasonable." The contract alleged in the counterclaim was unreasonable because its tendency was to stifle competition between common carriers and to create a monopoly in favor of the defendant.

The third exception cannot be sustained for the reason that, even waiving the objection that it fails to state in what particulars the testimony was incompetent, and conceding that it was irrelevant, it was not prejudicial to the appellant, as will hereinafter appear.

The fourth exception must be overruled, as the grounds of objection were not stated when the testimony was offered.

We will next consider the fifth exception. The presiding judge ruled that the testimony was competent in mitigation of damages, but not as a justification for the defendant's refusal to put in the telephone. In this there was no error.

The sixth exception cannot be sustained for the reason that there was testimony showing that the plaintiff had sustained actual damages. Under § 186a of the Code the whole case was, therefore, properly submitted to the jury.

The seventh exception has already been disposed of.

The eighth exception must be sustained on both the grounds assigned as error. It was a charge on the facts, because they were susceptible of more than one inference. The charge stated the law erroneously, in that it eliminated the important fact of knowledge on the part of the telephone company of the plaintiff's rights. In the latest edition of *Sutherland on Damages*, vol. 2, p. 1093, § 393, in discussing exemplary damages, it is said: "If a wrong is done wilfully,—that is, if a tort is committed deliberately, recklessly, or by wilful negligence, with a present consciousness of invading another's rights or of exposing him to injury,—an undoubted case is presented for exemplary damages. . . . These damages are allowable only when there is misconduct and malice, or what is equivalent thereto. A tort committed by mistake in the assertion of a supposed right, or without any actual wrong intention, and without such recklessness or negligence as evinces malice or conscious disregard of the rights of others,

will not warrant the giving of damages for punishment where the doctrine of such damage prevails." See also *Kibler v. Southern R. Co.* 62 S. C. 270, 40 S. E. 556, and *Fort v. Southern R. Co.* 64 S. C. 423, 42 S. E. 196.

The questions presented by the ninth exception have already been determined.

All the questions raised by the tenth exception have been considered except the question whether there was any testimony showing actual or punitive damages. While there is testimony showing actual damages, we have failed to discover in the record any testimony from which it could be reasonably inferred that there was a wilful or wanton disregard of the plaintiff's rights by the defendant.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and the case remanded to that court for a new trial.

Jones, J., concurs in the result.

RHODE ISLAND SUPREME COURT.

Annie D. NELSON

v.

NARRAGANSETT ELECTRIC LIGHTING
COMPANY.

James S. NELSON

v.

SAME.

(.....R. I.....)

1. Placing an electric light in close proximity to a trolley wire at a curve is not the proximate cause of an injury to one struck by glass falling from the globe when shattered by a trolley leaving the wire, since failure to keep the trolley on the wire is prima facie negligence, and is the act of a responsible person intervening between the placing of the light and the injury.
2. The court will take judicial notice of the fact that an electric lighting company could not locate lights in the street of a city without authority from the city to do so.
3. The location of an electric light in a street at the place designated by the proper municipal authorities is not wrongful as against pedestrians, so as to

NOTE.—On the question of proximate cause as affected by intervening agency, see also cases in notes to *Smith v. County Court*, 8 L. R. A. 82, and *Smithwick v. Hall & U. Co.* 12 L. R. A. 279; also the later cases in this series of *Pennsylvania R. Co. v. Hamill*, 24 L. R. A. 531; *Goodlander Mill Co. v. Standard Oil Co.* 27 L. R. A. 583; *Stone v. Boston & A. R. Co.* 41 L. R. A. 794; *Southern R. Co. v. Webb*, 59 L. R. A. 109; and *Cole v. German Sav. & L. Soc.* 63 L. R. A. 416.
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render its owner liable to such a person injured by glass falling from the globe when shattered by a trolley pole leaving the wire.

(June 23, 1904.)

ON DEMURRER to the declarations in actions brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Sustained.*

The facts are stated in the opinion.

Messrs. Walter B. Vincent and Ralph T. Barnefield, for defendant, in support of demurrers:

The negligence of a responsible agent, intervening between the defendant's negligence and the injury suffered, breaks the causal connection between the two.

Mahogany v. Ward, 16 R. I. 479, 27 Am. St. Rep. 753, 17 Atl. 860; *Rowell v. Lowell*, 7 Gray, 100, 66 Am. Dec. 464; *Tutein v. Hurley*, 98 Mass. 211, 93 Am. Dec. 154; *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 17, 10 Am. Rep. 205; *Missouri P. R. Co. v. Columbia*, 65 Kan. 390, 58 L. R. A. 399, 69 Pac. 338; *Wharton, Neg.* § 134.

The negligence of the railroad company in so running its car around the curve as to cause the trolley pole to fly from the overhead wire was not such an intervening act as the defendant was bound to anticipate.

Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L. R. A. 794, 51 N. E. 1; *Tutein v. Hurley*, 98 Mass. 211, 93 Am. Dec. 154.

It cannot be said that the defendant, in

locating its lamp, bearing in mind its duty to light the public streets as well as its duty to regard the safety of travelers, acted unreasonably.

Roberts v. Wisconsin Teleph. Co. 77 Wis. 589, 20 Am. St. Rep. 143, 46 N. W. 800; *Sheffield v. Central U. Teleph. Co.* 36 Fed. 164; *Allen v. Atlantic & P. Teleg. Co.* 21 Hun, 22; *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 391; *Keasbey*, *Electric Wires*, 2d ed. §§ 224, 236.

Messrs. James A. Williams, David S. Baker, and Lewis A. Waterman for plaintiffs, *contra*.

Tillinghast, J., delivered the opinion of the court:

These cases are brought to recover damages for injuries alleged to have been sustained by reason of the defendant's negligence in maintaining a certain electric light, surrounded by a glass globe, in such close proximity to an overhead trolley wire of the Union Railroad Company that said globe was broken by the trolley pole of the car slipping from the wire as it was going around a curve in the street. The plaintiff James S. Nelson, who is the husband of the plaintiff Annie D. Nelson, sues to recover damages for loss of services of his wife and for doctors' bills, etc., in consequence of the injuries which his wife sustained by reason of the accident in question, and his wife sues to recover for the personal injuries which she sustained by reason of the falling upon her of the glass globe which was broken, as aforesaid. The cases were heard together, and are before us on the defendant's demurrers to the plaintiffs' declarations.

The declarations allege, in substance, that the defendant was the owner of certain electric lighting apparatus, including poles, wires, and lamps, for the purpose of lighting the streets of Providence, and that the defendant negligently hung, or permitted to be hung, a certain electric light, surrounded by a glass globe, in such close proximity to an overhead trolley wire of the Union Railroad Company, and so negligently allowed the same to be and remain in such close proximity to the overhead trolley wire at the corner of Dorrance and Weybosset streets, that the glass globe was broken by the pole on the trolley car slipping from the wire as it was going around a curve at the corner of said streets, and striking said globe, thereby causing it to fall upon the plaintiff Annie, who was passing along the street in that vicinity, in consequence of which she suffered injuries, while in the exercise of due care on her part.

The grounds of the demurrers are, first, 67 L. R. A.

that it appears from the declarations that the alleged negligence was not the proximate cause of the injury; and, second, that it appears that the defendant was not negligent.

The position taken by plaintiffs' counsel in support of the declarations, briefly stated, is this: Two concurring causes, both in their nature proximate, produced the injury complained of. One of these causes was the placing and maintaining, by the defendant, of the lamp referred to in such close proximity to the trolley wire that the trolley pole was apt to strike it in case the pole slipped from the wire and the other cause was the happening of just this event. In view of this coincidence he contends that the case falls within the rule laid down in *Hampson v. Taylor*, 15 R. I. 83, 8 Atl. 331, 23 Atl. 732, where it was held that, where two causes combined to produce the injury, both in their nature proximate, the one being the defect in the highway, and the other some occurrence for which neither party was responsible, the corporation was liable, provided the injury would not have been sustained but for the defect in the highway. In that case, however, it is to be noted that one of the concurring causes was a natural cause, for which no person was responsible. And the question therefore arises whether the same can be said of one of the causes here, namely, the slipping of the trolley pole from the wire, which certainly was the proximate cause in point of time, at any rate, of the accident in question. Counsel says that the law in the case referred to is applicable to the case at bar. "The slipping of the trolley pole from the wire," he says, "was a pure accident, for which no person was responsible; and hence the proximate cause of the accident was the negligence of the defendant in locating its light." If this position were tenable, the case would seem to fall within the rule above stated. But we do not think it is. In the first place, we do not think it can be said that the slipping of the trolley pole from the wire was "a pure accident." An accident, according to the primary definition thereof as given in Webster's Unabridged Dictionary, is: "An event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected." If, as stated by plaintiff's counsel in his brief, "it is a well-known fact that trolley poles jump the wire from time to time from various causes, and that this is particularly true in going around curves, as in the case at bar," we fail to see how it can be logically claimed that such an event is "a pure accident" under the definition above given;

for a thing which happens so often as to become a well-known fact and a matter of common knowledge, as the fact referred to doubtless is, can hardly be called a pure accident. Again, if it was a pure accident, the defendant was not called upon to anticipate it. But, even conceding that the slipping of the trolley pole from the wire was a pure accident, as argued, yet it certainly cannot be said, as a matter of law, at any rate, that it was an accident for which no person was responsible; for the trolley pole was a mechanical appliance connected with the running of an electric car which was being operated by the Union Railroad Company, an undoubtedly responsible person. If this trolley pole had not slipped from the wire, the accident would not have happened. And as it was *prima facie* negligence on the part of the street railway company in not keeping it on the wire where it belonged, or at any rate in not preventing it from coming in contact with said electric light globe, such negligence, being the independent act of a responsible person, and intervening between the negligence of the defendant (if it was negligent in the premises) and the happening of the accident, broke the causal connection between the two, and hence became and was the proximate cause of the accident. See *Mahogany v. Ward*, 16 R. I. 479, 27 Am. St. Rep. 753, 17 Atl. 860.

As well argued by counsel for defendant, the placing of the globe in the position where it was, and maintaining it in that position, formed only the condition under which the accident happened, to which, in order for the globe to break, had to be super-added the negligence of the railroad company in so running its car around the curve as to cause the trolley pole to fly from the overhead wire, and cause the accident. Placing and maintaining the globe in the position in which it was at the time of the accident were entirely harmless acts in themselves, and would not have resulted in accident except for the intervention of the force which was brought to bear upon said globe by another party. And hence we think the act of the other party, being *prima facie* a negligent act, was the proximate cause of the accident.

But we think there is another potent reason why the declarations fail to state a case, and it is this: It appears that the lamp in question was a part of an electric lighting apparatus used for the purpose of lighting the streets of the city of Providence. And, this being so, it is certainly to be presumed that the poles, wires, and electric lights were located under the direction and with the authority of the city government; for the court will take judicial cognizance of the fact that the defendant could not erect and

maintain such structures without authority from the city so to do. Under this assumption the globe in question was rightfully in the place which it occupied when it was struck and broken by said trolley pole. And, being in the place which was presumably designated for it to occupy as aforesaid, it was rightfully there. And, the original act relied on by plaintiffs as being wrongful (and it must have been wrongful in order to render the defendant liable) not being so, the plaintiffs' claim that it was the proximate cause, or one of the proximate causes, of the accident, clearly fails, and for the simple reason that, if the defendant was not guilty of a wrongful act in maintaining said globe in said position, no liability can attach to it in the premises; for, in the absence of some wrongful act on the part of the defendant, no cause of action can arise.

In this connection, it is pertinent to remark that, for aught which appears, the defendant may have obtained the right to locate and maintain the lamp in question at that place prior to the time when the trolley wire referred to was erected; and, if so, it would seem that it was there by priority of right. But, however this may be, it was presumably there, at the time of the accident, by lawful authority, as already suggested, and hence we do not think the defendant can be charged with negligence in maintaining it there.

Demurrers sustained, and cases remanded for further proceedings.

PETITION OF Emeline A. WALDRON *et al.*

(.....R. I.....)

A residuary devise to testator's widow will not, as against his children, pass title to a burial lot upon which members of the testator's family are buried.

(March 30, 1904.)

NOTE.—Character of estate or property of owner in burial lot.

- I. *Introductory*, 118.
- II. *Easement*, 119.
- III. *License*, 120.
- IV. *Devise*, 121.
- V. *Cemetery dedicated to a class*, 122.
- VI. *When held in common*, 122.
- VII. *Right to mortgage*, 122.
- VIII. *Power of cemetery authorities*, 123.
- IX. *Trespass on lot owner's possession*, 124.
- X. *Ejectment*, 125.
- XI. *Effect upon, of legislative act or municipal ordinance closing cemetery*, 125.

I. *Introductory.*

It may be said that the exact question de-

PETITION for the opinion of the court as to whether the residuary clause in the will of Horatio L. Waldron passed title to a burial lot. *Negative answer returned.*

The facts are stated in the opinion.

Mr. A. B. Patton, for Emeline C. Waldron:

The burial lot in question is part of the property devised to Emeline C. Waldron in the residuary clause of her husband's will.

The corporation holds the title in fee to the cemetery-corporation lands, and, upon a sale of the lot, that fee is conveyed to the owner and may be conveyed and devised by him. If a burial has taken place, the lot is as much real estate after, as before, the burial.

cided in WALDRON'S PETITION, *vis.*, that a residuary devise to testator's widow will not, as against his children, pass title to a burial lot upon which members of the testator's family are buried, is one of first impression, although, as will be seen, one, and possibly two, cases in the same court have leaned in that direction. In arriving at its conclusion, the court in WALDRON'S PETITION reasoned from two standpoints: First, from the character of the property right of the owner of a burial lot, and, second, from the right to the control of the corpse, as between a widow and next of kin, and the consequent duty in the disposition of the body of a deceased person incumbent upon the person entitled to such control. The latter subject was thoroughly discussed in a *note* to *Larson v. Chase*, 14 L. R. A. 85, and the province of the present *note* will be an endeavor to state what would appear to be the law of the different jurisdictions, as to the nature or character of the estate or property which the owner of a burial lot in a public burying ground takes therein by his grant, lease, or certificate, or by the fact that he has purchased the same. That such estate or property is not of the character, even though conveyed by a deed, which on its face grants a fee simple absolute, as would be the case of other property, seems to be agreed, with possibly one or two exceptions, which will be noticed in the cases which follow. The qualified title or estate which it is generally conceded only passes by a conveyance of any sort of a lot in a public cemetery or burial ground has been variously described in the decisions on the subject. By some courts it has been designated as an easement; by others as a license or privilege; and by still others, not so precise in their language of description of the character of the estate, as an easement or license,—an easement or privilege.

In several of the most prominent cases on the subject it has been stated that a grant of a lot in a cemetery is said to be analogous to a grant of a pew in a church or meeting house, and that the right of burial in a public burying ground in some respects resembles the right of pew tenancy. *Jones v. Towne*, 58 N. H. 482, 42 Am. Rep. 602; *Page v. Symonds*, 63 N. H. 17, 56 Am. Rep. 481; *Sohler v. Trinity Church*, 109 Mass. 1; *Kincald's Appeal*, 66 Pa. 411, 5 Am. Rep. 377.

Nearly all of the cases seem pregnant with the theory that, upon the sale and purchase of 67 L. R. A.

Mr. Nathan B. Lewis, for Hattie L. Peirce:

The law puts upon the next of kin the duty of burying the remains and caring for them after burial.

4 Bradf. 503, Appx.

Rights of burial in churchyards, although acquired by deed of the particular lot, are only easements in land belonging to the religious society which owns the church and churchyard.

2 Am. & Eng. Enc. Law, p. 49; Washb. Real Prop. 6th ed. § 44; 6 Cyc. Law & Proc. p. 717; *Root v. Odd Fellows' Cemetery Co.* 148 Pa. 494, 24 Atl. 71; *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 503; *Thompson v. Hickey*, 50 How. Pr. 434; *Lewis v. Walker*, 165 Pa. 30, 30 Atl. 500.

a burial lot in a public burying ground, the conveyance, however positive in its terms, from the very nature and character of the transaction and of the thing bought and sold, contains an implied covenant on the part of the purchaser that when the public burial place shall, because of necessity of any kind, become unfit or dangerous to be used for that purpose, his estate or property in such burial lot will be considered at an end, and the remains of persons buried thereon may and shall be removed to another place. While it has not been discovered that the proposition has ever been intimated, it is suggested, whether all the differences of designation of the character of the estate of such a purchaser of a burial lot might not be consolidated or reconciled by designating the same a base or qualified fee.

In *Re Ely*, 1 N. Y. Legal Obs. 181, a vault in a cemetery lot was held to be personal property, and, under an act of the legislature, not liable to be inventoried as an asset of the deceased owner, nor liable for his debts.

II. Easement.

These cases hold that the estate is an easement.

A purchaser of a lot from a cemetery association holds it by a peculiar title. He acquires no absolute interest in, or dominion over, such lot, but merely a qualified and usufructuary right for the purposes to which the lots are devoted and for which they are set apart by the company. Their holding is in the nature of an easement, with the exclusive right to bury in the lots, subject to the general proprietorship and control of the association, in whom the legal title is lodged, and all purchasers from such companies are affected with notice of the limitations placed upon their holdings by the law of the land, and the charter, constitution, and by-laws of the company made in pursuance thereof. *Roanoke Cemetery Co. v. Goodwin*, 101 Va. 605, 44 S. E. 760.

In *Richards v. Northwest. Protestant Dutch Church*, 32 Barb. 42, it was said that the right of burial, when confined to a churchyard as distinguished from a separate, independent cemetery, although conveyed with a common formula, "heirs and assigns forever," must stand upon the same footing as the right of public worship in a particular pew of the church; and, although the deed purported to carry a certain specified piece of ground of certain dimensions, it de-

The title which Mr. Waldron held in this lot was not of such a character as to be considered any part of his estate for the purposes of administration, and could not be included in a devise of all the residue of his estate, without specific language showing an intent that it should so pass.

The law gives the control and custody of the dead body to the next of kin, and it follows, by analogy, that, in order decently to exercise the duty which the law thus imposes, the next of kin must necessarily have the control of the shroud, the casket, and even the earth in which such body is interred.

Hackett v. Hackett, 18 R. I. 155, 19 L. R. A. 558, 49 Am. St. Rep. 762, 26 Atl. 42; *Pierce v. Swan Point Cemetery*, 10 R. I.

scribed also the premises as belonging to a church corporation, as adjacent to a church edifice, as in a churchyard, and to be used exclusively as a place of interment, it was held that the one party in executing, and the other in accepting, the conveyance, must have considered it as the grant of a mere easement, and not of an ordinary absolute estate in fee.

The title to an easement of a burial lot may be acquired by prescription, where adverse possession for that purpose is held for the statutory period; and such adverse possession will be deemed to have been held by its use for a burial place, with or without inclosure, as long as gravestones stand marking the place as burial ground. *Hook v. Joyce*, 94 Ky. 450, 21 L. R. A. 96, 22 S. W. 651. The court, in the discussion of the question, treated the title which had been acquired by prescription and adverse possession as that of an easement.

The sale of lots in a public cemetery does not pass to the grantees the title in fee to such lots, but thereby assures to the grantee a license or easement therein for burial purposes, so long as the cemetery shall be used for cemetery purposes. Such license or easement becomes the property of the family of the original grantee of the lot upon his or her decease, but the fee of the lots in such cases remains in trustees of the cemetery; but, while this is so, the trustees of the cemetery cannot divest the owner of such license or easement of his right to use the lot for burial purposes; and, if they do so, and sell the lot, or any portion thereof, to another, who takes possession of the portion so purchased, an action in equity will lie to compel the removal of any burials thus unlawfully made thereon, and the restoration of the lot to the original purchaser. *McWhirter v. Newell*, 200 Ill. 583, 66 N. E. 345.

In *Gardner v. Swan Point Cemetery*, 20 R. I. 646, 78 Am. St. Rep. 897, 40 Atl. 871, which was a case in which the real question was as to the right of disposition of the remains of a decedent, the court, in alluding to the subject under consideration said that in the cases of churchyards and cemeteries it had been held that, though a deed may run to a grantee, his heirs and assigns, he takes only an easement or right of burial, rather than an absolute title.

III. License.

In other cases courts have refused to dignify the right of the purchaser of a burial lot therein 67 L. R. A.

227, 14 Am. Rep. 667; *Wynkoop v. Wynkoop*, 42 Pa. 293, 82 Am. Dec. 506; *Snyder v. Snyder*, 60 How. Pr. 368; *Mitchell v. Thorne*, 134 N. Y. 536, 30 Am. St. Rep. 699, 32 N. E. 10; *Derby v. Derby*, 4 R. I. 414; *Dickens v. Cave Hill Cemetery Co.* 93 Ky. 385, 20 S. W. 282; *Gardner v. Swan Point Cemetery*, 20 R. I. 646, 78 Am. St. Rep. 897, 40 Atl. 871.

Stiness, Ch. J., delivered the opinion of the court:

Horatio L. Waldron was the owner of a burial lot in Swan Point Cemetery. He died in 1901, leaving a will, in which Emeline A. Waldron, his widow, was his residuary legatee. The will made no mention of the burial lot, and the question is whether

as even an easement, but hold that, although a right exclusive in and to him, it is, nevertheless, a mere license or privilege.

In *Kincald's Appeal*, 66 Pa. 411, 5 Am. Rep. 377, a case which has probably been cited more frequently than any other, it was held that where a certificate stated that the subscriber, in consideration of an amount paid by him, was entitled to "two burying lots in the burying ground of said church," to have and to hold the said lots for the use and purpose, and subject to the conditions and regulations, mentioned in the deed of trust to the trustees of the church; and the deed to the trustees expressed no trust,—the certificate was no evidence of a grant to the lot holders of any interest or title in the soil, but was the grant of a mere license or privilege to make interments in the lots described, exclusively of others, as long as the ground should remain "the burying ground of the church;" and that whenever, by lawful authority, it should cease to be a burying ground, the right of the certificate holder and his property would cease. That the lot holder purchased a license—nothing more—irrevocable as long as the place continued a burying ground, but giving no title to the soil. That while the license continued he could, perhaps, bring trespass or case for any invasion or disturbance of it, whether by the grantors or by strangers; but that if, in the course of time, it should become necessary to vacate the ground as a burying ground, all that he could claim, either in law or in equity, would be that he should have due notice and the opportunity afforded to him of removing the bodies and monuments to some other place of his own selection, or that, on his failing to do so, such removal should be made by others; and that he accepted the grant or license subject to this necessary condition. The court approved the doctrine laid down in *Windt v. German Reformed Church*, 4 Sandf. Ch. 471, and in *Richards v. Northwest Protestant Dutch Church*, 32 Barb. 42.

Approved and followed in *Craig v. First Presby. Church*, 88 Pa. 42, 32 Am. Rep. 417.

In *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 503, which was a proceeding on the part of the cemetery association to enjoin the assessment of its property by the city, the position was taken by the cemetery company that it, as a corporation, was not liable to be assessed for municipal purposes, and that, if any assessment could be permitted, it must be against the individual lot

it passed to the widow under the residuary clause, or to his daughter as his heir at law.

The Proprietors of the Swan Point Cemetery is a corporation for the purpose of maintaining the cemetery grounds, which held title to the land in fee simple. It conveyed a lot by deed to Horatio L. Waldron, his heirs and assigns, limiting the use to sepulture of the dead, and to the rules of the corporation. Two previous wives and a child of Mr. Waldron were buried in the lot before his death.

Similar conditions existed in *Gardner v. Swan Point Cemetery*, 20 R. I. 646, 78 Am. St. Rep. 897, 40 Atl. 871, where a widow claimed title to a burial lot as residuary legatee. The court said: "In the cases of churchyards and cemeteries, it has been held

that, though a deed may run to a grantee, his heirs and assignees, he takes only an easement or right of burial, rather than an absolute title. [Citing cases.] So long as the land is used for burial purposes, he cannot exercise the same rights of ownership as in other real estate." The court did not decide the question of title in that case. The question was not one of title to the lot, but of a right to change the place of a body already buried, as between a widow and the next of kin of the testator, to whom she had conveyed the lot. Cases bearing upon title were cited to show how the right of control of the body would devolve, as a general rule.

A question of title came before this court in *Derby v. Derby*, 4 R. I. 414. In that case the executor was empowered to sell all the

owners. In affirming a judgment of the general term reversing a judgment at special term which held such assessment void, the court of appeals said that this theory could not be maintained, as the effect of the conveyance from the corporation to its individual lot owners was no more than to confer upon the holder of a lot a right of use for the purpose of interment, and that no such estate was granted as made him an owner in such sense as to exclude the general proprietorship of the association. That the association remained the owner in general, and held that relation to the public and to the government, while subject to the right of the individual, exclusive of any other person, to bury upon the subdivided plat assigned to him.

Where a cemetery was acquired and controlled by a corporation under statutory authority, and one in his lifetime, upon the payment of \$10, had received from an officer of the corporation a receipt for that amount as being the amount of purchase money of a grave 2 feet by 8 in the cemetery, with privilege to erect a head stone, and the wife of the purchaser had been buried in such space, it was held that the personal representative of the purchaser after the death of the latter could not have the mandatory process of the court to compel the interment of his intestate, as the right acquired under the agreement was a license only, and revocable. *McGuire v. St. Patrick's Cathedral*, 54 Hun, 207, 7 N. Y. Supp. 345.

The right of burial is not an absolute right of property, but a privilege or license, to be enjoyed so long as the place continues to be used as a burial ground, subject to municipal regulation and control, and legally revocable whenever the public necessity requires. It is a right of limited use for purposes of interment, which gives no title to the land. *Page v. Symonds*, 63 N. H. 17, 56 Am. Rep. 481.

Where a sale had been had for a former cemetery owned by a church, and the proceeds thereof had been expended in the purchase of new ground, which was conveyed to the church in fee and without any declaration of use or trust, but the church corporation dedicated the ground thus acquired to the purposes of the burial of the dead, the ground will be deemed to have been purchased for that purpose alone. Thereafter to those purchasing the right of burial therein a certificate was issued, whereby it was certified that the party to whom it was issued was the proprietor of a certain designated

lot in the cemetery, and that such lot was granted and conveyed by the church to the party, his heirs and assigns, forever, subject to the regulations of the trustees of the church. This certificate was neither under the seal of the corporation, nor acknowledged, nor recorded; but was simply signed by the chairman of the trustees, and attested by the register. It was held that the certificate conferred no title or estate in the soil; nor could it operate as a grant of an easement, because it was not under seal, nor was it acknowledged or recorded, so as to be effective to convey such an interest, but was a mere license or privilege to make interments in the lot described exclusively of others, so long as the ground remained a burying ground or cemetery, and that whenever, therefore, by lawful authority, the grounds ceased to be a place of burial, the lot holder's right and privilege ceased, except for the purpose of removing the remains previously buried. *Partridge v. First Independent Church*, 39 Md. 631; *Rayner v. Nugent*, 60 Md. 515; *Catholic Cathedral Church v. Manning*, 72 Md. 116, 19 Atl. 599.

One who buys the privilege of burying his dead kinsmen or friends in a cemetery acquires no general right of property. He acquires only the right to bury the dead, for he may not use the ground for any other purpose than such as is connected with the right of sepulture. Beyond this his title does not extend. He does not acquire, in the strict sense, an ownership of the ground; all that he does acquire is a right to use the ground as a burial place. *Dwenger v. Geary*, 113 Ind. 106, 14 N. E. 903.

IV. Devise.

Where an act of the legislature amending the charter of a cemetery company provided that the owners of lots should not sell the privilege of burying in their lots without the previous written consent of the company, but that they might by last will and testament, or by writing directed to the company, signed by such owners and attested by two witnesses, determine who should control the right of burial in their lots after their death; and providing, further, that, in case no such direction was made, the right of burial in any of the lots of the cemetery should go and descend to the lineal descendants of the joint owners thereof; and the lot owner by his last will and testament, instead of determining who should control such right of burial, devised his lot to his daughter; and thereafter

real estate to pay pecuniary and residuary legacies, and the question arose whether he should sell a burial lot in a cemetery, where the testator's first wife was buried. The court said: "This lot was purchased by the testator for a burial place for his family. That he should deliberately intend that it should be sold and go into the hands of strangers, it is difficult to believe, without the most express direction. It is the more difficult in this case, as within it are deposited the remains of his former wife, and could he intend that those remains should be disturbed? He had devoted this lot to pious and charitable uses, as a place of burial for the members of his own family: Did he mean to revoke it? . . . It could not have been in the contemplation of the testator that this lot should be sold out of

his family, nor could he have contemplated it as property in any such sense as to fall within the power given to the executor; and, without an express direction to sell this particular lot, we think we shall not be warranted in advising the executor to sell it."

These remarks apply with equal force to the case at bar. Although this devise was to his widow, yet, as there were no children of her marriage, the lot, if devised, would go out of his family to her heirs. His living daughter would have no right to be buried in the family lot. It seems improbable that he should have intended such a result, or that he meant to devise to his widow and her heirs a lot which contained the remains of his two previous wives and his children.

It is also improbable that one has in

the devisee sought permission from the company to sell a portion of the same, which was refused upon the ground that the devisee did not acquire the exclusive right to the lot, but that the descendants of the son of the original owner had a joint right to the lot for burial purposes,—it was held that a mandamus would not lie to compel the company to give such consent. *Dickens v. Cave Hill Cemetery Co.* 93 Ky. 385, 20 S. W. 282.

A cemetery lot, being regarded only as a place of interment of the dead, will not be deemed to pass by a provision in a will giving a power of sale to the executor of all the property of the testator for the payment of his debts. *Derby v. Derby*, 4 R. I. 414.

This is probably the nearest approach to the decision in *WALDRON'S PERMITTANCE*, that a burial lot will not pass by a residuary devise.

V. Cemetery dedicated to a class.

Where in a deed of a burial lot the privilege of burial secured is not a general one, but, by the express words of the deed by which the original grounds were set apart for a cemetery to the religious association, its use for a burial place was restricted to persons of a certain religious faith, there is in such a deed a clear and positive limitation to a class, and, where the courts cannot be in doubt as to the class intended by the parties to the deed, the lot owner will not be permitted to bury even his own son, where the latter is shown to be outside of the limited class. *Dwenger v. Geary*, 13 Ind. 106, 14 N. E. 903.

In such case the lot owner acquires his rights as a member of a particular religious class in a cemetery set apart by a member of that class to that class, and he has not the slightest claim, in justice or equity, to disregard the same, and bury in the cemetery one whom the laws of the church and the usage of the owners and rulers of the cemetery declare shall not lie there.

VI. When held in common.

A deed from a cemetery company to four individuals of the same family conveys a fee-simple title of one undivided fourth interest to each, with the use of the lot limited solely for burial purposes by the act incorporating the cemetery company. In such case no one mem-

ber has a right to permit the interment of a stranger in the lot. *Lewis v. Walker*, 165 Pa. 30, 30 Atl. 500.

In an action by one of four heirs at law, who were tenants in common of a burial lot in the cemetery, it was held that, if the cemetery was governed by the provisions of the statute of Massachusetts, the possession, care, and control of the lot were not in the plaintiff alone, but were in common in the four heirs of whom she was one, and the statute provided the course to be followed in case the four did not agree as to the control of the lot. And that if, on the other hand, the lot was not governed by the statute, the plaintiff and the defendants were merely tenants in common, and, the plaintiff having placed upon the lot a granite monument, such act was an exclusive appropriation by the plaintiff of a part of the land to her own use which the other tenants in common might treat her as an ouster and remove the structure from the common land, and a bill to prevent them from so doing showed no right to place or keep the monument on the lot; and a demurrer thereto was sustained. *Capen v. Leach*, 182 Mass. 175, 65 N. E. 63.

VII. Right to mortgage.

In *Lautz v. Buckingham*, 4 Lans. 484, which was an action for the foreclosure of a mortgage upon a cemetery lot, it was held that, where the defendant had conveyed to the plaintiff a plot of ground in a cemetery with the privilege of interment, and the plaintiff had executed an instrument in the nature of a defeasance, containing an agreement to reconvey upon certain conditions, such a transaction was practically a mortgage, and that strict foreclosure of the same would be decreed. The case is more fully reported in 11 Abb. Pr. N. S. 64, where the opinion of the court at special term is given, in which the court said that, regarding it in the light of a mortgage security, he thought it ought not to be sustained as it was against good morals, and therefore against the policy of the law, to encourage such instruments. That, in providing that such a lot or plot should not be liable to be sold on execution, the legislature had substantially declared against such policy, as a decree of foreclosure is an equitable execution, and no distinction is made in the statute between such and any other executions. It ap-

mind a burial lot in a residuary devise. Men are not likely to inventory it among their assets, or to regard it as property to be passed by a will. It is essentially a family heritage.

It has been held, on grounds of public policy, that a burial lot, where bodies have been buried, cannot be mortgaged for debts (*Thompson v. Hickey*, 50 How. Pr. 434), and that a deed of it carries only a right to use it for burial purposes (*Buffalo City Cemetery v. Buffalo*, 46 N. Y. 503). The charter of the cemetery provides that the land shall not be taxed, and a recent amendment to the charter also provides that it shall not pass by will except to the corporation.

While we do not mean to say that a burial lot is not property, yet all of these limita-

tions tend to show that it has been shorn of so many of the ordinary attributes of property as to raise the presumption that it is not intended to be passed under a general devise in which it is not specially mentioned. A strong reason for this is found in the right to the control of the corpse, as between a widow and next of kin, as shown in *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667, and *Hackett v. Hackett*, 18 R. I. 155, 19 L. R. A. 558, 49 Am. St. Rep. 762, 26 Atl. 42. The right of custody of the remains, and the right of property in the burial lot, should go together, where it is possible. Following the doctrine of *Derby v. Derby*, 4 R. I. 414, and the implied approval of it in *Gardner v. Swan Point Cemetery*, 20 R. I. 646, 78 Am. St. Rep. 897, 40 Atl. 871, a burial lot does not pass under

appeared as a fact in the case that no interment had been made in the lot at the time the mortgage was given, and this fact is alluded to in *Thompson v. Hickey*, 50 How. Pr. 434, as a reason why a distinction should be made between such a case and the mortgage of a cemetery lot in which there had been burials.

And this position was approbated by the general term in the first department in *Schroder v. Wanzor*, 36 Hun, 423.

VIII. Power of cemetery authorities.

Where one had purchased a lot in a cemetery without any restriction on his right of sepulture, the managers of the cemetery company had no power afterwards to abridge such right by any unreasonable limitation thereon; and, where the right of interment of another person was ordered by such purchaser, and was refused solely on the ground that the body was that of a colored man, it was held that the right of interment would be enforced by mandamus. *Com. ex rel. Bolleau v. Mt. Moriah Cemetery Asso.* 10 Phila. 385, Affirmed in 81 Pa. 235, 22 Am. Rep. 743.

Where a provision in a deed to a cemetery lot passed the title in fee simple to the grantee for burial purposes, on certain conditions annexed to the instrument, one of which was that "no vault shall be built entirely or partially above ground without permission of the company;" and the managers of the cemetery corporation had uniformly allowed lot owners to erect vaults, they have no power arbitrarily to deny the same right to the grantee in such deed; as they have no power to make or enforce a rule which would confer a right upon one lot owner in regard to the improvement of his property, and deny the same right to another lot owner. *Rosehill Cemetery Co. v. Hopkinson*, 114 Ill. 209, 20 N. E. 685.

Where one had purchased a family grave in perpetuity with no formal grant, but the only evidence was a receipt for the purchase money of the same; such an one was held to be entitled to an injunction to restrain those occupying the position of trustees of the parish from interfering with the graves. *Moreland v. Richardson*, 22 Beav. 596.

The by-laws of a cemetery corporation provided that the company should be composed of representatives of lodges of a certain order or 67 L. R. A.

society in good standing, who should subscribe for not less than a certain number of lots in the cemetery, and pay a certain sum therefor, and that every such lodge becoming a member of the company should be entitled to a lodge lot in the cemetery in which to inter the members of such lodge, etc. A lodge in good standing had taken the number of lots, and had assigned to it its lodge lot, and thereafter the city directed the opening of certain streets through the grounds of the cemetery. The cemetery company, through its trustees, entered into an arrangement whereby an exchange of property was effected for the purpose of squaring the lines of the lots and to avoid the angles resulting from the opening of the streets. The lodge before mentioned was represented by its trustee in the board of trustees, and he there objected to the proposed changes, and voted against them. The cemetery company made a new avenue immediately upon and across the lot of ground which had been conveyed to the plaintiffs, which obliterated the inclosure and destroyed the marks where the interments had been made. This was done against the protest and objection of the representative of the subordinate lodge mentioned, who refused to select a new lot which was offered, claiming their right to retain the lot which they had paid for, and which had ever since been in their undisputed possession, and it was held that the action of the cemetery company was within its chartered rights. *Root v. Odd Fellows Cemetery Co.* 145 Pa. 494, 24 Atl. 71.

In *People ex rel. Dwyer v. Hogan*, 91 N. Y. Supp. 715, the relator, a cemetery superintendent, had been convicted of permitting the body of a child to be interred in a cemetery lot owned by a certain person without the consent of the owner. It appeared that the record title of the lot was in the father of the child thus buried, and he thus appeared as the sole owner of the lot in which he demanded that his child should be buried. Two children were already buried in that lot, claimed by him to have been his children. Nothing was suggested to the relator of the right of the person having such record title to have the burial upon that lot, and he had no information that any transfer was claimed to have been made to the person claiming to be the owner, and there was no rule governing the conduct of the cemetery which required any specific evidence of the right to burial in any location.

a general residuary devise, but it descends to the heirs as intestate property. It is a family burial lot. It is that fact alone which gives a peculiar limitation to its tenure. The heir takes it subject to all the conditions for which the ancestor held it. A sort of trust attaches to the land for the benefit of the family. Neither the widow nor the child can be excluded from it for want of title, yet such a result might follow if the tenure was like that of other real estate. Children could exclude a widow, or a widow could exclude children, by virtue of

ownership of the land. The view, therefore, taken in *Derby v. Derby*, 4 R. I. 414, was founded in sound reason and policy, and it has been regarded as the law in this state for a long time. It did not quite touch the point involved here, because the question was whether the lot should be sold to pay debts or legacies. Still we do not hesitate to follow its doctrine, and accordingly our opinion is that the burial lot did not pass by the residuary clause of the will of Horatio L. Waldron, but descended to his daughter, Hattie L. Peirce.

The conviction and dismissal were reversed and the reator restored, the court holding that he could have done nothing else than to have granted the right claimed by the record holder of the lot.

IX. *Trespass on lot owner's possession.*

While it is generally conceded that the title, estate, property, or right which the purchaser of a lot in a public cemetery or burial ground takes therein is thus qualified or limited, yet, when he has thus acquired possession or the right thereto such possession is exclusive in him so long as the cemetery is lawfully used for burial purposes. And so positive is that right that he may maintain trespass *quare clausum* against anyone unlawfully interfering with the same, even the officers and servants of the cemetery company.

One who had entered into possession of a cemetery lot, inclosed it by a fence, and planted trees thereon, and, after the fence was removed, had cared for and attended to the lot, and been in possession of the same, claiming it as a family burial lot, even though he has no conveyance of the same or paper title thereto, has such a right of possession as that he may maintain an action for trespass in cutting the trees upon the lot. *Hollman v. Platteville*, 101 Wis. 94, 70 Am. St. Rep. 899, 76 N. W. 1119.

Where a deed to the owner of a burial lot in a cemetery provided that the grantee was entitled to the lot, to have and to hold the same to him, his heirs and assigns, to his and their issue, as a place of burial for the dead, such owner may maintain an action of trespass *quare clausum fregit* against the superintendent of the cemetery for disinterring and removing the remains of a child of the owner of the lot buried therein; and this although the cemetery had never been licensed under the statute. *Meagher v. Driscoll*, 99 Mass. 284, 96 Am. Dec. 759.

Where, by the rules of the selectmen of the town having charge of the cemetery, an inhabitant of the town was permitted to select a burial lot, but no deed was given, but his name was marked upon the plans of the cemetery; and a husband and wife selected such a lot and asked for a deed, but were informed by the sexton that no deed could be given them, but that the lot would be marked for them on such plan, which was done; and thereafter one of the selectmen selected the lot thus taken by the husband and wife, and was informed by the sexton that it had been selected and he could not give him consent to take the lot; and thereafter the verbal permission from the other selectman was obtained to occupy the lot, and he caused the remains of his deceased wife to be buried therein,—it was held that the husband and wife, who 67 L. R. A.

had originally selected the lot, and whose names had been placed upon the plan, could maintain an action of trespass *quare clausum* against the selectman who had afterwards thus attempted to occupy it, and who had afterwards made a burial thereon. *Gowen v. Bessey*, 94 Me. 114, 46 Atl. 792.

Where, at the time of the purchase of a burial lot, the plan of the cemetery contained an avenue, and the lot owner thereafter for many years had the right and enjoyment of passage through and over such avenue in common with many others without interruption, until another, claiming to have purchased a portion of such avenue as a cemetery lot, proposed to use the same as such and close the avenue, an action may be maintained by the owner of such original burial lot to prevent such obstruction of the avenue. *Burke v. Wall*, 29 La. Ann. 38, 29 Am. Rep. 316.

The heirs of one who has purchased a burial lot and established possession of it by using it for the burial of the dead, and in which he himself is afterwards buried, are in possession of the lot so as to maintain trespass against one who disturbs such possession. *Jacobus v. Congregation of Children of Israel*, 107 Ga. 518, 73 Am. St. Rep. 141, 33 S. E. 853; *Wright v. Hollywood Cemetery Corp.* 112 Ga. 884, 52 L. R. A. 621, 38 S. E. 94.

To entitle one to an action *quare clausum fregit* against one who digs and disturbs a grave, he must have the actual or constructive possession of the soil. Where one has, however, buried his dead in soil to which he has the freehold right, or to the possession of which he is entitled, he may, in protecting their graves from insult or injury, have an action of trespass against the wrongdoer. *Bessemer Land & Improv. Co. v. Jenkins*, 111 Ala. 135, 56 Am. St. Rep. 26, 18 So. 565.

Where one who owned a qualified fee in a cemetery lot claimed that his title extended to the middle of the alleys of the cemetery adjoining his lot, and brought an action of trespass against the general owner of the cemetery for digging up and improving the alleys and changing them from grass to gravel, it was held that the action could not be maintained. *Seymour v. Page*, 33 Conn. 64. In this case the plaintiff claimed that his title extended to the middle of the alleys in analogy to the right of an owner of land bounded by a highway; but the court said that the cases were so unlike that the well-settled rules of law which governed one were not applicable to the other. The court said, further, that the very nature of the case excluded the supposition that each of the hundreds of individuals owning a mere right of burying in a particular spot could go beyond his specified lim-

its and derange the whole system, substituting deformity for beauty, as his own bad taste or temper might suggest, and this, too, by construction of law.

In *New York Bay Cemetery Co. v. Buckmaster*, 49 N. J. L. 449, 9 Atl. 591, which was an action brought by the daughter of one having received a conveyance from a cemetery company under which she claimed title and right of possession, the conveyance being of the property in fee for the uses of sepulture only, and to and for no other uses whatever, and subject to the conditions and limitations, and with the privileges, specified in the rules and regulations which, at the date of the conveyance, were made, or which might thereafter be made and adopted by the managers of the cemetery, for the government of the lot holders and visitors, it was held that the fact that the plaintiff was thus limited in the use which she was to make of the property did not deprive her of the right of possession. It was urged by the cemetery company that the interest which was conveyed by the deed was a mere right of burial, and therefore the company, and not the grantee or his assigns, was entitled to possession; but, as before stated, the court held otherwise.

One who purchased a burial lot from a religious association having charge of the cemetery, paid for it, and took possession of it, in the only way that he could, *viz.*, by using it for the purposes for which it was intended,—burying his dead upon it,—has both the possession and the right of possession, and remains in possession until his death; and at his death the possession and the right of possession are transmitted to his heirs at law. And such possession, unless voluntarily relinquished, continues as long as the graves are marked and distinguishable as such, and the cemetery continues to be used. *Jacobus v. Congregation of Children of Israel*, 107 Ga. 518, 73 Am. St. Rep. 141, 33 S. E. 853.

X. Ejectment.

A person entered into full possession of certain lots in a cemetery which were in a free part of the latter, and for which no money consideration was due, and buried his dead—some seven or eight in all—in such lots; and thereafter the city having control of the cemetery, by ordinance, quieted possession thereof, and continued to recognize and acquiesce in such person's possession, but thereafter undertook to convey the lots to others, who were previously advised of the former's possession and claim of title. It was held that, under these circumstances, the city could not have lawfully disturbed such original possession, and that its grantees were simply trespassers against the owner, who had used the lots for burial purposes, and in whom the possession thereof had been quieted, and that he might maintain ejectment against such trespasser therefor. *Wilkinson v. Strickland* (Miss.) 35 So. 177.

But in *Hancock v. McAvoy*, 151 Pa. 460, 18 L. R. A. 781, 31 Am. St. Rep. 774, 25 Atl. 47, it was held that where, by the deed of a cemetery lot, all the vendee acquired was the right of interment or sepulture in the lots described therein, and declared to be held for the uses and purposes of sepulture only, and to and for no other use, intent, or purpose whatsoever, the right thus sharply defined and limited is also subject to all the rules, regulations, conditions, and restrictions contained and set forth in the article 67 L. R. A.

cles of association made and adopted by the corporators or managers of the incorporated cemetery company; as the language of the deed evidently contemplates possession and general control of the cemetery grounds, etc., by the company, and the grantee in the deed acquires no such interest in the lands, nor such right of possession, as will support an action of ejectment.

And in *Doe ex dem. Stewart v. Garrett*, 119 Ga. 386, 64 L. R. A. 99, 46 S. E. 427, which was an action of ejectment, it was held that, the parcel of land sought to be recovered being averred to be a cemetery lot for burial purposes, any conveyance upon those terms would carry only a limited use, or an easement, which was sometimes called a mere license; and that, to recover such an easement or license, an action of ejectment will not lie.

XI. Effect upon, of legislative act or municipal ordinance closing cemetery.

Reference is made to the remarks in the introduction, *supra*, I., as to the implied covenant on the part of the purchaser of a burial lot that, in case of the happening of the necessity that the cemetery shall be closed, his rights in the lot will be considered at an end; and the following are cases deciding that the legislative and municipal authorities may compel the closing of a cemetery, and that thereupon the rights of the lot owner will determine. Included are also the two New York cases alluded to in *supra*, I., which take a different ground, and also hold that the conveyance confers a title to the land, and not a mere easement or privilege.

Rights of burial under churches or in public burying grounds are peculiar, and are so far public that private interests in them are subject to the control of the public authorities having charge of the police regulations; and, where the legislature has passed an act providing for the removal of bodies from and closing up the tombs under a church, the officers of the church, in obedience to, and by authority of, such act are justified in removing the bodies and remains interred under their church, as therein directed; and a bill by the descendants of the original owners of the tomb to prevent them from so doing will be dismissed. *Sobler v. Trinity Church*, 109 Mass. 1.

The power of a municipal corporation to declare an overflowing cemetery in the heart of a large city inimical to the health of a community, and therefore a nuisance, is undoubted, and a lot owner in such cemetery, although holding his title to his lot by an apparent absolute fee, will be remediless to prevent such action on the part of the municipality; and so, where a municipal corporation conveyed lands for the purpose of a cemetery, with a covenant for quiet enjoyment, and afterwards, by virtue of an act of the legislature, passed an ordinance prohibiting the further use of the land for cemetery purposes, this was not a breach of the covenant. *Brick Presby. Church v. New York*, 5 Cow. 538; *Coates v. New York*, 7 Cow. 585.

Thereafter Vice Chancellor McCoun denied a petition to sell the church and lands of the same Brick Presbyterian Church upon the objection of a lot owner, on the ground that the deed in this case and the lease conferred title to the land, and not a mere easement or privilege to inter the dead, and that it made no difference that any further interments were prohibited within the vaults, and that no argument drawn from that

circumstance could give the petitioners any right to resume the control of the vaults, to break them up, or desecrate the ground. *Re Brick Presby. Church*, 3 Edw. Ch. 155.

And the case was referred to with approbation, and the position there taken confirmed, by Chancellor Sandford in *Windt v. German Reformed Church*, 4 Sandf. Ch. 471.

But in *Re Reformed Presby. Church*, 7 How. Pr. 476, where the terms of the instrument under which the lot owners claim a right of burial were that the corporation "do sell, convey, and confirm unto the party of the second part, his heirs and assigns, forever, to be used for the purpose of a burial place only, that certain piece of ground, etc.," it was held that the proper construction to be given to the instrument was that it was a grant of the use of the lot as a place of burial in subordination to the right of the corporation in the soil or freehold, and that the trustees had a right, upon complying with the provisions of the statute, to sell the property and remove the remains of the dead, if the court should deem it proper, to authorize them to do so.

In *Went v. Methodist Protestant Church*, 80 Hun, 266, 30 N. Y. Supp. 157, Affirmed in 150

N. Y. 577, 44 N. E. 1129, it was held that every owner of a cemetery lot must be deemed to have purchased and to hold it for the sole purpose of using it as a place of burial, and was bound to know at his peril that it might become offensive by the residence of many people in its vicinity, and that its use must yield to laws for the suppression of nuisances. That every cemetery within or near large cities must give way to the advance of population; that interments must ultimately cease, and the remains of the dead that are capable of removal must be reinterred in new grounds; and that every lot owner holds his title subject to that contingency; and no condition or covenants contained in deeds appropriating the lands to particular uses can prevent the legislature from declaring such use unlawful, and compelling the removal of all bodies from the grounds.

The last case evidently sustains the position taken by the former supreme court in *Brick Presby. Church v. New York*, 5 Cow. 538, and *Coates v. New York*, 7 Cow. 585, *supra*, and practically but effectually overrules *Re Brick Presby. Church*, 3 Edw. Ch. 155, and *Windt v. German Reformed Church*, 4 Sandf. Ch. 471, *supra*. P. H. V.

NEW YORK COURT OF APPEALS.

John M. MACK, *Appt.*,
v.
William J. LATTA *et al.*, *Respts.*

(178 N. Y. 525.)

Officers of a corporation who secure subscriptions to its stock by fraud are properly joined in an equitable suit against the corporation to enjoin collection of the amount unpaid, and to secure a return of what has been paid upon the subscription.

(Gray, J., *dissent.*)

(June 3, 1904.)

A PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Special Term for New York County sustaining a demurrer to the complaint in an action brought to enjoin the collection of the amount unpaid on a stock subscription, and to recover back sums already paid. *Reversed.*

The facts are stated in the opinion.

Messrs. Nicoll, Anable, & Lindsay, for appellant:

The complaint states facts sufficient to constitute a cause of action against each of the respondents.

Where a person assumes to give to another information concerning his pecuniary condi-

tion, or that of a third person, for the purpose of inducing action thereupon, he must disclose all the facts within his knowledge relating to the subject; and, if he does not do so, and the suppression gives a false color and meaning to what he has said, there is actionable fraud.

Allen v. Addington, 7 Wend. 10; *Ward v. Center*, 3 Johns. 271; *March v. First Nat. Bank*, 4 Hun, 466, Affirmed in 64 N. Y. 645; *Viele v. Goess*, 49 Barb. 96, Affirmed in 51 N. Y. 624; *Newell v. Randall*, 32 Minn. 171, 50 Am. Rep. 562, 19 N. W. 972; *Mallory v. Leach*, 35 Vt. 156, 82 Am. Dec. 625.

Promoters of a company, engaged in obtaining subscriptions, are bound to make to those from whom they solicit subscriptions a full and complete disclosure of all material facts affecting the enterprise.

Brewster v. Hatch, 122 N. Y. 349, 19 Am. St. Rep. 498, 25 N. E. 505; *Getty v. Devlin*, 54 N. Y. 403; *Walker v. Anglo-American Mortg. & T. Co.* 72 Hun, 334, 25 N. Y. Supp. 432; *Central R. Co. v. Kisch*, L. R. 2 H. L. 99; *Virginia Land Co. v. Haupt*, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168; *Crump v. United States Min. Co.* 7 Gratt. 352, 56 Am. Dec. 116.

Statements as to what would ordinarily be matters of opinion, if they are made in bad faith, with intent to deceive, will be treated as statements of fact, and held to be the basis for a claim of fraud.

Simar v. Canaday, 53 N. Y. 298, 13 Am. Rep. 523; *People v. Peckens*, 153 N. Y. 576, 47 N. E. 883; *Weidner v. Phillips*, 39 Hun,

NOTE.—As to rescission for fraud or misrepresentation in procuring subscription to stock, including the manner of relief, see *note* to *Fear v. Bartlett*, 33 L. R. A. 721.
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1; *White v. Loudon*, 90 Hun, 218, 28 N. Y. Supp. 619, 36 N. Y. Supp. 1135; *Upton v. Vail*, 6 Johns. 181, 5 Am. Dec. 210; *Hickey v. Morrell*, 102 N. Y. 454, 55 Am. Rep. 824, 7 N. E. 321; *Obry v. Miller*, 12 N. Y. S. R. 596; *Chamberlin v. Fuller*, 59 Vt. 247, 9 Atl. 832.

In such an action for rescission it is not necessary for the plaintiff to show definite pecuniary damage.

Harlow v. La Brum, 151 N. Y. 278, 45 N. E. 859; *Stewart v. Lester*, 49 Hun, 58, 1 N. Y. Supp. 699; *Smith v. Countryman*, 30 N. Y. 656; *Valton v. National Fund Life Assur. Co.* 20 N. Y. 32.

An action on the case for deceit will lie, although the person making the false statements derived no benefit from them, and was not in collusion with one who did.

Pasley v. Freeman, 3 T. R. 51; *Upton v. Vail*, 6 Johns. 181, 5 Am. Dec. 210; *Barney v. Dewey*, 13 Johns. 224, 7 Am. Dec. 372; *Hubbard v. Briggs*, 31 N. Y. 518; *Hubbell v. Meigs*, 50 N. Y. 480, *New York Land Improv. Co. v. Chapman*, 118 N. Y. 288, 23 N. E. 187.

In those cases where it is sought to recover of directors damages which a person has sustained in consequence of having been induced by their fraud to take shares in their company, the courts of equity exercise a jurisdiction concurrent with that of courts of law.

Thomp. Corp. § 1483; *Cook, Corp.* 4th ed. § 156; *Henderson v. Lacon*, L. R. 5 Eq. 249; *Ross v. Estates Invest. Co.* L. R. 3 Eq. 122; *Tyler v. Savage*, 143 U. S. 79, 36 L. ed. 82, 12 Sup. Ct. Rep. 340; *Vreeland v. New Jersey Stone Co.* 29 N. J. Eq. 188, 651; *National Trust Co. v. Gleason*, 77 N. Y. 400, 33 Am. Rep. 632; *Davis v. Old Colony R. Co.* 131 Mass. 258, 41 Am. Rep. 221; *Bosher v. Richmond & H. Land Co.* 89 Va. 455, 37 Am. St. Rep. 879, 16 S. E. 360; *Emery v. Pease*, 20 N. Y. 62; *Wright v. Wright*, 54 N. Y. 437; *Porous Plaster Co. v. Scabury*, 43 Hun, 611; *Wetmore v. Porter*, 92 N. Y. 76; *Mitchell v. Thorne*, 134 N. Y. 536, 30 Am. St. Rep. 699, 32 N. E. 10; *Phillips v. Wortendyke*, 31 Hun, 192; *Hedden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25.

Where one has been induced to contract to buy corporate stock and pay part of the price upon the strength of false statements by a corporate agent, the latter may be joined with the company in an equity action for rescission, and decreed to refund the money so paid.

Cook, Corp. 4th ed. § 156; *Tyler v. Savage*, 143 U. S. 98, 36 L. ed. 90, 12 Sup. Ct. Rep. 340; *Bosher v. Richmond & H. Land Co.* 89 Va. 462, 37 Am. St. Rep. 879, 16 S. E. 360; *Mahr v. Norwich Union F. Ins. Soc.* 67 L. R. A.

127 N. Y. 452, 28 N. E. 391; *Derham v. Lee*, 87 N. Y. 599; *Gray v. Fuller*, 17 App. Div. 29, 44 N. Y. Supp. 883; *Bradley v. Bradley*, 165 N. Y. 183, 58 N. E. 887; *Bosworth v. Allen*, 168 N. Y. 157, 55 L. R. A. 751, 85 Am. St. Rep. 667, 61 N. E. 163.

Mr. William J. Fanning, for respondent Maloney:

There is no evidence going to show that the stock was not worth what was paid for it.

It is the very essence of the action of fraud and deceit that the same should be accompanied by damage.

Deobold v. Oppermann, 111 N. Y. 531, 2 L. R. A. 644, 20 N. Y. S. R. 81, 7 Am. St. Rep. 760, 19 N. E. 94; *Taylor v. Guest*, 58 N. Y. 266.

The complaint fails to allege any damage, or facts from which damage may be presumed.

Seman v. Becar, 15 Misc. 616, 38 N. Y. Supp. 69; *Thompson v. Gould*, 16 Abb. Pr. N. S. 424; *Morton v. Chesley*, 16 Misc. 172, 37 N. Y. Supp. 1065.

The complaint, taken as a whole, does not state facts sufficient to constitute a cause of action for deceit against the individual defendants.

Peek v. Gurney, L. R. 6 H. L. 377; *Hubbell v. Meigs*, 50 N. Y. 487; *Gordon v. Butler*, 105 U. S. 558, 26 L. ed. 1169; *Dawe v. Morris*, 149 Mass. 188, 4 L. R. A. 158, 14 Am. St. Rep. 404, 21 N. E. 313.

Assuming that the complaint sets forth but one cause of action, plaintiff has attempted to blend therein two inconsistent remedies, one being in disaffirmance, and the other in affirmation, of the contract.

Yeamans v. Bell, 151 N. Y. 230, 45 N. E. 552; *Roome v. Jennings*, 2 Misc. 257, 21 N. Y. Supp. 938; *Bowen v. Mandeville*, 95 N. Y. 237; *Vail v. Reynolds*, 118 N. Y. 297, 23 N. E. 301; *Teall v. Syracuse*, 32 Hun, 332; *Hubbell v. Meigs*, 50 N. Y. 487; *Wiles v. Suydam*, 64 N. Y. 175; *Seymour v. Lorrillard*, 8 N. Y. Civ. Proc. Rep. 90; *Perkins v. Slocum*, 82 Hun, 366, 31 N. Y. Supp. 474; *Stanton v. Missouri P. R. Co.* 15 N. Y. Civ. Proc. Rep. 296, 2 N. Y. Supp. 298; *O'Brien v. Fitzgerald*, 143 N. Y. 377, 38 N. E. 371; *Bosley v. National Mach. Co.* 123 N. Y. 550, 25 N. E. 990.

Messrs. Butler, Notman, Joline, & Mynderse, for respondent Latta:

The causes of action alleged are inconsistent. A cause of action for a rescission of the contract and recovery of the amount paid is based upon a disaffirmance of the transaction. A cause of action for the recovery of damages for fraud or deceit in inducing the making of a contract proceeds upon an affirmation of the contract. In the one case the plaintiff must offer to restore

what he has received; in the other case he retains what he receives, and recovers his damages.

Yeomans v. Bell, 151 N. Y. 230, 45 N. E. 552.

The two causes of action do not affect all the parties to the action.

Stanton v. Missouri P. R. Co. 15 N. Y. Civ. Proc. Rep. 296, 2 N. Y. Supp. 298; *Church v. Stanton*, 9 N. Y. S. R. 121; *Nichols v. Drew*, 94 N. Y. 22; *Compton v. Hughes*, 38 Hun, 377; *Paulsen v. Van Steenberg*, 65 How. Pr. 342; *House v. Cooper*, 30 Barb. 157; *Adams v. Stevens*, 7 Misc. 468, 27 N. Y. Supp. 993; *McKenzie v. Hatton*, 9 Misc. 16, 29 N. Y. Supp. 18; *Olin v. Arendt*, 35 App. Div. 529, 54 N. Y. Supp. 820; *Goldmark v. Magnolia Anti Friction Metal Co.* 30 App. Div. 580, 52 N. Y. Supp. 446; *Hess v. Buffalo & N. F. R. Co.* 29 Barb. 391; *Kelly v. Newman*, 62 How. Pr. 156; *Pracht v. Ritter*, 16 Jones & S. 509; *Gray v. Rothschild*, 112 N. Y. 668, 19 N. E. 847; *Day v. Bank of State*, 9 N. Y. Civ. Proc. Rep. 51.

Mr. Arthur H. Van Brunt also for respondent Latta.

Parker, Ch. J., delivered the opinion of the court:

Plaintiff, upon misrepresentations made to him by the two individual defendants,—one the president of defendant corporation, and the other a director and member of the executive committee, and who were the chief promoters of the corporation,—was induced to subscribe for \$500,000 worth of stock. Twenty per cent (\$100,000) was called for by the corporation and paid by plaintiff before he became aware that the representations made to him were untrue. As soon as the discovery was made, he brought this action on the equity side of the court against the corporation and the two officials who made the misrepresentations. He seeks to have the subscription adjudged void and canceled; to have defendants perpetually enjoined from asserting the validity of the agreement, and from bringing or maintaining any action at law or in equity based thereon; and to have judgment against the individual defendants, as well as against the corporation, for the \$100,000 paid, with interest. Defendants separately demur to the complaint, and the question presented is whether an action can be maintained in equity against the individual defendants who made the misrepresentations, as well as the corporation receiving the money.

Our attention has not been called to any precedent in this state for such an action where the right to maintain it was challenged either by demurrer or suitable objection at the trial.

Bosley v. National Mach. Co. 123 N. Y. 550, 25 N. E. 990, was an action in equity against a corporation and its president, House, to obtain rescission of a contract of subscription for stock, for an accounting, and for payment to her of the balance found due. Plaintiff had judgment at special term rescinding the contract, and awarding her a judgment against both defendants for the amount found due. That judgment was affirmed in the general term and this court, where it was for the first time insisted that there was no equitable cause of action against defendant House, and that the only relief to which plaintiff was entitled against him was a money judgment. The court says (p. 557, 123 N. Y., p. 992, 25 N. E.): "We are inclined to believe that this claim is well founded, but the defendant House cannot avail himself of it here, as there is no exception in the record upon which he can base such a claim." That case, however, is authority for the maintenance of this action against defendant corporation, and accords with the opinion of the appellate division in this case, which holds, upon reasoning which we entirely approve, that the complaint states a good cause of action against defendant corporation for a rescission of the contract, and for judgment against it canceling the subscription, and awarding to plaintiff \$100,000 paid by him, with interest. That court was of the opinion, however, that the individual defendants were improperly joined in the action, and the intimation in *Bosley's Case*, 123 N. Y. 550, 25 N. E. 990, is in the same direction. And the investigation of counsel and our own research have not brought to our attention a case in this state holding otherwise. Indeed, there seems to be no decision bearing directly upon the question, one way or the other. It is therefore an open question for consideration in this court.

As we have seen, the action will lie as brought against defendant corporation, and our inquiry must be whether equity should bring in the individual defendants whose misrepresentations have compelled plaintiff to bring the suit in order to relieve himself of a further payment of \$400,000, and to recover the \$100,000 already paid. The demurrer of the individual defendants requires us to assume that the facts alleged in the complaint are true, and thus we are advised that the statements made by them to plaintiff were of such a character as to entitle him to have his subscription canceled on the ground of fraud. That being so, it is clear that, upon the facts stated in the complaint, plaintiff would be entitled to judgment against the individual defendants in an action at law for damages for their fraud. It is true, defendant corporation received the

\$100,000, and not the individual defendants, but they could not escape in an action at law a judgment for such damages as plaintiff sustained, for it is well settled in this state that recovery may be had of a party in such a case, although he received no benefit from the transaction. *Hubbard v. Briggs*, 31 N. Y. 518; *Hubbell v. Meigs*, 50 N. Y. 480; *Schwenk v. Naylor*, 102 N. Y. 683, 7 N. E. 788; *New York Land Improv. Co. v. Chapman*, 118 N. Y. 288, 23 N. E. 187. And it is held in Massachusetts that upon a rescission of a contract the aggrieved party may recover as his damage, from the agent making the misrepresentations inducing the contract, the money paid the principal, which in that case was a corporation. The court says in part: "We are of opinion that, under these circumstances, he has a right to recover damages of the defendant to an amount which will put him in the same position as if the fraud had not been practised on him. As a consequence of the fraud, he has paid out a sum of money as a premium for which he has got nothing. We think he is entitled to recover it of the defendant. The contention of the defendant that the cancelation of the policy was the cause of the loss of the premium paid seems to us to be a refinement which leads to unjust results. . . . To hold as the defendant claims would be to deprive the plaintiff of his right of election for the benefit of the defendant." *Hedden v. Griffin*, 136 Mass. 229, 232, 49 Am. Rep. 25. So, if plaintiff had brought this action against the corporation alone, and obtained a judgment canceling the contract and awarding him the \$100,000 advanced, with interest, and he should have failed to collect from the corporation by reason of its lack of assets, he could undoubtedly have collected the balance unpaid in an action at law against the officers whose fraudulent representations had induced the contract. That being so, it is clear that a multiplicity of actions would be avoided, and a greater certainty of collection would result in an action such as this, where, all the parties being before the court,—those guilty of the fraud as well as the direct beneficiary of the fraud,—the court could enjoin actions by the corporation for the balance of the subscription, cancel the subscription, and give plaintiff judgment against all the defendants for the amount paid, directing collection so far as possible out of the corporation; the balance, if any, to be collected from the individual defendants. Such a decree would likely secure the co-operation of defendant officers towards efforts on the part of the corporation to satisfy the judgment in order to reduce as far as possible the sums they would be personally obliged to pay. And such effort on

their part it is but just that an unfortunately defrauded plaintiff should have. Again, it would more promptly, if not more certainly, restore to the party injured his own, for recovery would necessarily be much delayed by procedure requiring him to exhaust his remedy against the corporation before bringing action against the persons actually guilty of the fraud. It is a favorite object of equity to prevent multiplicity of suits. And the question presented to a court of equity when that doctrine is invoked is "whether there is a sufficient common bond among the body of similarly situated persons on the one side of the controversy to authorize the court to interfere and give complete relief to them or against them all in one proceeding, and thus avoid a multiplicity of suits." 1 Pom. Eq. Jur. § 257, note. Under this head, Chancellor Kent says in *Brinkerhoff v. Brown*, 6 Johns. Ch. 139, 157: "A bill against several persons must relate to matters of the same nature, and having a connection with each other, and in which all the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct." Pomeroy says (1 Pom. Eq. Jur. § 180): "The fact that there is a legal remedy is not the criterion. That legal remedy, both in respect to its final relief and its modes of obtaining the relief, must be as efficient as the remedy which equity would confer under the same circumstances, or else the concurrent jurisdiction attaches." It must be obvious that the relief afforded by a suit such as plaintiff has brought would be more prompt, and therefore more efficient, to right the wrong done to a plaintiff by a corporation and its officers and agents, as in this case.

This subject has received consideration in 1 Cook on Corporations, 4th ed. § 156, where the author says: "The complainant in a bill in equity to set aside a subscription obtained by fraud cannot sue in behalf of himself and others who may wish to come in. But several subscribers, defrauded in the same way, may join in the bill as cocomplainants. Fraudulent intent need not be proved. Scierter is not the essence of the action. . . . The corporation is to be a defendant, and, if merely a cancelation of the subscription and an injunction against suits at law are sought, the corporation, it seems, may be the sole defendant. A court of equity in these actions will give complete relief by decreeing that the directors guilty of the fraud shall refund to the subscriber payments made by him before discovering the fraud. This relief dispenses with an action at law for damages for deceit, and, when sought for in the bill in equity, the guilty directors must be made parties." In

2 Thompson on Corporations, § 1483, it is said: "It is clear upon authority that, in those cases where it is sought to recover of directors damages which a person has sustained in consequence of having been induced by their fraud to take shares in their company, the courts of equity exercise a jurisdiction concurrent with that of the courts of law. Hence the fact that a person defrauded in this manner has a remedy at law does not oust the jurisdiction of equity to afford him relief." And in § 1484 the same author says: "The only advantage of going into equity with such a suit seems to be to obtain a more ample remedy. In an action at law for deceit the plaintiff can only recover the damages he has suffered, but in equity he may claim (1) a cancellation of his subscription; (2) a decree against the directors jointly and severally for the repayment to him of all the moneys paid for the shares; and (3) an injunction against future calls. To such a suit, of course, the corporation is a party." In England the court of equity has applied the rule stated by both Cook and Thompson in a number of cases. *Henderson v. Lucon*, L. R. 5 Eq. 249, is an action in equity against a corporation and five of its directors to cancel for fraud a subscription to its stock, and secure the return of £100 paid upon it. The court says (p. 261): "Any representations made by the agents of a company which form the foundation of a contract between that company and a third person—those misrepresentations lying at the root of the contract—will entitle the other party to avoid the contract, and the company must in that sense take upon themselves the consequences of the misrepresentations of their agents. The contract must be annulled. The position of the agents themselves, who make the misrepresentations, is different. . . . If you are to make them personally liable for the consequences of their misrepresentations, not they, but the party for whom they contracted, pocketing the proceeds,—as in this instance the company, for whom the directors may be taken to be acting as agents,—you must fix them also with a guilty knowledge of the misrepresentation which is communicated to the person who is to be led into the contract." The court, after examining the facts, and reaching the conclusion that such knowledge existed on the part of the directors, says further (p. 262): "The plaintiff is therefore entitled to a decree for the repayment of the £100 from the directors personally. Further than that, he is entitled to an injunction restraining the continuance of the proceedings at law. He is also entitled to a declaration that the company, being now in liquidation, are bound to repay to him this £100, and to an injunc-

tion restraining them from proceeding on the judgment, and also from proceeding against him in respect of any further calls." In *Ross v. Estates Invest. Co.* L. R. 3 Eq. 122, plaintiff filed a bill to set aside an allotment of shares to him on the ground of fraudulent misrepresentations contained in the prospectus. The court holds that there had been such an amount of misrepresentation by the directors and other authorized agents, for whose statements—having adopted and had the benefit of them—they were responsible, that any contract to take shares entered into on the faith of the prospectus must be set aside. The mandate of the decree in that case is (p. 139): "Direct the defendants to repay the deposit of £10 paid by plaintiff for the shares, and defendants, the directors, to cause the plaintiff's name to be removed from the register." An injunction against suits on the subscription is also granted, and it is directed that all the defendants pay the costs. *Kent v. Freehold Land & Brickmaking Co.* L. R. 4 Eq. 588, was a suit against the corporation, certain directors, and a promoter to cancel a subscription for stock, and recover back moneys already paid thereon. The court, after reaching the conclusion that plaintiff's subscription was induced through fraudulent representations says (p. 601): "The plaintiff seeks relief against them all, and against them all he is entitled to relief, for Spargo, though not a director, concurred in the acts of the directors. The decree will be that the plaintiff's name be removed from the list of shareholders; for an account of what moneys have been paid by him to the company, and of what sums he has received, with interest on both sides, at 5 per cent; then that the balance be paid to the plaintiff, and that the defendants pay the costs of the suit, with an injunction to stay the action." These authorities were cited with approval in *Vreeland v. New Jersey Stone Co.* 29 N. J. Eq. 188, 195. The vice chancellor says: "These cases, in my opinion, declare the correct rule. All who get gain by fraud must bear the legal consequences of the wrong they do." That was a suit to set aside complainant's contract to take 100 shares of the stock of the corporation, and to recover the amount paid under it, on the ground that it was induced by wilful misrepresentation. It appeared that the defendants constituted the whole proprietorship of the corporation, so that, while the payment was to the corporation, they necessarily received the entire benefit of it; but the principle applied is not different on that account, and the court rested its entire argument on the English cases cited *supra*, and the doctrine therein asserted. That case was subsequently unanimously affirmed,

without opinion by the court of errors and appeals. 29 N. J. Eq. 651.

Bosher v. Richmond & H. Land Co. 89 Va. 455, 37 Am. St. Rep. 879, 16 S. E. 360, is a suit in equity against a corporation and certain promoters to rescind for fraud a subscription contract, and obtain repayment of the sums paid under it. The principal point discussed is whether several stockholders jointly defrauded may join in such an action. The court says (p. 462, 89 Va., 884, 7 Am. St. Rep. p. 362, 16 S. E.): "A court of equity in these actions will give complete relief by decreeing that the directors guilty of the fraud shall refund to the subscriber payments made by him before discovery of the fraud. This relief dispenses with an action at law for damages for deceit, and, when sought for in a bill in equity, the guilty directors must be made parties, and the bill is not multifarious by reason of its blending prayers for these various kinds of relief."

In *Tyler v. Savage*, 143 U. S. 79, 36 L. ed. 82, 12 Sup. Ct. Rep. 340, suit is brought by a creditor of a Virginia corporation, in behalf of herself and other creditors, against the company, its president, Tyler, and certain directors and other persons. Plaintiff's claim is based upon a payment of \$10,000 for stock of the company, induced by alleged fraudulent misstatements by Tyler. The bill alleged that Tyler personally, as well as the company, was liable to repay the \$10,000. The decree stated "that the defendant John Tyler, individually, and the remaining assets of the Virginia Oil Company, are liable to the plaintiff, Sarah C. Savage, for the sum of \$10,000 paid by her into the treasury of the company at the instance of the said John Tyler." P. 90, 143 U. S., p. 88, 36 L. ed., and p. 344, 12 Sup. Ct. Rep. The Supreme Court affirming the decree, says (pp. 97, 98, 143 U. S. pp. 89, 90, 36 L. ed., and pp. 345, 346, 12 Sup. Ct. Rep.): "The averment of the bill that the \$10,000 was justly due to the plaintiff by Tyler and the company, because that sum was unlawfully obtained from her by misrepresentations of the affairs of the company by Tyler, who was its president and duly authorized agent, and because that sum went into the treasury of, and was expended by, the company, is a distinct allegation that the \$10,000 was justly due to her by Tyler. . . . The relief against Tyler was properly granted under the prayer of the bill for general relief. It was consonant with the facts set out in the bill as a ground of relief against Tyler personally, and it was relief agreeable to the case made by the bill."

These decisions seem to us so well grounded in reason as to justify a court of

equity, invoked to cancel a subscription for stock on the ground of fraud, and enjoin further calls for payment and the prosecution of actions thereon, in bringing in the officers and agents of the corporation who were personally guilty of making the misrepresentations constituting the fraud, so that plaintiff may have complete relief in one action against both the corporation and the persons guilty of the fraud.

The judgments of the Appellate Division and of the Special Term should be reversed, and defendants permitted to answer within twenty days, on payment of the costs in all courts.

Bartlett, Martin, Vann, Cullen, and Werner, JJ., concur. Gray, J., dissents.

PEOPLE of the State of New York, *Respt.*,
v.

George E. MILLS, *Appt.*

(178 N. Y. 274.)

1. A district attorney, even when acting by permission of a judge of the court, has no authority to consent to the removal of indictments from the court records, so as to relieve one who removes them with his consent with intent to destroy them from liability to prosecution under the provisions of the statute which make their wilful and unlawful removal criminal, and their unlawful appropriation grand larceny.
2. Taking up court records from the place where they have been laid, and walking away with them with intent to destroy them, are overt acts which render one guilty under a statute making the unlawful removal of such records a crime, although they were taken from a place where they had been placed by authority of the district attorney for the purpose of detecting defendant in the commission of the crime.
3. One who proposes a scheme, and puts in motion the forces by which court records are removed from the files for the purpose of destroying them, is guilty as principal throughout the transaction, although the papers are actually removed by the district attorney under permission of a judge of the court, and placed in the custody of a public officer for delivery to the one who wishes them.

(O'Brien and Bartlett, JJ., dissent.)

(April 26, 1904.)

NOTE.—For effect of instigation or consent to crime when given for purpose of discovering criminals as defense to prosecution, see also, in this series, *Connor v. People*, 25 L. R. A. 341, and *note*; *Com. v. Hollister*, 25 L. R. A. 349; *Love v. People*, 32 L. R. A. 139; *People v. Gillman*, 46 L. R. A. 218; and *State v. Abley*, 46 L. R. A. 862.

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Trial Term for New York County convicting him of an attempt to destroy court records contrary to the provisions of the statute. *Affirmed.*

Statement by Vann, J.:

The indictment against the defendant contains two counts, each charging an attempt to violate a distinct section of the Penal Code; the first being founded on § 94, and the second on § 531. The facts appearing on the trial, as well stated by the appellate division, are as follows:

Richard C. Flower was a physician, and was also engaged in promoting certain mining interests. In connection with such enterprise he was indicted under six different indictments for alleged larcenies, and was also suspected of being implicated in the suspicious death of one Hagaman, which case the district attorney was investigating shortly prior to the offenses charged in the present indictment. Francis P. Garvan, an assistant district attorney of the county of New York, had special charge of the prosecution of the indictments against Flower, and also of the investigation of the death of Hagaman. The defendant was a lawyer, engaged in the practice of his profession in the city of New York, with a son of Richard C. Flower, and he was also interested in various mining companies in connection with Dr. Flower and Andrew D. Meloy and others at the time when the indictments were found against Flower, and when he was being otherwise investigated, and he took a very lively interest in Dr. Flower's behalf.

It appeared from the testimony of Meloy: That he was president and a member of the board of directors of the Lone Pine Mining Company, of which board the defendant was a member. That on Saturday, March 28, 1903, at a directors' meeting of this mining company, the defendant called attention to the prosecution against Dr. Flower, and stated that it was having a bad effect upon the company. That he thought Garvan was persecuting Flower. That the ends of justice were not being promoted, and he expressed a wish that the directors should pass some resolution asking Garvan or the district attorney's office to discontinue the attack upon Flower. Such resolution, however, was neither adopted nor offered. On the next day Meloy testified that he received a telephone message from the defendant, asking him to meet him on Riverside drive, about Eighty-fifth or Eighty-sixth streets. That he met him there alone; had a conversation with him, in which he spoke of Flow-

er's increasing difficulties, about his counsel, what they had done, and what his anxieties and fears were. He discussed Garvan and the latter's attitude to the case, and asked Meloy if he would not make an engagement with Garvan so that the defendant could see and have a talk with him, and see if the prosecutions could not be stopped; and there was some conversation about the money which had been paid for counsel, and that, if it were given to Garvan, it would accomplish greater results. The defendant finally said: "I will not give Hart any money, or any lawyer. . . . I know the head of this thing, and I am going to give what money I give to Garvan. . . . What I want to do is to get in contact with Garvan, and I want you to do it for me." . . . When he said he wanted to get in contact, I asked him if he knew what he was doing,—what he was about. He said he thought he did. Then I said the same general remark,—"Be careful." At the end of the conversation I left Mr. Mills, and stated I would see Mr. Garvan the next day, and make an engagement." Meloy further testified that he asked the defendant why he did not get in touch with Garvan himself, and in reply the defendant stated, in substance, "that if he came himself, Mr. Garvan would be afraid, but that you could arrange it for him." Meloy then parted from the defendant with the understanding that he was to see Garvan, and make an appointment for him the next day. Meloy, however, took an entirely different course. The next day he consulted with his own counsel, telling him what had occurred. Thereupon his counsel and himself interviewed Garvan over the telephone, with the result that the three had a meeting in the afternoon, and the whole matter of the conversation was stated to Garvan, after which Mr. Jerome, the district attorney, was brought into the conference, and informed of what had taken place. Jerome testified that on the next day after the conference he communicated with Detective Sergeant Brindley, and gave him directions concerning the case, as a result of which he was to put himself into communication with the defendant for the purpose of detecting him in the commission of any crime which he might commit or attempt to commit. Meloy had no communication with Brindley, but the latter called him up on the telephone for the purpose of making arrangements by which he could meet the defendant. Meloy then saw the defendant, and informed him that he had seen Garvan and made arrangements for him to meet Garvan's wardman, Brindley. The defendant demurred to this, stating that he wanted to meet Garvan. Meloy told him that Garvan would not do business with him directly,

but that he would have to do it with Brindley, and thereupon the defendant consented to see him; and Meloy, in the defendant's presence, called up Brindley by telephone at the district attorney's office, and told him that the defendant would meet him. As a result of this, the defendant and Brindley met in the afternoon in Haan's restaurant, No. 11 Park Row, in the city of New York. After identifying each other, they went into one of the booths, when Mills stated that he had been instructed by Dr. Flower to have an interview with Garvan about the disposition of the charges against Flower. Brindley informed him that it was impossible for him to see Garvan, and defendant said: "Well, Dr. Flower is anxious for me to talk to Garvan, and I do not see why he does not want to talk to me just as lawyer to lawyer. That would be all right." And when informed that this was impossible, he said: "Well, if you can assure me that you will fulfil any contract or proposition that I make to you I am willing to talk with you." After some further conversation defendant stated: "That Dr. Flower was a fool to have let the matter go as far as it did, as the opportunity was presented to him when Mr. Garvan had him in his office for examination in the Hagaman matter; that this was his time for to make a settlement, instead of fighting it out; and that now he has engaged high-priced counsel, who would drag the case out so as to justify a large fee. . . . He would go to the fountain head and settle the case. I asked him then, 'Well, what is it you want us to do?' He says, 'Well, these indictments that have been found against Dr. Flower, you can withdraw them and misplace them, lose them, or dispose of them in some way, or Mr. Garvan could go into court, and permit him to go into court on a demurrer, and have the indictments quashed.' I told him that I would see Mr. Garvan, and submit this to him, and let him know. He then said, 'Well, Mr. Garvan ought to be satisfied with this. The matter is not worth as much money now as it would have been to us if it had been disposed of before indictment and all of this publicity. Dr. Flower's business has suffered very much from this, and, of course, it is not worth the money it would have been before the publicity.' He said that as to the Hagaman matter 'Mr. Garvan could say that, after thorough examination of witnesses, and the autopsy, and the examination of the report of the physician and chemist, he had come to the conclusion that the death of Mr. Hagaman was caused by natural causes, and that this would relieve both Dr. Flower and his client, Mrs. Hagaman,—that is, Mills's client,—of this notoriety.' . . .

He said he would have to see Dr. Flower so as to make the arrangements for the money; that Dr. Flower is an old bird at this game; has had twenty years' experience, and would be very particular about arranging these matters." After arranging that the defendant should be known thereafter as McChesney, the parties separated. This conversation was repeated by Brindley to Jerome, and thereupon Jerome applied to "a judge of" the court having the custody of the indictments, explaining how he desired to use them, without, however, mentioning any name, and the "judge" permitted them to be taken from the files of the office, and Jerome delivered them to Brindley. In the afternoon of the next day the defendant telephoned Brindley at the district attorney's office that everything was all right; that he had seen Dr. Flower, and "that it would be a go." At 12 o'clock of that day Brindley and the defendant again met at Haan's restaurant, when the defendant asked, "'As to those indictments, what have you done?' I says, 'Well, pursuant to your suggestion of yesterday about these indictments, I have inquired as to what effect it would have, and find that there are copies in the district attorney's office of these indictments.' He says: 'Yes, that is right. By taking these indictments—the originals—the copies could be made demurrable, and Mr. Garvan could go into court, and with all apparent good faith fight our motion to demur on those indictments, and, of course, the judge would decide against him.' He says, 'But how do we know as to your good faith in those other matters that may come up in the future?' 'Well,' I says, 'You would have possession of the indictments then, and that would be evidence of good faith on our part.' He says, 'Yes, but I do not want those indictments. I will take them from you,—buy them,—and would go somewheres with you and destroy them.' I says, 'Well, I have withdrawn those indictments, have given no reason why I did, and have them with me;' and I showed them to him. He took them and examined them. After carefully examining them, he says, 'Well, there are only five indictments here, and there has been no indictment on the bribery charge. That makes that the easier to dispose of: one prisoner already having been discharged, it would be an easy matter for Mr. Garvan to have the other one discharged.' He said, 'I will have to see Dr. Flower to get the money, and will try to find him by 5 o'clock this afternoon.' I said, 'Well, that would be after banking hours, and would be rather late,' and he says, 'Well, I will have to try to find him somewheres.' I then said 'Well, what amount did you want to pay for this service?' He says, 'Well, \$1,500.' I says I

thought that was rather cheap. He said, 'Well, I will make it \$2,000 in this way: \$1,500 to be paid to Mr. Garvan and \$500 you and I will divide.' Brindley consented to this, and after some further conversation the parties separated, agreeing to meet again later in the afternoon. Subsequently the defendant called Brindley over the telephone, stating that he could not make the arrangements for that day; would have to postpone it to the next. Brindley replied that it was a risky thing for him to keep the indictments out of the court of general sessions. "He said: 'Well, under no conditions put them back. Keep them out. It will be all right. You can make any excuse. Say you cannot find them, but keep them out, anyway.'" The parties had prior to this time agreed to refer to the indictments as "subpoenas," and the money as "additional evidence." A meeting was arranged for next day, at which time Brindley posted in Haan's restaurant other officers and persons to observe what transpired between him and the defendant. He met the defendant shortly after 1 o'clock at Haan's rathskeller, and after considerable conversation with respect to the Hagaman matter, and what might occur in the future with respect to complaints against Dr. Flower, defendant said: "I have the money here, and we can do more business in the future." He put his hand in his inside pocket, and withdrew an envelope,—this one (indicating),—and passed it to me and said: 'Just count it. There is \$1,500.' The envelope was open when he handed it to me. I took it from him,—from his hand. I looked into it. It had fifteen \$100 bills in it. I counted them. They are there now." The envelope and money were then received in evidence. Defendant then said: "This is for Mr. Garvan. Give this to Mr. Garvan. You and Mr. Garvan can settle for this \$1,500." He said, "Look out; be careful." Thereupon the defendant called attention to certain persons who were observing them, and Brindley told him they were all "grafters." He then gave to Brindley \$250 more, and said, "The other \$250 I have in my pocket." Brindley then produced the indictments, which the defendant examined, and finally suggested, as they were being watched, that they go upstairs. He picked up the indictments, placed them in his outside pocket, walked to the stairway leading to the café upstairs, when Brindley placed him under arrest. He was searched in the presence of other persons in the café, the indictments were found upon him, and he was taken to the station house. The defendant admitted that the indictments were found upon his person at the time of his arrest, and he did not deny but that he had meetings with Brindley, as testified

to by the latter, or but that the money which was produced in court and introduced into evidence was given by him to Brindley at the place and time that the testimony established. The defendant's claim in answer thereto was that he and Brindley were engaged in buying up claims against Dr. Flower, and that in all the negotiations which he had with Brindley he was acting as the representative of Flower against creditors and their attorney, Mr. Hart, from whom he was to receive releases to be delivered to him by Brindley; but he admits that Brindley produced the indictments; told him what they were; that he looked at them, and subsequently put them in his pocket at the request of Brindley.

The jury found the defendant guilty upon both counts, and he was sentenced accordingly. Upon appeal to the appellate division the judgment was affirmed, one of the justices dissenting, and the defendant thereupon came to this court.

Messrs. John R. Dos Passos, Benjamin Steinhardt, and Edmund F. Harding, with **Messrs. Howe & Hummel**, for appellant:

The defendant, under the evidence disclosed, committed no indictable crime.

A crime is an act committed or omitted in violation of some public law, either commanding or forbidding it.

There are, in every criminal act, generally three distinct actors, viz., the people, the accused, and the person against whom the wrong is committed.

4 Sharswood's Bl. Com. 1869, p. 333.

In the present case there is an absolute want of all of the necessary requisites to constitute a crime. There is no complainant or third person against whom the injury was inflicted.

There could be no crime committed by the defendant in accepting the indictments, because it was with the full consent of the state. *Volenti non fit injuria*.

Beccaria, Crimes & Punishments, 1785, ed. p. 7.

Where the facts show that the entrapping plan is originated by one who apparently becomes the victim, or his agent, and the design is suggested to the accused and merely adopted by him, he cannot be convicted.

Connor v. People, 18 Colo. 373, 25 L. R. A. 341, 36 Am. St. Rep. 295, 33 Pac. 159; *O'Brien v. State*, 6 Tex. App. 665; *Com. v. Bickings*, 12 Pa. Dist. R. 206.

Where the facts show that the design originates with the accused, but is not coupled with the necessary act to complete the crime, that act being committed by the apparent victim, or his agent, the defendant cannot be convicted.

State v. Hayes, 105 Mo. 76, 24 Am. St. Rep. 360, 16 S. W. 514; *People v. Collins*, 53 Cal. 185; *State v. Stickney*, 53 Kan. 308, 42 Am. St. Rep. 284, 36 Pac. 914; *Com. v. Bickings*, 12 Pa. Dist. R. 206; *State v. Hull*, 33 Or. 56, 72 Am. St. Rep. 694, 54 Pac. 159; *Williams v. State*, 55 Ga. 391; *People v. McCord*, 76 Mich. 200, 42 N. W. 1106; *Speiden v. State*, 3 Tex. App. 156, 30 Am. Dec. 126; *Love v. People*, 160 Ill. 501, 32 L. R. A. 139, 43 N. E. 710; *Saunders v. People*, 38 Mich. 218.

The common law (4 Sharswood's Bl. Com. pp. 250 *et seq.*) and the Penal Code of New York both provide a complete remedy for cases of this kind,—where persons disclose a wish or intention to commit a crime. The remedy is to prevent the person from proceeding further by holding him to good behavior.

There was no evidence to show that defendant was guilty of a violation of §§ 94 and 531 of the Penal Code, under which he was indicted.

There was no trespass committed, no taking which would justify or support the conviction for an attempt to commit larceny in the second degree.

Thorne v. Turck, 94 N. Y. 95, 46 Am. Rep. 126; *Zink v. People*, 6 Abb. N. C. 413, 77 N. Y. 114, 33 Am. Rep. 589; *People v. Nichols*, 3 Park. Crim. Rep. 579, 17 N. Y. 114.

Mr. Robert C. Taylor, with **Mr. William Travers Jerome**, for respondent:

At common law, trespass was an element of larceny; but, in the modifications which the law of larceny has undergone in New York a trespass is no longer necessary.

People v. Laurence, 137 N. Y. 517, 33 N. E. 547.

The defendant's act clearly brought him within the definition of a principal, as declared by § 29 of the Penal Code.

People v. Bliven, 112 N. Y. 91, 8 Am. St. Rep. 701, 19 N. E. 638; *People v. Cotto*, 131 N. Y. 577, 29 N. E. 1008; *People v. Peckens*, 153 N. Y. 576, 47 N. E. 883.

A mere "solicitation" to commit a crime is sufficient to justify a conviction for an attempt.

King v. Higgins, 2 East, 5, 6 Revised Rep. 358; *People v. Bush*, 4 Hill, 135; *McDermott v. People*, 5 Park. Crim. Rep. 102; *Bishop*, New Crim. Law, 8th ed. §§ 767, 768.

The defendant received the indictments *animo furandi*. When he finally took them up from the café table, put them in his pocket, and walked away with them, he effected an asportation in the strictest technical sense of the word.

Reg. v. Laurence, 4 Cox, C. C. 438; *Reg. v. Walsh*, 1 Moody, C. C. 14; *Harrison v. People*, 50 N. Y. 518, 10 Am. Rep. 517.

Section 34 defines an attempt as "an act 47 L. R. A.

done with intent to commit a crime, and tending, but failing, to effect its commission."

People v. Moran, 123 N. Y. 254, 10 L. R. A. 109, 20 Am. St. Rep. 732, 25 N. E. 412; *People v. Gardner*, 144 N. Y. 119, 28 L. R. A. 699, 43 Am. St. Rep. 741, 38 N. E. 1003; *People v. Sullivan*, 173 N. Y. 122, 63 L. R. A. 353, 93 Am. St. Rep. 582, 65 N. E. 989.

The "trap," so called, cannot be availed of as a defense.

1 Bishop, New Crim. Law, § 257, 8th ed. § 262; *Riley v. State*, 16 Conn. 47; *Forsythe v. State*, 6 Ohio, 20; *Grimm v. United States*, 156 U. S. 604, 39 L. ed. 550, 15 Sup. Ct. Rep. 470; *People v. Krivitzky*, 168 N. Y. 182, 61 N. E. 175; 8 Am. & Eng. Enc. Law, title *Criminal Law*, p. 295; note of Francis Wharton to *Bates v. United States*, 10 Fed. 98.

Vann, J., delivered the opinion of the court:

The indictments against Dr. Flower were records or documents filed in a public office under the authority of law. Code Crim. Proc. § 272; Code Civ. Proc. § 866. They were the property of the state, and a wilful and unlawful removal of them constituted a crime under § 94 of the Penal Code. Anyone who unlawfully obtained or appropriated them was guilty of grand larceny in the second degree, according to the provisions of another section of the same statute. Penal Code, § 531. Whoever is guilty of violating either section may be convicted of an attempt to commit the offense specified therein, even if it appears on the trial that the crime was fully consummated, unless the court, in its discretion, discharges the jury, and directs the defendant to be tried for the crime itself, which was not done in the case before us. Code Crim. Proc. §§ 35, 685. The jury found the defendant guilty of an attempt both to remove and to steal the indictments, and after affirmance by the appellate division we are confined in our review to such questions as were raised by exceptions taken during the trial.

In view of the able and exhaustive opinion of the appellate division, the only question we feel called upon to consider is that raised by the challenge of the learned counsel for the appellant in the nature of a demurrer to the evidence. He claims that, even on the assumption that all the evidence for the prosecution is true, still the facts thus proved do not constitute the crime charged in either count of the indictment. His argument is that the object of the district attorney was not to detect, but to create, a crime; and that no crime was committed by the defendant in taking the in-

dictments into his possession, because he took them with the consent of the state as represented by the district attorney. The flaw in this argument is found in the fact that the records were the property of the state, not of the district attorney, and that the latter could not lawfully give them away, or permit them to be taken by the defendant. Purity of intention only could prevent the action of the district attorney from being a crime on his part. This is true also as to the detective, for, if either had in fact intended that the defendant should permanently remove the indictments, and steal, appropriate, or destroy them, he would have come within the statute. Neither of those officers represented the state in placing the records where the defendant could take them, but each was acting as an individual only. Neither had the right or power, as a public officer, to deliver them to the defendant, and, if either had acted with an evil purpose, his act would have been criminal in character. An act done with intent to commit a crime, and tending, but failing, to effect its commission, is an attempt to commit that crime. Penal Code, § 34. Felonious intent alone is not enough, but there must be an overt act shown, in order to establish even an attempt. An overt act is one done to carry out the intention, and it must be such as would naturally effect that result, unless prevented by some extraneous cause. In *People v. Bush*, 4 Hill, 133, the prisoner solicited one Kinney to burn a barn, and gave him matches for the purpose, and it was held sufficient to warrant a conviction for attempt at arson, although the prisoner did not mean to be present at the commission of the offense, and Kinney did not intend to commit it. The furnishing of the matches was the overt act. If the defendant did anything with intent to steal the papers, which in the ordinary course of events, unless interfered with, would have resulted in the theft thereof, it was an overt act. *People v. Sullivan*, 173 N. Y. 122, 133, 63 L. R. A. 353, 93 Am. St. Rep. 582, 65 N. E. 989. Taking up the records, putting them in his pocket, and walking away with them was an overt act, because it was done with the intent to remove and appropriate them, and would ordinarily result in carrying that intention into effect. It was a trespass to take the indictments into his possession under the circumstances, for he did it, as the jury found, with the intention of stealing them. It was not necessary that the trespass should be accompanied with violence, as it was enough for him to secure the physical custody of the papers, and have it in his power to take them away and appropriate them, the same as if he had picked them up in

the clerk's office. No more force would be required in the case supposed than in the case proved. The touch of a pickpocket is so light that it cannot be felt, yet the force is sufficient to constitute a trespass and an attempt to commit a crime, even if there is nothing in the pocket to steal. *People v. Moran*, 123 N. Y. 254, 10 L. R. A. 109, 20 Am. St. Rep. 732, 25 N. E. 412. As was said by the court in a late case: "It is now the established law, both in England and in this country, that the crime of attempting to commit larceny may be committed although there was no property to steal, and thus the full crime of larceny could not have been committed." *People v. Gardner*, 144 N. Y. 119, 125, 28 L. R. A. 699, 43 Am. St. Rep. 741, 38 N. E. 1003, 1004, and cases cited.

Knowing that he had no right to the indictments, and that the officers had no right to let him have them, when the defendant picked them up from the table and put them in his pocket *animo furandi*, the law presumes that the act was done *vi et armis*, for the amount of violence is not important. He removed the papers from the control of the real owner, and had them in his own control, so that the state could not have recovered possession without his consent or by forcibly taking them away from him, which was in fact done. The detective could only get them back if he and his assistants were strong enough, unless the defendant voluntarily gave them up. He had the same control of them that he had of his own pocketbook, for both were in his pocket, and neither could be taken from him except by the use of force. Temporary possession, though but for a moment, by one who intends to steal, is enough, and possession "is the having or holding or detention of property in one's power or command." *Harrison v. People*, 50 N. Y. 518, 10 Am. Rep. 517. As was said by Judge Folger in the case cited, quoting with approval from an old manuscript of a distinguished judge: "If every part of the thing is removed from the space which that part occupied, though the whole thing is not removed from the whole space which the whole thing occupied, the asportation would be sufficient; so, drawing a sword partly out of its scabbard will constitute a complete *asportavit*." The defendant picked up the papers from the table; he held them in his hand; he put them in his pocket, and was walking away with them when he was arrested. In whose possession were they at that time, if not in his, and how did they get there unless by his unauthorized physical interference with them? The district attorney did not authorize him to take them, for he could not, and the defendant knew that he could not.

Neither the district attorney nor the detective stood for the state of New York in placing them where the defendant could get them, for no court or officer has that power under the law. The statute expressly prohibits a record or document "whereof a transcript duly certified may by law be read in evidence" from being "removed, by virtue of a *subpoena duces tecum*, from the office in which it is kept, except temporarily, by the clerk having it in custody, to a term or sitting of the court of which he is clerk, or by the officer having it in custody, to a term or sitting of a court or . . . referee held in the city or town where his office is situated." Where it is required at any other place for use as evidence, it may be removed by order of the court "entered in the minutes, specifying that the production of the original, instead of a transcript, is necessary." Code Civ. Proc. § 866. This is the only statute which confers any power on the court in relation to the subject, and clearly it did not authorize the court to allow the district attorney to take the indictments in question for the purpose of giving them away, even temporarily, or permitting them to be taken into possession by one who wanted to steal them. An order made for such a purpose would be void, but no order of the kind was actually made by the court, or "entered in the minutes." The district attorney told one of the judges, out of court, what he wanted of the indictments, and, to use his own words, "that I desired to keep them over night, but I did not want to go to the clerk's office about it, and that I did not want to do it without the consent of some judge, and he was the only judge in the building, and he consented." While such consent gave some moral support to the district attorney, it added not a whit to his legal powers. The Code of Criminal Procedure requires that an indictment "must be filed with the clerk and remain in his office as a public record." § 272. No one is authorized to take it away, except when it is needed as evidence, or in court upon the trial of the accused. We have recently held that a record made for the purpose of identifying a convict, and kept in the office of the superintendent of state prisons, could not be given away or surrendered, even after the person convicted had been acquitted upon a new trial granted through appeal. We declared that the record was beyond the control of the superintendent except for preservation and use, and that even the courts could not compel him to give it up without express authority from the legislature. *Molineux v. Collins*, 177 N. Y. 395, 398, 65 L. R. A. 104, 69 N. E. 727. If the district attorney had had the indictments in his possession for use in court in prose-

cuting Dr. Flower, such possession would have been the possession of the state, for it would have been lawful, and in the line of his duty. When, however, he had them in his possession for the purpose of delivering them to the defendant, or letting him take them with intent to carry them away and destroy them, such possession was not that of the state, for the district attorney was not then acting in an authorized or official capacity, although it is conceded that he thought he was. As the defendant "proposed the scheme and put in motion the forces by which the indictments were actually removed from the files of the court and delivered to him," we agree with the appellate division that he was a principal throughout the transaction. Penal Code, § 29; *People v. Bliven*, 112 N. Y. 79, 8 Am. St. Rep. 701, 19 N. E. 638; *People v. Peckens*, 153 N. Y. 576, 47 N. E. 883. However, even if he had not instigated the scheme pursuant to which the indictments were removed from the office of the clerk and brought where he could put his hands upon them, still, if he then took them into his possession with intent to steal them, knowing what they were and where they came from, he was guilty of the offense charged. It was unnecessary for him to remove them from the clerk's office, but was sufficient if he took them *animo furando* from any place, or from any person, either with or without consent.

We shall not review the authorities cited on either side, for that duty has been so thoroughly discharged by the appellate division that we can throw no further light upon the subject. We merely state that an important distinction between this case and those relied upon by the appellant is found in the difference between public and private ownership of the property taken by the accused. In most cases some third person is injured by the crime, and is directly or indirectly the complainant, but in this case the state was, as it must be in all criminal cases, the prosecutor, and it was also the injured party, for its property was the subject of the attempt at larceny. If an individual owner voluntarily delivers his property to one who wishes to steal it, there is no trespass; but when the property of the state is delivered by any one, under any circumstances, to any person for the purpose of having him steal it, and he takes it into his possession with intent to steal it, there is a trespass, and the attempt is a crime. The state did not solicit or persuade or tempt the defendant, any more than it took his money when he handed it over to the detective. Neither did the district attorney, as such, but Mr. Jerome did, acting as an individual, with the best of motives,

but without authority of law, and hence his action did not bind the state. While the courts neither adopt nor approve the action of the officers, which they hold was unauthorized, still they should not hesitate to punish the crime actually committed by the defendant. It is their duty to protect the innocent and punish the guilty. We are asked to protect the defendant, not because he is innocent, but because a zealous public officer exceeded his powers, and held out a bait. The court do not look to see who held out the bait, but to see who took it. When it was found that the defendant took into his possession the property of the state with intent to steal it, an offense against public justice was established, and he could not insist as a defense that he would not have committed the crime if he had not been tempted by a public officer whom he thought he had corrupted. He supposed he had bought the assistant district attorney when he handed over the money, but he knew he had not bought the state of New York, and hence that the assistant had no right to give him its property for the purpose of enabling him to steal it.

The judgment of conviction should be affirmed.

Parker, Ch. J., and Haight, Cullen, and Werner, JJ., concur.

O'Brien, J., dissenting:

This case is *sui generis*. There is no case in this state that I have been able to find that is at all substantially similar. The cases cited in support of this conviction at the bar and in the courts below are well enough in their way, but they do not touch the vital question involved in the case. This will be seen upon an examination of the cases themselves in connection with the views herein expressed. After a careful examination of the record, the first thought that impresses the mind has been admirably expressed by an eminent judge of the highest court in the land in a famous case which has just been decided in that court: "Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law for the future, but because of some question of an immediate, overwhelming interest which appeals to the feeling and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well-settled principles of law will bend." There is in this case, doubtless, something of immediate, overwhelming interest, which distorts the judgment and 67 L. R. A.

leads it away from the real principles that ought to control the decision.

The defendant was indicted and convicted for an attempt to steal six indictments that had been filed by the grand jury against a certain Dr. Flower. He, it seems, was a director and manager of a mining corporation, and, in connection with his transactions concerning the stock of that corporation, he was indicted for stealing certain moneys that it is said he received upon a sale of the stock. The particular facts upon which the indictments rest are of no consequence. It is enough for us to know that they were presented by the grand jury in the usual course, and were on file in the proper office. The defendant is an attorney at law, and was a director in the same corporation, and was a friend of Flower. A man named Meloy was also a director, who had some quarrel or dispute with the defendant and Flower concerning the management of the corporation. He had some dispute or quarrel with the defendant in the corporate meetings, and was really an enemy of the defendant, though he professed to be a friend. The desire for revenge still nestled in his bosom, and that doubtless is a sufficient explanation for his conduct in the transaction which will be presently related. The transaction is a very remarkable one, and, although it appears at length and with considerable detail in the large record before us, it can be compressed into a very brief statement. In stating the case I will aim to give it the coloring which is most unfavorable to the defendant, and will wholly reject his own version of the transaction.

On or about the 29th of March, 1903, the defendant called up Meloy on the telephone, and asked him to meet him at a designated place in New York. This meeting took place, and Meloy testifies that the defendant made at that interview the following statement to him: The defendant said, in substance, that there had been a large amount of money spent for counsel in the Flower case, and that if the money had been given to the district attorney, or one of his deputies, the prosecution would have long since ceased; and the defendant suggested to Meloy that the latter make an engagement for an interview with an assistant district attorney. In other words, the defendant disclosed to Meloy, in plain words, a project to bribe the district attorney, or rather his assistant, to make way with the indictments, or to terminate the prosecution by some proceeding in court upon a demurrer. There can be no doubt whatever that the defendant entertained the design to terminate the prosecution upon these six indictments by bribery. The exact course to be followed

was evidently not clear in his mind, and was to await further development. This, of course, was a project that shocks our sense of propriety, and arouses at once a prejudice against the defendant. It is the one thing in this case that distorts the judgment, and is liable to lead courts away from the legal question involved in the case. When the interview was finished, and Meloy and the defendant parted, it was agreed that Meloy was to see the assistant district attorney, and arrange an interview between the latter and the defendant. Here Meloy found his opportunity to get even with the defendant, and in that way settle their old quarrel. Instead of going to see the assistant, as he had led the defendant to believe, he went to his own lawyer, and disclosed to him the conversation and proposal which had been made by the defendant to him. He and his counsel then proceeded to call upon the assistant the same day, and informed him of the conversation that Meloy had had with the defendant. The assistant immediately asked Meloy and his counsel to accompany him to the office of the district attorney, where these four persons had an interview, and then, or perhaps at a subsequent one, a plan was arranged by which the district attorney agreed to obtain from the files of the court the six indictments which were pending against Flower, and to deliver them into the custody of a detective in his office, who would meet the defendant, with the indictments, and obtain from him a proposition for the delivery of them to the defendant upon payment of a certain sum, which the detective would represent would go to the assistant.

Subsequently to the interview which resulted in the foregoing plan, Meloy, acting under the instructions of the district attorney and of his own counsel, had another interview with the defendant, and informed him that it was impossible for the assistant to meet the defendant, but that the assistant had deputed a wardman or detective in the office, in whom he had confidence, to meet the defendant and receive from him his proposition; and it was through Meloy that the defendant and the detective finally connected with each other. When Meloy met the defendant, he concealed from the latter the fact that he had an interview with the district attorney, and that there was a plan on foot to entrap him. Subsequently the detective and the defendant connected with each other over the telephone, and, as a result of that connection, they met at a certain restaurant in the city at about 3 o'clock on the afternoon of the 31st day of March, 1903. In this interview the defendant told the detective that these indictments had been found against

Dr. Flower, and that he could withdraw them and misplace them; and he suggested to the detective, who claimed to represent the district attorney's office, that he could withdraw them, misplace, lose, or dispose of them in some way, or the assistant could go into court or permit him to go into court on a demurrer and have the indictments quashed. All this resulted in a proposition by the detective to procure the indictments and deliver them to the defendant on payment of \$1,750. On a subsequent interview at the same place the detective and the defendant met, and the former received the money, produced the indictments, handed them to the defendant, who put them in his pocket, and thereupon the detective and a policeman, who was outside the door, looking on, immediately arrested the defendant, and, of course, the detective took the indictments away from him, and here the heroic farce ended. The rest is judicial history.

It will be seen from this statement that all the defendant did was to disclose to Meloy his corrupt purpose to bribe the district attorney. That, of course, was bad enough, and he could have been arrested after the disclosure under the provisions of the Code for the prevention of crime, and could have been required to give security for his good behavior. Code Crim. Proc. §§ 82-90. It will be seen also that everything else in the transaction which subsequently took place was aided, induced, procured, and consummated by the state itself, acting through its officers and agents.

The six indictments in question were doubtless records within the meaning of the statute. The law requires that such records be filed with the clerk, and remain in his office as public records, not to be shown to any person other than a public officer until the defendant has been arrested. Code Crim. Proc. § 272. But the statute permits them to be removed by order of the court, specifying that the production of the original, instead of the transcript, is necessary. It must be assumed, and in fact it appears, that the district attorney procured the delivery of the indictments to him in compliance with law. No one suggests that he or anyone else purloined or obtained them by any fraud or in any illegal way. Hence he had the lawful possession and custody of the records, and, as authorized agent, voluntarily delivered them to the defendant for a moment, intending all the time to take them back. In other words, the custodian of the papers, as they went into the pocket of the defendant, had a string tied to the package, which enabled him in a moment to resume the actual possession. There was not a moment of time when these records were not

surrounded by the legal protection that they would have had if never removed from the proper office. There were two detectives looking on, and constructively, if not actually, they were in the possession of these papers all the time. There never was a time when the defendant had, in any legal sense, any dominion over them, or the opportunity to remove or destroy them. The statute declares that "a person is guilty of grand larceny in the second degree who, under circumstances not amounting to grand larceny in the first degree, . . . steals or unlawfully obtains or appropriates . . . a record of a court or officer, or a writing, instrument, or record kept, filed, or deposited according to law, with, or in keeping of any public office or officer." Penal Code, § 531. It also declares that "an act, done with intent to commit a crime, and tending but failing to effect its commission, is an attempt to commit that crime." Penal Code, § 34. Now, what act is imputable to the defendant, that was done with intent to steal the records? We know that he intended to bribe the district attorney. But the only thing done in the whole transaction by the defendant was to put the records in his pocket for a moment, after having them voluntarily handed to him by the detective, and they were immediately taken away from him. There was no intention on the part of the detective to do anything but to carry out a plan previously formed, to which the defendant was not a party, and under these circumstances there was not, in law, any delivery whatever. The crime charged would have been just as well supported if the defendant had done nothing more than to touch the papers with his little finger. He did nothing except what the state, acting through its officers and agents, wanted him to do,—solicited, persuaded, tempted, and procured him to do,—and I may add that the officers would have been grievously disappointed and chagrined, had the defendant acted otherwise than he did. And if he had refused to touch the papers he would have been just as guilty then of stealing, or of an attempt to steal, as he is now.

The defendant is charged in the indictment with having done something "against the peace of the people of the state of New York and their dignity." How far the peace of the state has been disturbed, or its dignity violated or insulted, will appear from what has already been stated. The state has taken advantage of a man with an evil and corrupt disposition,—a man who was willing to commit a crime,—and through its officers has tempted and procured him to put six indictments in his pocket, and then complains that its peace has been disturbed and its dignity violated. The question 67 L. R. A.

arises here whether this farce constitutes a criminal offense. There is no complainant or third person in this case against whom the injury was inflicted. There is nobody but the state itself and the defendant, and it seems to me that there could be no crime committed by the defendant in accepting the indictments, because it was with the full consent of the state. *Volenti non fit injuria*. And herein this case differs widely from any other existing precedent. I have said that the state was an aggressive, voluntary actor in this transaction. The state was the owner and custodian of these indictments. It permitted them to be taken from the clerk's office by its laws and its courts, and to be placed in the custody of its prosecuting officer, and in all that he did with these records he represented the state. The state, existing only as an artificial and impalpable being, could not act without agents; and hence the district attorney, for all the purposes of this case, and for the purposes of the administration of criminal justice, is the agent of the state, and his acts are imputable to the state and to the people; and hence the delivery of the indictments to the defendant by authority of the district attorney was an absolute consent on the part of the state to the defendant to receive them. Hence the state, instead of seeking to redress a wrong which had ensued from a violation of the criminal law, evidenced by the defendant's threat to bribe one of its public officers, stooped to conspire to entice a man to commit a crime and become a criminal. The representative of the state took its records, and sought to make their voluntary delivery to the defendant a crime. This court has held that a process server, employed by a railroad company to subpoena witnesses to testify in a pending suit, represented the company, and acted within the scope of his duty and employment, when engaged in an attempt to bribe witnesses to testify falsely in the case; that, although an attempt to suborn witnesses was unlawful, yet the act of the agent bound the principal, and his unlawful act would be imputed to the corporation. *Nowack v. Metropolitan Street R. Co.* 166 N. Y. 433, 54 L. R. A. 592, 82 Am. St. Rep. 691, 60 N. E. 32. In view of this decision, it is difficult to see upon what ground or for what reason it is asserted in this case that the district attorney's office did not represent the state, and that the acts of the detective, set in motion by the office, cannot be imputed to the state. If the public prosecutor and his detective did not represent the state, they did not represent the law; and, if they did not represent the law, they must as mere private persons have been using records of the crim-

inal courts in eating houses and other public places in order to tempt the unwary.

I have said that there was no precedent in this state to uphold this judgment, and fortunately that is true. There are precedents that justify the state and its officers, when a crime has been committed, to entrap the perpetrator by acts, admissions, or circumstances, or, in other words, to procure evidence to convict a party of a crime with which he is charged. All the cases cited seem to be authorities of that character. I have no comment to make upon them, but I think it may be safely asserted that never before in this state have the courts been called upon to pass on a case where the crime was created by the act, advice, and procurement of the commonwealth. But while it is true that no prosecution like this has ever come before any of the courts of this state, our sister states have not been so fortunate.

The law upon the subject is well discussed in the case of *State v. Hayes*, 105 Mo. 76, 24 Am. St. Rep. 360, 16 S. W. 514. In that case the accused proposed to another to commit burglary of a storehouse. The other consented, or pretended to consent, but, like Meloy in this case, proceeded to inform the authorities, and then went with the accused to the storehouse, and entered it by raising a window with the assistance of the accused. He handed out a piece of bacon to the accused, who assisted him out of the building. The accused took the bacon, and was arrested while carrying it away; the whole transaction having previously been arranged with the authorities. It was held that the accused could not be convicted of either burglary or larceny.

In *State v. Hull*, 33 Or. 56, 72 Am. St. Rep. 694, 54 Pac. 159, the accused had been convicted of stealing cattle. It appeared, however, that a person employed by the owner to detect suspected thieves, of which the defendant was one, co-operated, or pretended to co-operate, with them or with the accused in planning and carrying out the larceny and asportation. It was held that it was not larceny, and the conviction was reversed. The case of *People v. Collins*, 53 Cal. 185, is to the same effect.

The principle at the bottom of all the cases is this, *viz.*, that a person decoyed by others into the doing of some act that otherwise would be a crime is no criminal, in the eye of the law, unless the persons inducing or procuring him to do the act were themselves criminals, intending to commit the crime. Hence the defendant in this case committed no crime unless Meloy and the district attorney themselves intended to and did commit a crime. But that hypothesis is simply absurd.

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In *State v. Stokney*, 53 Kan. 308, 42 Am. St. Rep. 284, 36 Pac. 714, the court said: "If Payne was employed by the owner to open the door and decoy the appellant within the building, and the entrance was with the consent of . . . [the owner], then certainly the appellant cannot be held responsible for a burglarious entry."

In *Williams v. State*, 55 Ga. 391, the court said: "It is difficult to see how a man may solicit another to commit a crime upon his property, and, when the act to which he was invited has been done, be heard to say that he did not consent to it. In the present case, but for the owner's incitement, through his agent, the accused may have repented of the contemplated wickedness before it had developed into act. It may have stopped at sin, without putting on the body of crime. To stimulate unlawful intentions, with the motive of bringing them to punishable maturity, is a dangerous practice. Much better is it to wait and see if they will not expire. Humanity is weak. Even strong men are sometimes unprepared to cope with temptation and resist encouragement to evil."

In *People v. McCord*, 76 Mich. 200, 42 N. W. 1106, the court said: "But our duty to public justice and decency requires us to dispose of the other views of the case. In some of its features, it is one of the most disgraceful instances of criminal contrivance to induce a man to commit a crime, in order to get him convicted, that has ever been before us. If the prisoner's statement is believed—and the court, in the latter part of the charge, seems to have assumed it was probable—he was not the active agent in the crime, but guilty of aiding and abetting Flint, and therefore only guilty if Flint was guilty. It would be absurd to hold Flint guilty of burglary. He did what he was expected to do, and had no such intent as would hold him responsible. It may be true that a person does not lose the character of an injured party by merely waiting and watching for expected developments. Possibly,—but we do not care to decide this,—leaving temptation in the way, without further inducement, will not destroy the guilt, in law, of the person tempted, although it is a diabolical business, which, if not punishable, probably ought to be. But it would be a disgrace to the law if a person who had taken active measures to persuade another to enter his premises and take his property can treat the taking as a crime, or qualify any of the acts done by invitation as criminal. What is authorized to be done is no wrong, in law, to the instigator."

In *Love v. People*, 160 Ill. 501, 32 L. R. A. 139, 43 N. E. 710, the court said: "Acts otherwise criminal, done by a party against

property at the instigation and by the encouragement of a detective, who acts in pursuance of a plan previously arranged with the owner of the property, do not constitute a crime. . . . If he could make the criminal, and induce the commission of the crime, and cause the arrest of the actor, or throw around him a web of circumstances that would lead to a conviction, it would redound to the glory of his chief and cause his advancement. With him the end justified the means, and the reputation of the agency to which he belonged and his own advancement were apparently his object. Such means and agents are more dangerous to the welfare of society than are the crimes they were intended to detect and the criminals they were to arrest. . . . Strong men are sometimes unprepared to cope with temptation and resist encouragement to evil when financially embarrassed and impoverished. A contemplated crime may never be developed into a consummated act. To stimulate unlawful intentions for the purpose and with the motive of bringing them to maturity, so the consequent crime may be punished, is a dangerous practice. It is safer law and sounder morals to hold, where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act by one acting in concert with such owner, that no crime is thus committed. The owner and his agent may wait passively for the would-be criminal to perpetrate the offense, and each and every part of it for himself, but they must not aid, encourage, or solicit him that they may seek to punish. After a careful consideration of the evidence in this record, and with a deliberative regard for the importance of the question under discussion, we are constrained to hold the evidence does not sustain this conviction. The judgment is reversed, and the defendant is ordered discharged."

In *Connor v. People*, 18 Colo. 373, 25 L. R. A. 341, 36 Am. St. Rep. 295, 33 Pac. 159, the court said: "In the case under consideration, the only evidence of the inception of the scheme to rob the express company is that of Holliday, who states that it was instigated by his superiors at St. Louis, and by him suggested to the plaintiffs in error. It further appears that before the consummation of the conspiracy the officers of the express company were informed of and consented to the scheme; hence, under the foregoing authorities, the prosecution cannot be sustained. We do not wish to be understood as intimating that the services of a detective cannot be legitimately employed in the discovery of the perpetrators of a crime that has been or is being committed; but we do

say that when, in their zeal, or under a mistaken sense of duty, detectives suggest the commission of a crime, and instigate others to take part in its commission, in order to arrest them while in the act, although the purpose may be to capture old offenders, their conduct is not only reprehensible, but criminal, and ought to be rebuked, rather than encouraged by the courts."

In *O'Brien v. State*, 6 Tex. App. 665, the court said: "Where the officer first suggests his willingness to a person to accept a bribe to release a prisoner in his charge, and thereby originates the criminal intent, and apparently joins the defendant in a criminal act first suggested by the officer, merely to entrap the defendant, the case is not within the spirit of said article 307 of the Criminal Code."

In *Com. v. Bickings*, 12 Pa. Dist. R. 206, the court said: "The liability of men to fall into crime by consulting their interests and passions is unfortunately great without the stimulus of encouragement. No state, therefore, can safely adopt a policy by which crime is to be artificially propagated. . . . This is virtually the case of a detective who, by promising to perpetrate a crime, lures an innocent man into aiding and abetting it; the object being, not the perpetration of the crime, but the luring of the abettor. Such a proceeding is not a reality, but merely a tragical farce, in which the detective, masquerading as a criminal, captivates the unsophisticated defendant, and then, with mock heroics, denounces him."

These cases, and many others that might be cited, show very clearly the character of the prosecution disclosed by the record, as it is understood and treated in the criminal law. This court, in its indignation at the defendant's project to bribe a public officer, should not lose sight of its own duty and dignity. No court can afford to close its ears against reason, to ignore logic, and to brush aside legal principles, in order to put some miscreant for a few months in jail. We cannot affirm this judgment without adopting and approving all the acts and proceedings which enter into the judgment and form a part of it. I am not disposed to criticise the learned district attorney for doing what he supposed to be his duty. No doubt, he acted honestly. But this court has its own duty and responsibility. If the prosecuting officers of the state can tempt every evil-disposed person into overt criminal acts, and then prosecute them, there is an opportunity, doubtless, to fill the prisons to overflowing. But I think we ought not to approve of that at the expense of destroying fundamental maxims of the law.

We cannot affirm this judgment without holding that fraud does not vitiate every

transaction. If it is committed by the state, through its officers, and for the purpose of procuring evil-disposed persons to manifest their corrupt intentions by overt acts, then, according to the judgment in this case, the fraud is not only lawful, but commendable. We cannot hold that the end always justifies the means. We cannot hold that it is more important that one evil-disposed person shall be put in prison than that ninety-nine innocent persons be acquitted. It is not the law yet that in criminal cases, where there is a doubt upon the law or the facts, the people, and not the accused, shall have the benefit of it. It is still law, at least in theory, that a person is to be presumed innocent until shown to be guilty. It seems to me that some or all of these fundamental maxims have been ignored in this case, and nothing has been seen except the evil purpose of the defendant to bribe a public officer. If this defendant is, in law, guilty of attempting to steal the papers that were handed to him by the detective, I have no comment to make upon the conduct of the officers who devised and carried out the plan. It may be that they might be considered public benefactors, as possessing the zeal and the vigor to punish evil intentions. But I am not prepared to make this court a party to the transaction by giving it approval, as it must logically, if this judgment is affirmed.

The argument of the learned court below in support of the conviction rests upon a single proposition, which I quote from the opinion: "Having proposed the scheme and set in motion the forces by which the indictments were actually removed from the files of the court and delivered to him, every act from the inception of the scheme to its final consummation by the delivery of the indictments was the act of the defendant, no matter by whom it was performed, and it constituted him a principal in the transactions." [91 App. Div. 331, 86 N. Y. Supp. 529.] The fallacy of this proposition consists entirely in its application, since everyone will admit that a party who employs or procures another to commit a crime is a principal. Whatever other persons, acting as his agents, do in furtherance of the crime, may be imputed to the one who set the forces in motion. No one questions this rule of law. But did the defendant set the district attorney and his staff in motion? Were they his instruments and agents in the scheme to steal the records? If so, they were criminals worse than the defendant, since they were the sworn officers of the law, and intrusted, for the time being, with the custody and safe-keeping of the records. Were they doing the defendant's work, and engaged in

promoting and effectuating his evil purpose to bribe them? If the proposition quoted is correct as applied to this case, it logically follows that they were certainly guilty of all these things. But that is only a distorted view of the facts, since they were not acting for the defendant. They were not his agents in crime, and in no legal and proper sense did they represent the defendant. The whole scheme that was finally consummated in the saloon, when the detective succeeded in getting the records in the defendant's coat pocket for an instant of time, originated with themselves. There was not, and could not have been, any crime whatever, without the active aid, procurement, encouragement, and connivance of these public officers; and hence there was not, in law, any crime at all. There was an evil purpose in the defendant's mind, which was never carried out or consummated. The proposition of the learned court quoted above virtually and logically represents the district attorney's office as aiding the defendant, and therefore as an agency for the perpetration and promotion of crime. How much more reasonable, charitable, and just it would be to present the office and its occupants in the true light, namely, as representing the state and acting for it in all that was done! I should be surprised if the learned, able, and honest district attorney would desire to be represented as acting in any other capacity; and I will add it is much more complimentary to him to treat the transaction in the saloon, when the records were produced by his detective, as a mere farce or experiment, rather than a crime, which, if committed at all, was by his aid, advice, and procurement. It was not only harmless, but the whole performance was absolutely silly, since copies of the six indictments were in the district attorney's office, and the loss of the originals could not embarrass the prosecution in the least. The defendant, though a lawyer himself, evidently did not see what a silly project the whole scheme was, but certainly the district attorney, his assistant, and the detective must have known. The genius and vigilance that can convert evil thoughts into criminal acts might be admired, but on sober reflection no public officer can think it fair or proper to be represented as giving aid, advice, or assistance to an evil-disposed person, that may enable him to do, or appear to do, the things that constitute a crime. It is plain from the opinions that I have quoted from the courts of sister states that those tribunals entertain no such views of this transaction as those expressed by the learned court below in this case. These cases hold that such a transaction does not amount to any crime, and, in my opinion, they are the expression of

good sense and sound law. That view is safer for the public, and much more charitable to the officers themselves. I would not give to them the character of agents carrying out the defendant's evil purpose, but rather as engaged in a harmless farce or experiment. The fundamental question in this case is plain and simple, and it is this: Can the state, through one of its own officers and agents, on learning that one of its citizens harbors criminal designs in his mind, and has a criminal inclination, enter upon a plan to tempt him, suggest to him what to do in order to accomplish his criminal purpose, take records from the files in pursuance of the plan, and deliver them for a sum of money previously agreed upon, all conceived and carried out in fraud for the very purpose of decoying the person into some criminal act in order to prosecute him for the same, upon the sole ground that its peace and dignity have by that act been insulted and violated? I have no hesitation in asserting that an act thus procured and manufactured cannot be a punishable crime, either in the domain of law, of morals, or of common sense.

It has been said, with perhaps much truth, that it is and always has been the natural disposition of mankind to reverence law more in its high abuses and summary movements than in its calm and constitutional energy, when it dispensed blessings with an unseen but liberal hand. Courts cannot inspire much respect for the majesty and dignity of law or the orderly administration of justice when they depart from sound and settled principles in order to crown with success the traps devised by public officers to decoy evil-minded persons into the commission of acts which under other circumstances would be criminal. When the state and its officers come into a court of justice, demanding the punishment of a person accused of crime, they ought to appear there with clean hands, and not as a part of the forces that procured the consummation of the unlawful act.

The highest and most enlightened court is liable to be misled by plausible and distorted arguments. But in this case the wayfaring man cannot err, since he has the force of reason and the light of authority to guide him. This judgment can be affirmed with the strong hand of power, but it is quite useless to try to cover it with a glamour of reason or law. The evil purpose of this defendant, never consummated, ought not to have any more influence over the question involved in this case than the smallest pebble on the shore over the turbulent and angry waves of the sea. I think the approval of this judgment is a bad precedent, since we cannot escape adopting acts and arguments that are

only a virtual modification of the arguments in support of lynch law. It is not worth while for this court to become a party to this transaction for the sake of sending this defendant, who, so far as we know, is a bad man, to a prison for a few months.

There was a ruling made by the learned trial judge which seems to me should not be ignored. The people were permitted to prove that, about the time the transaction referred to took place, an assistant district attorney was engaged in investigating the cause of the death of a man named Hagaman. The assistant himself was put upon the stand, and he testified that the body had been exhumed; that an autopsy had been performed; that the record of the pathologist had been received; that the organs of the dead man had been preserved, and were in process of a chemical analysis by the expert; that Dr. Flower, supposed to know something about the conditions surrounding the death, had been examined, and the written statements taken; that the autopsy was held at Poughkeepsie, where Hagaman was buried. All these things, he said took place in January or February, previous to the transaction in question. The assistant testified that, as head of the homicide bureau, he had charge of the proceedings against Flower; that the matter had been submitted to the grand jury; and that the assistant had collected the evidence. Now, what all these matters had to do with the question before the court, which manifestly was whether the defendant stole, or attempted to steal, the indictments when he put them in his pocket for a moment in the saloon, it is utterly impossible to conceive. The defendant was not indicted for, or charged with, bribery, nor for any complicity or connection with the death of Hagaman. It seems that it was a subject that had been widely discussed in all the papers, and the name of Flower, the defendant's client, had been connected in some way with the matter. The evidence was all objected to by the defendant's counsel. The objections were overruled in every case, and exceptions taken. This evidence could serve only one purpose, and that was to present the defendant before the jury as an associate, friend, and counselor of a man who was suspected, if not accused, of murder. The ruling of the learned trial judge admitting this evidence against the defendant's exception and objection was manifestly prejudicial to the defendant's right to a degree which is difficult to describe. If the defendant had been indicted for bribery or for an attempt to bribe the district attorney or his assistant, it is possible that this evidence could be justified; but a motive for the commission of one crime is not evidence in the prosecution

for another and different offense. It seems to me that the ruling embodies a fatal error, and, even if the testimony was not as clearly incompetent on its face as it appears to be, the presumption is that it prejudiced the accused, under the settled rule of this court. *People v. Koerner*, 154 N. Y. 377, 48 N. E. 730; *People v. Helmer*, 154 N. Y. 603, 49 N. E. 249; *Stokes v. People*, 53 N. Y. 183, 13 Am. Rep. 492; *Greene v. White*, 37 N. Y. 405.

The judgment of conviction should be reversed, and a new trial granted.

Bartlett, J., dissenting:

I concur in the result reached by Judge O'Brien.

It is argued that the error in the reasoning of counsel for the defendant consists in assuming that the district attorney and his detective represented the state of New York in the scheme devised in the district attorney's office to entrap the defendant. I deem this the crucial point in the case. The district attorney and his detective undoubtedly acted upon the theory that they were representing the state, and doing it a great service in bringing this defendant into a situation that would result in conviction, and, as they supposed, merited punishment. This was an unfortunate error of judgment. It is a violent assumption, under the circumstances, that the district attorney and his detective were acting as private citizens, and the state was not bound in any way by what they did. The state, as a legal entity, can only be represented by officers duly authorized to exercise certain of its powers resting in its absolute sovereignty. In the case at bar, according to the testimony of the people's witnesses, the district attorney was advised that the defendant had expressed the desire to one of these witnesses to bribe an assistant district attorney to withdraw, misplace, or lose the six indictments against Flower, or go into court and oppose a motion to quash the indictments in such a manner as to permit it to succeed. This wicked purpose to bribe an official, existing in the mind of the defendant, and communicated to a man whom he supposed was his friend, represents his extreme position at the time the district attorney was advised that one of his assistants might be improperly approached. No crime had been committed or attempted. It will be observed that, according to the people's witnesses, the intention lurking in the defendant's mind was bribery. He did not contemplate getting possession of the indictments himself; his idea being that the assistant district attorney, if capable of being bribed, might lose or misplace them, or defend in a half-hearted manner a motion made to quash them. At this juncture the scheme was devised in the district attorney's office of allowing one of its detectives to place himself in communication with the defendant, and assure him that he sustained such relations to the district attorney's office and assistant district attorney as would serve his purpose. This plan was carried out, and resulted in leading the defendant into the supposed commission of two entirely distinct crimes, to wit: (1) An attempt to commit the crime wilfully, etc., removing, etc., a public document, i. e., certain indictments, in violation of § 94 of the Penal Code; (2) the crime of attempted grand larceny in the second degree by attempting to steal the aforesaid indictments. This was not a scheme or device to detect crime already committed, wherein secrecy and deception are often resorted to in order to bring the guilty to punishment, but it was a plan to entrap the defendant, who up to that time had committed no crime whatever, but was planning in his own mind a wicked scheme to bribe an assistant district attorney. In order to carry out the scheme of the district attorney, it required the exercise of the great power and discretion conferred upon him by law. The indictments in question were on file in the clerk's office, and no court or officer had the power, under the law, to remove them for the purposes contemplated by this scheme. Code Civ. Proc. § 866. This section permits records to be brought into court in the custody of a clerk when necessary, and, when they are required at any other place, they may be removed by order of the court, specifying that the production of the original instead of the transcript is necessary. The district attorney obtained this order of the court, and secured the possession of the indictments in question; giving his official receipt therefor. Nevertheless this defendant is indicted for attempting to remove filed documents from a public office and attempting to steal the same. The indictments were removed from the files of a public office by the district attorney, and were in his official custody and control every moment of time until they were returned to the proper custodian, and the receipt given for the same taken up. The farce enacted in the saloon where this defendant was surrounded by the officers of the law shocks the sense of justice; and, if the state disapproves this mode of procedure, it should renounce its unsavory fruits, which include \$2,000 more or less. In order to reach the conclusion that the district attorney did not represent the state in devising and carrying out this scheme, we are compelled to regard him merely as the agent of the state, exceeding his authority in the premises. I am of opinion that this familiar principle of the law of agency has no application to this

case. It is essential that the sovereignty of the state should be duly represented by its officials, and there is no valid reason why it should not be bound by the action of the district attorney when he commits a grave error of judgment. The argument that the district attorney and his detective did not represent the state in this prosecution permits the inference that if they did this conviction could not stand. It is contrary to public policy and sound reason, when a defendant is entrapped by the district attorney's office into the commission of a crime he did not originally contemplate, that the state should be able to say it will treat the alleged criminal precisely as if the crime for which he was indicted originated in his own wicked intention, unaided by the officials who claim to represent it, and who deliberately induced him to act.

In the case of *Love v. People*, 160 Ill. 501, 32 L. R. A. 139, 43 N. E. 710, cited by defendant's counsel, the court held: "Burglary is not committed by those assisting a detective in entering a building and taking money from a safe in pursuance of a previously arranged plan between him and the owner, with the sole intent of entrapping the others into the apparent commission of a crime. Acts otherwise criminal, done by a party against property at the instigation and by the encouragement of a detective, who acts in pursuance of a plan previously arranged with the owner of the property, do not constitute a crime." Numerous cases laying down this same principle of law are cited from various states.

A sound public policy requires that the state of New York should be estopped, as is a private individual who seeks to induce a person by scheme or device to commit a crime. It well comports with the dignity of the state to say that it repudiates this action of its officials, and permits this defendant, although unworthy, to go free, because he stands convicted of a crime which he never would have attempted and could not have committed save by the assistance of those who on this occasion, however proper their motives, have misrepresented it.

I vote for reversal.

Fanny McComb HERZOG, *Appt.*,

v.

TITLE GUARANTEE & TRUST COMPANY
OF NEW YORK CITY *et al.*, Exrs.,
etc., of James Jennings McComb, De-
ceased, *et al.*, *Respts.*

(177 N. Y. 86.)

1. The provisions of a will will be af-

fectured by those of a codicil only so far as the latter is valid.

2. A provision in a will giving a child an annuity and an equal share in the residue when distributed is modified by a codicil providing that, in case of her marriage to a person named, her annuity shall be a specified amount, and upon her death a certain sum shall be divided among her children, so far as the matter of definiteness and certainty of language is concerned.

3. The court cannot take a portion of the fund out of the hands of trustees for the purpose of giving validity to a codicil by permitting a construction of its provisions independently from those of the will where a fund is left to trustees to pay annuities to testator's children during the lifetime of two of them, and to devise the residue at their decease, and the codicil attempts to create a further restriction on the alienation of the share of one of the children under certain contingencies.

4. A revocation, as to one of the testator's children, of a provision in a will that the remainder of his property shall be divided among his children, will leave the portion of that child to be distributed as intestate property.

5. A bequest is not a gift to a class within the rule that it shall be divided among the survivors, where at the time of making it the number of the donees is certain, and the share each is to receive is also certain, and in no way dependent for its amount upon the members who shall survive.

6. A partial disinheritance of a child, who, by the terms of a will, is to share equally in the distribution of testator's estate, does not, in the absence of express words, constitute a devise to the other children; but, as to the portion taken from such legatee, there will be an intestacy.

7. A codicil directing trustees, who, under the will, are to hold the residue of the estate during the lifetime of the testator's youngest two children paying annuities to all the children during such lives, and dividing the property at their termination, to hold the share of another child during her lifetime upon the happening of a certain contingency, paying her an annuity during her life, and dividing the principal among her children at her death, is void as suspending the period of alienation beyond two lives in being at the testator's death.

(December 18, 1903.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, First Department, reversing a judgment of a Special Term for New York County in plaintiff's favor in an action brought to obtain a construction of the will of James Jennings McComb, deceased, and to enforce rights in his property contrary to the terms of a codicil. *Reversed.*

The facts are stated in the opinion.

NOTE.—In addition to the cases in this series on the general question of perpetuities, see *note* to *Saxton v. Webber*, 20 L. R. A. 509, on the 67 L. R. A.

effect on prior takers of the failure of a gift because it violates the rule against perpetuities.

Messrs. Robert W. B. Elliott, Robert L. Harrison, and William W. MacFarland, with Messrs. Harrison & Byrd, for appellant:

The ninth clause of the third codicil is void for the reason that it suspends the power of alienation of the trust estate beyond the period of two lives.

Rothschild v. Roux, 78 App. Div. 282, 79 N. Y. Supp. 833.

The whole residue is given to trustees, and the provisions of the codicil do not change that disposition.

Redf. Wills, 263, 290, 3d ed. p. 360; *Brant v. Willson*, 8 Cow. 56; *Hard v. Ashley*, 117 N. Y. 606, 23 N. E. 177.

The necessary result of the codicil is the perpetuation of the trust until the death of Fanny.

McSorley v. Wilson, 4 Sandf. Ch. 515; *Cochrane v. Schell*, 140 N. Y. 531, 35 N. E. 971.

There is no direct gift to Fanny's children. The gift is future and contingent, and to those who are yet unknown and unascertained, and who cannot be ascertained until the mother's death. It is obvious that such an interest is not alienable in the meantime.

Smith v. Edwards, 88 N. Y. 92; *Clark v. Cammann*, 160 N. Y. 323, 54 N. E. 709; *Delafield v. Shipman*, 103 N. Y. 463, 9 N. E. 184; *Re Baer*, 147 N. Y. 348, 41 N. E. 702; *Fargo v. Squiers*, 154 N. Y. 250, 48 N. E. 509; *Dougherty v. Thompson*, 167 N. Y. 472, 60 N. E. 760; *Haynes v. Sherman*, 117 N. Y. 433, 22 N. E. 938.

The condition is void because it might make a part of the trust estate inalienable for more than two lives.

McSorley v. Wilson, 4 Sandf. Ch. 515; *Schettler v. Smith*, 41 N. Y. 328; *Haynes v. Sherman*, 117 N. Y. 433, 22 N. E. 938; *Burrill v. Boardman*, 43 N. Y. 256, 3 Am. Rep. 694; *Knox v. Jones*, 47 N. Y. 397.

A declaration that the ninth clause of the third codicil is valid carries with it the necessary conclusion that the testator dies intestate as to one fourth of his residuary estate.

Re Kimberly, 150 N. Y. 90, 44 N. E. 945.

The law abhors an intestacy, whether total or partial, and will not favor a construction of a will which leads to that result.

Johnson v. Brasington, 156 N. Y. 187, 50 N. E. 859.

Plaintiff had a vested equitable estate in one fourth of the residuary trust created by the fifteenth clause of the will.

If the marriage of the plaintiff with Mr. Louis Herzog divested her of her interest in the residue that part will not go in augmentation of the remaining parts as the 67 L. R. A.

residue of a residue, but will devolve as undisposed of.

Skrymsner v. Northcote, 1 Swanst. 566, 1 Wills. 248, 18 Revised Rep. 142; 2 Jarman, Wills, 5th Am. ed. p. 363; *Morton v. Woodbury*, 153 N. Y. 243, 47 N. E. 283; *Floyd v. Barker*, 1 Paige, 480; *Beekman v. Bonsor*, 23 N. Y. 298, 80 Am. Dec. 269; *Hard v. Ashley*, 117 N. Y. 606, 23 N. E. 177; *Betts v. Betts*, 4 Abb. N. C. 317; *Kerr v. Dougherty*, 79 N. Y. 327; *Re Woolley*, 78 App. Div. 224, 79 N. Y. Supp. 513; *Creswell v. Cheslyn*, 2 Eden, 123, Affirmed in 3 Bro. P. C. 246; *Skipwith v. Cabell*, 19 Gratt. 788; *Ramsay v. Sheldermine*, L. R. 1 Eq. 129; *Humble v. Shore*, 7 Hare, 247, 1 Hem. & M. 550; *Chap-eau's Estate*, Tucker, 410.

The gift in the residuary clause is not a gift to a class.

Re Kimberly, 150 N. Y. 90, 44 N. E. 945; *Re Russell*, 168 N. Y. 169, 61 N. E. 166.

Mr. Edward M. Scudder, guardian ad litem, in person:

The extended term of trust sought to be effectuated by the ninth clause of the third codicil is void as suspending the power of alienation beyond the statutory period.

Real Property Law, § 83; Personal Property Law, § 3; *Rudley v. Kuhn*, 97 N. Y. 26; *Haynes v. Sherman*, 117 N. Y. 433, 22 N. E. 938.

The absolute power of alienation must be present and effective when the precedent estate determines.

Dana v. Murray, 122 N. Y. 604, 26 N. E. 21; *Schettler v. Smith*, 41 N. Y. 328; *Knox v. Jones*, 47 N. Y. 389; *Hawley v. James*, 16 Wend. 121; *Purdy v. Hayt*, 92 N. Y. 446; *Haynes v. Sherman*, 117 N. Y. 433, 22 N. E. 938.

In the trust at bar the "absolute power of alienation" does not necessarily exist at the expiration of two lives in being at the time of its creation.

Purdy v. Hayt, 92 N. Y. 446; *Schettler v. Smith*, 41 N. Y. 328; *Re Baer*, 147 N. Y. 348, 41 N. E. 702; *Clark v. Cammann*, 160 N. Y. 315, 54 N. E. 709; *Re Crane*, 164 N. Y. 71, 58 N. E. 47; *Schlereth v. Schlereth*, 173 N. Y. 444, 93 Am. St. Rep. 616, 66 N. E. 130.

The fact that the ninth clause of the codicil is void does not affect the validity of the fifteenth clause of the original will.

Tilden v. Green, 130 N. Y. 29, 14 L. R. A. 33, 27 Am. St. Rep. 487, 28 N. E. 880; *Savage v. Burnham*, 17 N. Y. 561; *Harrison v. Harrison*, 36 N. Y. 543.

Mr. John Notman, for respondents:

The intention of the testator was clear, that, in the event of his daughter Fanny marrying Mr. Louis Herzog, she should only enjoy from his estate the provision for the

benefit of herself and children, made in the codicil.

New York L. Ins. & T. Co. v. Baker, 165 N. Y. 484, 53 L. R. A. 544, 59 N. E. 257; *Re Hoyt*, 160 N. Y. 607, 48 L. R. A. 126, 55 N. E. 282; *Burnet v. Burnet*, 30 N. J. Eq. 595; *Ex parte Dickson*, 1 Sim. N. S. 37, 20 L. J. Ch. N. S. 33, 15 Jur. 282; *Selden v. Keen*, 27 Gratt. 576; 1 Story, Eq. § 291c; *Newton v. Marsden*, 2 Johns. & H. 356, 31 L. J. Ch. N. S. 690, 8 Jur. N. S. 1034, 6 L. T. N. S. 155, 10 Week. Rep. 438.

There is no suspension of the power of alienation beyond the statutory period.

The court should be slow to adopt a construction which would defeat the intention of the testator.

Jessup v. Pringle Memorial Home, 27 Misc. 427, 59 N. Y. Supp. 207.

The limitation of the power of alienation upon the two lives specified in the fifteenth article of the will is not extended or increased by the ninth clause of the third codicil.

The annuity is clearly releasable and assignable, and so not within the rule of suspension.

Bailey v. Bailey, 97 N. Y. 460; *Corse v. Chapman*, 153 N. Y. 406, 47 N. E. 812.

And this being so, even if there were another life estate, there would be no unlawful suspension.

Chaplin, *Suspension of the Power of Alienation*, ed. 1891, § 233.

Annuities do not suspend the power of alienation.

Lang v. Ropke, 5 Sandf. 363; *O'Brien v. Mooney*, 5 Duer, 51; *Griffen v. Ford*, 1 Bosw. 123; *Hunter v. Hunter*, 17 Barb. 25; *Mason v. Jones*, 2 Barb. 229; *Buchanan v. Little*, 154 N. Y. 147, 47 N. E. 970.

Merely making a charge upon an estate will not have the effect of suspending the absolute ownership or power of alienation.

Mason v. Jones, 2 Barb. 229, Affirming 2 Sandf. Ch. 432; *Leggett v. Perkins*, 2 N. Y. 327.

The charge of an annuity is not a limitation upon the power of alienation.

Frazer v. Hoguet, 65 App. Div. 192, 72 N. Y. Supp. 840.

The daughter Fanny could release or assign her annuity legacy, and the legacy to her child is likewise assignable and releasable.

Beardsley v. Hotchkiss, 96 N. Y. 201; *Moore v. Little*, 41 N. Y. 66; *Miller v. Emans*, 19 N. Y. 384; *Woodgate v. Fleet*, 44 N. Y. 1; *Ham v. Van Orden*, 84 N. Y. 257; *Mott v. Ackerman*, 92 N. Y. 539; *Griffin v. Shepard*, 124 N. Y. 74, 26 N. E. 339; *Re Tilford*, 5 Dem. 524.

The fact that the infant is under disability does not affect this question of assigna-

bility and releasability so far as the legal right is concerned.

Beardsley v. Hotchkiss, 96 N. Y. 201; *Quade v. Bertsch*, 65 App. Div. 606, 72 N. Y. Supp. 916.

The will here is so clear in its intent that Fanny should not have one fourth of the estate if she married Louis Herzog that, even if it were possible to spell out a particular intent that he did not mean to limit the time of the marriage, the general intention must be carried into effect, though it may defeat the particular intent.

Jackson ex dem. Hammond v. Vccder, 11 Johns. 169; *Jackson ex dem. Ellsworth v. Jansen*, 6 Johns. 73; *Parks v. Parks*, 9 Paige, 107; *Lovett v. Kingsland*, 44 Barb. 560, Affirmed in 35 N. Y. 617.

Mr. Robert E. Deyo, with *Messrs. Deyo, Duer, & Bauerdorf*, for respondent J. Scott McComb:

James Jennings McComb did not die intestate as to any part of his estate. Whatever was taken from Fanny was transferred to the other children.

Heartt v. Livingston, 14 Hun, 285, Affirming 53 How. Pr. 487; *Towne v. Weston*, 132 Mass. 513; *Harris v. Davis*, 1 Colly. Ch. Cas. 416, 9 Jur. 269.

Mr. George A. Strong, with *Messrs. Duer, Strong, & Whitehead*, for respondent executors and trustees:

An ordinary annuity given directly is assignable. It can, therefore, neither create nor contribute to an illegal suspension.

Radley v. Kuhn, 97 N. Y. 26; *Cochrane v. Schell*, 140 N. Y. 516, 35 N. E. 971; *Phillips v. Phillips*, 112 N. Y. 197, 8 Am. St. Rep. 737, 19 N. E. 411; *Durfee v. Pomeroy*, 154 N. Y. 583, 49 N. E. 132.

A trust may be created to pay an annuity.

Cochrane v. Schell, 140 N. Y. 516, 35 N. E. 971; *Rothschild v. Roux*, 78 App. Div. 282, 97 N. Y. Supp. 833.

A trust will never be raised by implication in order that, so soon as raised, it may be declared to be illegal and void.

Post v. Hover, 33 N. Y. 593; *Robert v. Corning*, 89 N. Y. 225; *Van Cott v. Prentice* 104 N. Y. 45, 10 N. E. 257; *Roe v. Vingut*, 117 N. Y. 204, 22 N. E. 933; *Crozier v. Bray*, 120 N. Y. 366, 24 N. E. 712; *Greene v. Greene*, 125 N. Y. 506, 21 Am. St. Rep. 743, 26 N. E. 739; *Steinhardt v. Cunningham*, 130 N. Y. 292, 29 N. E. 100; *Locke v. Farmers' Loan & T. Co.* 140 N. Y. 135, 35 Atl. 578; *Hopkins v. Kent*, 145 N. Y. 363, 40 N. E. 4; *Steinway v. Steinway*, 163 N. Y. 183, 57 N. E. 312; *Haug v. Schumacher*, 166 N. Y. 506, 60 N. E. 245; *Harrison v. Harrison*, 36 N. Y. 543; *Smith v. Edwards*, 88 N. Y. 92; *Matteson v. Palser*, 56 App. Div. 91, 67 N. Y. Supp. 612.

Martin, J., delivered the opinion of the court:

This action was for the construction of the will of James Jennings McComb, who died on the 31st of March, 1901, leaving a last will and testament, to which there were three codicils. Without referring to, or discussing, the provisions of the will or codicils which have no necessary bearing upon the question before us, we shall only call attention to those relating to the question under consideration. The questions on this appeal involve the construction and effect of the fifteenth paragraph of the will, as changed or modified by the ninth provision of the third codicil thereto.

After making many other provisions for intended recipients of his bounty, he provided for his issue, immediate and remote, by the fifteenth clause of his will. He thereby gave, devised, and bequeathed all the rest, residue, and remainder of his estate to his executors and trustees, and their successors, to hold, invest, maintain, and manage during the lives of those two of his children who, surviving him, should be the youngest at the time of his death, in trust, however, and for the purpose, among others, of paying from the income of the residuary estate not otherwise disposed of the sum of \$6,000 per annum to each of his four children, Mary Alice, Fanny Rayne, Lillie, and Jennings Scott, and, upon the termination of the trust, to transfer and convey said residuary estate in equal parts, share and share alike, to his children above named, or to their respective heirs, legatees, devisees, next of kin, executors, administrators, or assigns. The ninth clause of the third codicil was as follows: "It is my will, and I hereby direct, that, in case my daughter Fanny shall marry Mr. Louis Herzog, the provision which she shall enjoy from my estate shall be as follows: An annuity of fifteen (\$15,000) thousand dollars per year shall be paid to her, so long as she shall live, free and clear from any enjoyment or interference therewith on the part of her husband. Upon her death the sum of three hundred (\$300,000) thousand dollars shall be divided between her children, who may survive her, and the issue of any child of hers, who may have previously died, such issue to take the parent's share. The principal so to be divided upon her death shall be three hundred (\$300,000) thousand dollars." The plaintiff remained unmarried until about nine months subsequent to the death of the testator, when she was married to the Mr. Louis Herzog therein mentioned and referred to.

Upon the argument and in the briefs of 67 L. R. A.

counsel a number of very interesting and important questions were elaborately and exhaustively discussed in a manner evincing great industry, research, and ability upon the part of the learned counsel for the respective parties. Many of those questions, however, we shall not discuss or determine, but shall confine our examination to the question passed upon by the courts below which we think is decisive and controlling.

On the trial the learned special term held that the ninth clause of the third codicil, construed in connection with the fifteenth article of the will, was illegal, inoperative, and void. Upon appeal to the appellate division, that learned court held to the contrary, and reversed the judgment upon the ground that that provision of the codicil was valid. We concur in the opinion of the learned appellate division so far as it states that "it was manifestly the intention of the testator to modify the third and fourth subdivisions of the fifteenth clause or article in the event that Fanny should marry Herzog, by providing that she should then receive \$15,000 per annum as a life annuity, instead of a share in the income of the residuary estate during the continuance of the trust, and in the principal thereof at the termination of the trust, and that upon her death her issue should receive \$300,000." The will and codicil are to be taken and construed as parts of one and the same instrument, and the dispositions of the will are not to be disturbed further than are necessary to give effect to the codicil. *Hard v. Ashley*, 117 N. Y. 606, 23 N. E. 177; *Goodwin v. Coddington*, 154 N. Y. 283, 48 N. E. 729. Therefore, in ascertaining the effect of the ninth clause of the codicil upon the interest of the plaintiff under the fifteenth clause of the will, both instruments must be read and interpreted as one. From them the intention of the testator must be ascertained. The intent to be discovered is not whether he intended to make a valid disposition of his estate, but what provisions he in fact intended to make. When that is found, it is for the court to determine whether such intended provisions are valid or otherwise. *Colton v. Fox*, 67 N. Y. 348, 351. The question of intent may relate to the mode of administration and the character of the gift, as well as to the amount or the person to whom it is made. The duty of the court is not to make a new will or codicil to carry out some supposed but undisclosed purpose, but to ascertain what the testator actually intended by the language employed by him, when properly interpreted, and then to determine whether such intended provisions are valid or otherwise. The duty of the court is to interpret, not

to construct; to construe the will and codicil, not to make new ones. *Tilden v. Green*, 130 N. Y. 29, 51, 14 L. R. A. 33, 27 Am. St. Rep. 487, 28 N. E. 880.

All the valid provisions of the will for the benefit of the testator's issue, either immediate or remote, are contained in the fifteenth clause. Although, as to other gifts by his will he had adopted different methods for their administration, yet, when it came to the bulk of his estate, and to the provisions for his children and their issue, he plainly and purposely provided that such provisions should be administered through the instrumentality of a trust. Obviously his purpose was to suspend the power of alienation for the longest period permissible under the law. That intent he plainly and expressly states in the fifteenth clause of his will. Thus the dominant purpose of the testator, so far as gifts to his children and their issue were concerned, was to provide for the inalienability of their shares for the longest period possible. There is nothing in the ninth clause of the codicil indicating or expressing any other purpose as to the share given the plaintiff and her issue in case of her marriage to Herzog, but the provision that in that case she should receive \$15,000 a year, and \$300,000 should be divided between such of her children and their issue as should survive her, discloses that the same general intent of inalienability was to be continued as to the share provided for the plaintiff by such ninth clause.

A doubt may exist as to the sufficiency of the codicil to cut down the absolute gift to the plaintiff contained in the will, by reason of the indefiniteness and uncertainty of the language employed. The rule is that an absolute gift by a will cannot be cut down by a later provision unless the intention to do so is expressed in language as plain, definite, and certain as is used in making the original gift. *Banzer v. Banzer*, 156 N. Y. 429, 51 N. E. 291. We are, however, inclined to the opinion that the language of the codicil is sufficiently plain to show an intention on the part of the testator to modify his original gift to the plaintiff as to the amount of the income she should receive, between whom the remainder of the income should be divided, between whom the corpus of the fund should be ultimately divided, the proportion or amount thereof they should each receive, and the time when such division should be made as to the share going to the plaintiff and her children or their issue. Therefore, just so far as the codicil modifies or changes the provisions of the will, it should be held to be effective. *Hard v. Ashley*, 117 N. Y. 606, 23 N. E. 177.

In considering the effect of the codicil upon
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on the provisions of the will to which it relates, our attention must be directed to the provisions for the disposition of that portion of the estate, and the method in which it is to be administered or divided between its intended recipients. If the codicil, when construed in connection with the fifteenth clause of the will, is illegal and contrary to the law in either of those respects, it is void, and should not be given effect. After eliminating from the fifteenth clause of the will the invalid provisions therein, the testator, in effect, gave the remainder of the income from his residuary estate not specially dedicated to other purposes to his children equally, share and share alike; and upon the termination of the trust each child, or her issue, successors, or representatives, was to be paid one fourth of such residuary estate. This provision was not revoked, nor was it even modified, by the codicil, unless a condition should arise which might be either precedent or subsequent; and upon the happening of that condition the only modification of the gift in the fifteenth clause was to change or reduce the amount the plaintiff should receive from the income, and to give her children \$300,000 instead of the share which she or they would have received if such condition had not arisen. In other words, by the codicil, upon the happening of the event mentioned therein, the clear and obvious intent of the testator was that the fifteenth clause should be so modified as to divide the income and corpus of the residuary estate among his children and their issue, successors, and representatives, under the provisions of that clause, but in different proportions. No portion of the residuary estate was withdrawn from the operation of the trust, or dedicated to any purposes except those mentioned in the fifteenth clause of the will and the ninth clause of the third codicil. By such modification, upon the termination of the trust, the whole corpus of the residuary estate was still to be divided between his four children or their respective issue, if the condition mentioned did not arise. But if it arose, then the plaintiff was to have an annuity of \$15,000 a year so long as she lived, and upon her death \$300,000 was to be divided between her children who should survive her, including the issue of any child who should have previously died.

We think the plain and intended effect of the fifteenth clause, as modified by the ninth provision of the codicil, was to continue the trust as it stood in the will as to all of his children, unless the plaintiff should marry Herzog, in which event the amount or share of such children was to be changed so that the plaintiff and her children or grandchild-

dren were to receive a reduced sum, and the income and body of the trust estate were to be divided in a different manner, but through the same instrumentality. The codicil contains no words of gift, provides no other method by which the \$15,000 of the income was to be paid to the plaintiff, and establishes no other fund or source from which either the income or principal was to be derived. Nor does it state by whom the \$300,000 is to be divided, or in whose hands it is to remain until the time of the plaintiff's death. The whole scheme and plan of the will, except as to the portion which she and her children were to receive, are left intact and unchanged. The only method of administration is provided by the will. The form of bequest in the fifteenth clause is by words of gift contained only in the direction to transfer and divide. The same form of bequest is contained in the ninth clause of the codicil. The effect of the codicil was not to revoke the residuary clause, interfere with the trust, or change the scheme or method provided for the administration of his estate, but simply to provide that, if the condition mentioned should arise, the amount should be changed as to the income, and \$300,000 of the principal, which otherwise would go to her or her children, was to be transferred to such of her children or their issue as should be living at the time of her death. Considering the situation of the testator at the time the codicil was made, his full knowledge of the whole scheme and plan of his will as to the execution of its provisions for his children, with no designation of any person to carry out the provisions of the codicil, and the fact that the codicil was a mere modification of the provisions of the fifteenth clause, it seems obvious that he intended to employ the same agency to accomplish the administration of the fifteenth clause, as modified by the occurrence of the condition mentioned in the codicil, as though that condition had not arisen.

It is likewise to be observed that the testator's entire estate, except the residuum, has been disposed of, and by the residuary clause the title to the residue of his property after paying other independent legacies was absolutely vested in the trustees for the purposes stated in the third and fourth paragraphs of the fifteenth clause of the will. Under these circumstances, and in the absence of any such provision by the testator, the court cannot set apart any portion of the trust fund or of the estate for the purpose of establishing another fund for the payment of, or to produce, the annuity to the plaintiff during her life, or from which to pay the legacies to her children or their is-

sue at her death. The court has no power to divest the legal title of the trustees to any portion of the estate. *Cochrane v. Schell*, 140 N. Y. 516, 536, 35 N. E. 971. Consequently the only manner in which such annuity and legacies can be satisfied is through the trust, and under the powers conferred upon the trustees by the fifteenth clause, as modified by the ninth clause of the third codicil.

Moreover, if the effect of the codicil was not, as already suggested, to modify the third and fourth subdivisions of the fifteenth clause of the will, and to continue the trust for the execution of the provisions thereof as modified, then as to one fourth of the residuary estate the testator died intestate. In other words, if the effect of the codicil was, upon the plaintiff's marriage to Herzog, to revoke the provisions contained in the fifteenth clause of the will as to the plaintiff, there being no gift over of that portion, it would not continue as a part of the residue for division among the other three children or their issue, as it seems to be settled that, where the disposition of an aliquot part of the residue falls from any cause, that part will not go in augmentation of the remaining parts, as a residue of residue, but will devolve as undisposed of. 1 *Jarman*, Wills, 764; *Morton v. Woodbury*, 153 N. Y. 243, 257, 47 N. E. 283; *Beekman v. Bonsor*, 23 N. Y. 575, Appx.; *Hard v. Ashley*, 117 N. Y. 606, 23 N. E. 177; *Kerr v. Dougherty*, 79 N. Y. 327, 346; *Floyd v. Barker*, 1 Paige, 480, 482. It is perfectly manifest that the testator intended no such result. We think his clear purpose was to continue the trust as provided in the will, and in case of the plaintiff's marriage that it should be modified as stated in the codicil, and that the residuary estate should then be divided according to that provision as thus modified through the instrumentality of the trust, and that the only intended effect of the codicil was to change the amount which was to go to each of his children by augmenting the shares given to the others, except the plaintiff, by the amount of the diminution of her share.

The gift to the plaintiff and her children by the codicil was not an independent or initial gift to them, but was substitutional,—to take the place of the original gift which she was to enjoy in case the condition as to her marriage was not broken,—and therefore must be construed as subject to the same conditions as the former one as to the property on which they are charged, or the fund out of which they are payable. Redf. Wills, pt. 1, p. 360, § 26; *Theobald*, Wills, p. 137; *Bristow v. Bristow*, 5 Beav. 289; *Cooper v. Day*, 3 Meriv. 154; *Leacroft v.*

Maynard, 1 Ves. Jr. 279; *Crowder v. Clowes*, 2 Ves. Jr. 449; *Giesler v. Jones*, 25 Beav. 418; *Fisher v. Brierley*, 30 Beav. 267.

The codicil did not operate as a revocation of the testator's previous testamentary provisions, beyond the clear import of its language; and his expressed intention to change the will in the particular mentioned by implication negatives any intention to alter it in any other respect. *Redfield v. Redfield*, 128 N. Y. 466, 27 N. E. 1032; *Viele v. Keeler*, 129 N. Y. 190, 29 N. E. 78.

The contention that the gift in the residuary clause was a gift to a class, and consequently the brother and the two sisters of the plaintiff would take the entire residue, cannot be sustained. This gift contains none of the elements necessary to constitute such a gift. A bequest is not a gift to a class, where, at the time of making it, the number of the donees is certain, and the share each is to receive is also certain, and in no way dependent for its amount upon the members who shall survive. A gift to a class is a gift of an aggregate sum to a body of persons uncertain in number, at the time of the gift, to be ascertained at a future time, who are all to take in equal or in some other definite proportions; the share of each being dependent for its amount upon the ultimate number. *Re Kimberly*, 150 N. Y. 90, 93, 44 N. E. 945; *Re Russell*, 168 N. Y. 169, 61 N. E. 166.

The claim of the respondents that the codicil effected a gift to the brother and sisters of the plaintiff of her share in the residuary estate in case of her marriage, independent of the trust, and uncontrolled by its provisions and limitations, and hence that there was no intestacy, cannot be sustained. At most, it can only be said that the testator intended to partially disinherit her as to her share. But if such was the intent and effect of the codicil, as there was no gift over to them, it constituted a mere disinheritance, without a legal gift to another, which is insufficient to cut off the right of heirs or next of kin to inherit. *Gallagher v. Crooks*, 132 N. Y. 338, 342, 30 N. E. 746.

Assuming, then, as we must, that the intention of the testator, by his codicil, in case the condition as to the plaintiff's marriage arose,—was to merely modify the residuary clause by substituting the provision therein for the plaintiff and her children in lieu of the provisions for her contained in the fifteenth clause, and that that clause of the will as thus modified became a part of the trust to be administered by the trustees of the will in accordance with its provisions as thus modified, the question is presented whether the codicil then falls within the condemnation of the statute forbidding the sus-

pension of the absolute power of alienation of real property or the absolute ownership of personal property for a period longer than during the continuance of two lives in being at the creation of the estate or at the death of the testator. By the express provisions of section 15 of the will, the trustees were to hold the property during the lives of two of the testator's children designated, of whom the plaintiff was not one, and pay the income to his children during the continuance of the trust. That provision as modified, if valid, imposed upon the trustees the duty of continuing the trust and retaining the title to the trust property during the lives of those two children; and, in addition, it required them to retain the title to that portion of the trust property necessary to pay her \$15,000 a year for the further period of her natural life, and upon her death to pay \$300,000 thereof to her surviving children or their issue. If this will and codicil disclose one purpose more clearly than any other, it is that it was the intention of the testator that the portion of his estate intended for his children and their issue should be held in trust and remain inalienable by them until the full end and termination of the trust term by the death of his two children by whose lives it was measured, and, in case the plaintiff should marry Herzog, that the share intended for her and her children should remain inalienable during the further period of her natural life. Thus it is obvious that, during the continuance of the two lives mentioned, the title to all the residuary estate was to remain in the trustees; and also that, as to so much of the trust fund as was necessary to produce the portion intended for the plaintiff and her children, the title was to remain in the trustees, not only during the lives mentioned, but also during the life of the plaintiff. Consequently there was, or might be, a suspension of the absolute power of alienation or the absolute ownership of the property for a period longer than during the continuance of two lives in being at the death of the testator. The rule is that where, by the terms of an instrument creating an estate, there may be an unlawful suspension of the power of alienation, or of the absolute ownership, the limitation is void, although it turns out by subsequent events that no actual suspension beyond the prescribed period would have taken place. In other words, to render such future estates created by will valid, they must be so limited that in every possible contingency they will absolutely terminate within the period of two lives in being at the death of the testator, or the estate will be held void. *Schettler v. Smith*, 41 N. Y.

328; *Know v. Jones*, 47 N. Y. 389, 397; *Hawley v. James*, 16 Wend. 121; *Purdy v. Hayt*, 92 N. Y. 446; *Haynes v. Sherman*, 117 N. Y. 433, 22 N. E. 938; *Dana v. Murray*, 122 N. Y. 604, 26 N. E. 21. That the testator intended by the ninth clause of his codicil to create a future inalienable estate during the life of the plaintiff is shown by the fact that the only words of gift are contained in the direction to divide and transfer. Under such circumstances the vesting in the beneficiaries will not take place, or the future executory limitation take effect, until such future time arrives. *Warner v. Durant*, 76 N. Y. 133, 136; *Smith v. Edwards*, 88 N. Y. 92, 103; *Delaney v. McCormuck*, 88 N. Y. 174, 183; *Delafield v. Shipman*, 103 N. Y. 463, 467, 9 N. E. 184; *Shipman v. Rollins*, 98 N. Y. 311; *Re Crane*, 164 N. Y. 71, 58 N. E. 47; *Schlereth v. Schlereth*, 173 N. Y. 444, 93 Am. St. Rep. 616, 66 N. E. 130. Hence the title to the portion of the testator's estate mentioned in the fifteenth clause of his will, from which the plaintiff's annuity was to be paid, and from which, upon her death, the \$300,000 was also to be paid, was to remain in the trustees, and was inalienable for a longer period than two lives in being at the death of the testator.

It is argued by the respondents that annuities do not suspend the power of alienation, and therefore, under the provisions of the codicil, the annuity to the plaintiff is alienable. We are inclined not to agree with that proposition, as applicable to this case, as it is clearly apparent from the will and codicil that the testator intended that the provision for the plaintiff should be and remain inalienable during her life. *Cochrane v. Schell*, 140 N. Y. 516, 35 N. E. 971. But if as to the annuity it could be so held, still, as to the portion of the trust fund required to pay the \$300,000 to such of the children of the plaintiff or their issue as should survive her, it was clearly inalienable during her life, and the title was suspended beyond the statutory limit.

These considerations lead us to the conclusion that *the judgment of the Appellate Division should be reversed*, and that entered upon the decision of the Special Term affirmed, with costs to all the parties in all the courts, payable out of the residuary fund.

Parker, Ch. J., and O'Brien, Haight, Vann, and Werner, JJ., concur. Gray, J., concurs in result.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

Charles J. SWAN, *Plff. in Err.*,
v.

WESTERN UNION TELEGRAPH COMPANY.

(129 Fed. 318.)

1. A telegraph company receiving a message for transmission is bound to notify the sender, in case the line is obstructed so that the message cannot be sent within a reasonable time, so as to give him an opportunity to avail himself of other modes of conveying the desired information to the sendee; and it is liable to the sendee for any damages which may be caused to

him because of nonperformance of this obligation.

2. The measure of damages for failure to notify one who delivers a message to a telegraph company for transmission, advising the sendee to purchase certain stock, of the fact that it cannot be transmitted because of obstruction of the line, is the difference between what the stock could have been purchased for had the message been promptly sent and what was paid for the stock under the belief that the advice related to conditions at the time the message reached the sendee.

(January 5, 1904.)

NOTE.—Duty of telegraph company to notify sender of message if it cannot be promptly transmitted or delivered.

It is common experience that a message tendered to a telegraph company for transmission is in due time delivered to the sendee. Because of this experience persons desiring to communicate quickly with others at a distance have come to rely on the continued operation of the rule, and to act in important business and personal matters upon the assumption that a message tendered for transmission will be delivered at its destination within the time reasonably necessary for that purpose. The question then arises whether, in case that result will not occur in 67 L. R. A.

any particular instance, he is entitled to be informed of that fact, or whether the company may transmit the message at its convenience, leaving him in ignorance of the fact that his expectation, and perhaps his object, in employing the company has not been realized. Prompt delivery may become impossible, either because the line is not in working order or is crowded with other business, because the sendee cannot be found, or because the terminal office is not able for some reason to handle the business. In each of these instances a few cases have considered the question of the duty of the company and the rights of the sendee, and the weight of authority is that in either case the sender must receive notice of the impending delay.

ERROR to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois to review a judgment in favor of defendant in an action brought to recover damages for failure to give notice of delay in sending a telegram. *Reversed.*

The facts are stated in the opinion.

Argued before *Grosscup* and *Baker*, Circuit Judges, and *Bunn*, District Judge.

Mr. Henry Love Clarke, for plaintiff in error:

In cases where, through any cause, it is impossible to send a despatch, or where considerable delay will be necessary, it is the duty of the company to inform the sender, particularly where the message shows on its face the necessity or importance of its speedy transmission.

Line out of order.

SWAN V. WESTERN U. TELEG. CO. represents the majority opinion upon this branch of the subject.

A telegraph company receiving for transmission a message in the transmission of which haste is important, at a time when its line is not in working order, and there is a rival line by which the message can be sent, is bound, either to notify the sender of the obstruction in the line, or to transmit the message over the rival line; and the fact that the obstruction is believed to be temporary merely, so that the line will soon be open for business, is immaterial. *Fleischner v. Pacific Postal Teleg. Cable Co.* 55 Fed. 738. The court says the company's liability arises from the fact that there was a competing line in good working order by which the message could have been sent without delay. In that case, however, it appeared that the obstruction of the lines had occurred without the default or negligence of the company to which the message was first tendered. The question of the effect of stipulations limiting the liability of the company, which were contained in the blank on which the message was written, were discussed to some extent, and held not to be controlling in the case, and the decision was affirmed for the reason given by the lower court in 14 C. C. A. 166, 29 U. S. App. 227, 46 Fed. 906. But in the latter case the judge who wrote the main opinion took up and discussed the question of the effect of the stipulations in the blank, and held that in the case at bar that amounted merely to a stipulation against liability for the fraud of the company itself, which it was not allowed to do. The judge says a corporation conducting a telegraph business ought not, as matter of public policy, to be allowed to formulate and maintain any regulations which would allow it to work a fraud upon those seeking to employ this necessary means of communication, and yet afford the person defrauded no adequate means of redress.

The correctness of the decision in the *Fleischner* Case is recognized in *Birkett v. Western U. Teleg. Co.* 103 Mich. 361, 33 L. R. A. 404, 50 Am. St. Rep. 374, 61 N. W. 645.

In *Hierhaus v. Western U. Teleg. Co.* 8 Ind. App. 246, 34 N. E. 581, the court says it is manifestly unfair for the company to receive a mes-

25 Am. & Eng. Enc. Law, p. 779; *Western U. Teleg. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172; *Hendricks v. Western U. Teleg. Co.* 123 N. C. 304, 78 Am. St. Rep. 658, 35 S. E. 543; *Pacific Postal Teleg. Cable Co. v. Bank of Palo Alto*, 54 L. R. A. 711, 48 C. C. A. 413, 109 Fed. 369; *Postal Teleg. Cable Co. v. Lathrop*, 131 Ill. 575, 7 L. R. A. 474, 19 Am. St. Rep. 55, 22 N. E. 583; *Fleischner v. Pacific Postal Teleg. Cable Co.* 55 Fed. 738, 14 C. C. A. 166, 29 U. S. App. 227, 66 Fed. 899; *Gray, Communication by Telegraph*, § 18; *Birkett v. Western U. Teleg. Co.* 103 Mich. 361, 33 L. R. A. 404, 50 Am. St. Rep. 374, 61 N. W. 645; 14 Am. & Eng. Enc. Law, 2d ed. p. 75; *Trall v. Baring*, 4 De G. J. & S. 318; *Loewer v. Harris*, 6 C. C. A. 304, 14 U. S. App. 615, 57 Fed. 368; *Davies v. Lou-*

sage knowing that its wires are broken and that an electrical storm is raging which renders it impossible to transmit promptly, and keep such knowledge locked up from the sender. Persons resort to telegraphy because of its rapid communication, and pay exorbitant prices for the service because it is rapid. If the company knows that it cannot give quick communication when the message is accepted it cannot excuse itself except by notifying the person presenting the message of its inability. Suppose there were several lines between the same point operated by different companies, and that one of the lines is broken and cannot be repaired for several hours, and these facts are known to the corporation only. A message is presented and accepted, and no notice of inability is given. A delay of several hours ensues, and great damage is incurred. Would it be contended that the company would not be liable, when, if it had communicated its inability, the message might have been sent by another line and the loss avoided?

And that rule was recognized as correct upon a second appeal in the same case. 12 Ind. App. 17, 39 N. E. 881.

If a company which receives an important message to be forwarded by a connecting line knows at the time of delivering it to the latter that, because of the condition of such line, it cannot be forwarded promptly, it is bound to notify the sender of that fact. *Western U. Teleg. Co. v. Sorsby*, 29 Tex. Civ. App. 345, 69 S. W. 122. In that case it appeared that the connecting line would make only a modified acceptance of the telegram with no promise as to when it would be sent forward. The court, treating the company who contracted with the sender as his agent, says, surely it is the duty of an agent sent to make delivery of a thing to advise his principal that the person to whom it is consigned refuses to accept, or declines to accept, on the terms made by the sender.

A stipulation in the blank on which the message was written, that the company would not be liable for delays arising from unavoidable interruptions in the working of its lines, does not relieve the company from liability for delay because of its line being down at the time the message is received, of which the sender is not notified. *Western U. Teleg. Co. v. Birge-Forbes Co.* 29 Tex. Civ. App. 526, 69 S. W. 181.

The Texas supreme court, however, regards

don & P. Marine Ins. Co. L. R. 8 Ch. Div. 489; Reynell v. Sprye, 1 De G. M. & G. 660.

In actions based on the delay of a telegram, proof that the delay occurred puts upon the defendant telegraph company the entire burden of accounting for and excusing that delay.

Fleischner v. Pacific Postal Teleg. Cable Co. 55 Fed. 738.

A simple notification to the addressee that the long delay had occurred might have relieved the defendant in error from liability for more than nominal damages.

The plaintiff was entitled to read the hour-date as it stood, and was not chargeable with knowledge of any of the private rules the defendant may have had as to the meaning of the said hour-date.

New York & W. Printing Teleg. Co. v.

the question of the company's duty as one of fact for the jury. It says, if, after receiving a message for transmission, the company discovers that its lines are down so that the message cannot be promptly delivered, the question whether it is bound to notify the sender of the fact is for the jury. *Faubion v. Western U. Teleg. Co. (Tex. Civ. App.) 81 S. W. 56.* The court says it was not the duty of the company to attempt to deliver the message by any other means of communication.

Opposed to the above cases is an implication in a Georgia case that no duty rests upon the company.

In *Western U. Teleg. Co. v. Cohen, 73 Ga. 522*, it is intimated that, if a message cannot be transmitted by reason of storms or other atmospheric influences, the company will be excused for the nontransmission of the message.

Also the *dictum* of a single judge in a Canadian case.

In *Stevenson v. Montreal Teleg. Co. 16 U. C. Q. B. 530*, where defendant, which had a line running from Hamilton to Buffalo, received a message for transmission to New York, and the question was whether it was liable for the negligence of the connecting line in Buffalo, the majority of the court held that it was not; but it appeared that a delay occurred in the transmission to Buffalo, and the dissenting judge considers that phase of the case, and reaches the conclusion that it was not bound to send the message *via* Montreal, or to inform the sender of the fact that the line was out of commission. He says the corporation was bound to transmit only as soon as it could reasonably be done. The telegraph is a means of communication extremely liable to be deranged and affected by atmospheric influences; communication may be prevented one minute, and yet fully established the next. Therefore, it is not reasonable to expect that the company is bound on every occasion when a person desires a communication to be forwarded to inform him that possibly the message may not be forwarded for some minutes or hours. It is more reasonable to cast the burden on the one offering the message to make inquiries if he desires to know the probability of delay.

And a decision in a Michigan case.

Where, because of a storm in New York, so that the operator in Detroit, where a message was delivered to the company for transmission 47 L. R. A.

Dryburg, 35 Pa. 298, 78 Am. Dec. 338; Pear-sall v. Western U. Teleg. Co. 9 N. Y. S. R. 132; Webbe v. Western U. Teleg. Co. 169 Ill. 610, 61 Am. St. Rep. 207, 48 N. E. 670.

The measure of damages was the amount lost as a result of the delay of the message.

Fleischner v. Pacific Postal Teleg. Cable Co. 55 Fed. 738; United States Teleg. Co. v. Wenger, 55 Pa. 262, 93 Am. Dec. 751; Western U. Teleg. Co. v. Hall, 124 U. S. 444, 31 L. ed. 479, 8 Sup. Ct. Rep. 577.

Mr. Percy B. Eckhart for defendant in error.

Bunn, District Judge, delivered the opinion of the court:

This action was brought by Charles J. Swan, the plaintiff in error, against the Western Union Telegraph Company, to re-

to New York city, could not effect direct communication, and therefore transmitted the message to Buffalo, where it was delayed for some time without notifying the sender, the court held the telegraph company not liable for the delay, upon the ground that it had relieved itself from liability by the stipulation in its blank that the company should not be liable for negligence in transmission of the message unless it was repeated. The court held that, if the Detroit operator did not have actual knowledge that the message could not be sent forward, and there was nothing to notify the Buffalo operator of its importance because of a direction to repeat, there was no liability. *Jacob v. Western U. Teleg. Co. (Mich.) 10 Det. L. N. 904, 98 N. W. 402.*

While the latter decision does not profess distinctly to relieve the company of the duty to notify the sender of trouble on the line, its obvious effect is to do so. For the purposes of the case, the knowledge of the Buffalo operator must be imputed to the one at Detroit, because it could be instantly communicated, and, if the sender was entitled to notice, should have been; so that the plain result of the decision is that a stipulation requiring the message to be repeated relieves the company of the duty to notify the sender that his message will be delayed.

Failure to find sender.

It is the duty of the company in all cases practicable promptly to inform the sender of the message that it cannot be delivered. *Hendricks v. Western U. Teleg. Co. 126 N. C. 304, 78 Am. St. Rep. 658, 35 S. E. 548.* The court says, while its failure to do so may not be negligence *per se*, it is clearly evidence of negligence. In many instances by such a course the damage could be greatly lessened, if not entirely avoided. A better address might be given, mutual friends might be communicated with, or even a letter might reach the addressee. In any event, the sender might be relieved from great anxiety, and would know what to expect.

And the same opinion was adopted in *Laudie v. Western U. Teleg. Co. 126 N. C. 431, 78 Am. St. Rep. 668, 35 S. E. 810*, where the delivery required the message to be forwarded by telephone beyond the end of the telegraph line, which could not be done because the telephone wire was down and would not operate.

cover damages for losses sustained on account of the failure of the defendant company to give notice of the delay in sending an important business telegram relating to the purchase of certain mining stock on the Boston Stock Exchange. A jury was waived, and the case tried by the court upon the following stipulation of facts, to wit:

It is hereby stipulated and agreed by and between the parties herein, by their respective attorneys, that:

The plaintiff makes no claim against the defendant on account of negligent delay in transmitting and delivering the message in controversy, and said question may be considered by the court as eliminated from the case; but the plaintiff charges the defendant

with negligently failing to give due notice of delay of the message, or by reason of the 3 27 PM under the sender's signature, with wrongfully misleading the plaintiff as to such delay, as set forth and charged in the declaration. On May 1, 1901, and for some time theretofore and thereafter, the defendant corporation was engaged in and operating a public telegraphing business and service for compensation between and within Chicago, Illinois, and Houghton, Michigan. On said 1st day of May, 1901, one Horace J. Stevens, a mining expert, and editor of certain copper-mining publications, and assistant commissioner of mineral statistics for the state of Michigan, occupied an office in the said town of Houghton, and was well known to the local office of the defendant at

The failure to notify the sender of a telegram of its nondelivery is evidence of negligence. *Cogdell v. Western U. Teleg. Co.* 135 N. C. 431, 47 S. E. 490. The court says, if, for any reason, it cannot deliver the message, it becomes its duty to inform the sender, stating the reason therefor, so that the sender may have the opportunity of supplying the deficiency whether it be in the address or expense of delivering the message.

But the question, whether or not it is negligence to fail to attempt to notify the sender that the addressee cannot be found so that the telegram cannot be delivered is a question of fact to be determined by the jury. *Western U. Teleg. Co. v. Davis* (Tex. Civ. App.) 51 S. W. 258, 24 Tex. Civ. App. 429, 59 S. W. 46.

In *Western U. Teleg. Co. v. Jones*, 69 Miss. 658, 38 Am. St. Rep. 579, 13 So. 471, where the company accepted a message for transmission to a point where it had no office, and then attempted to deliver it there by means of telephone, but the message was delayed, and the company set up in defense of its liability the negligence of the telephone company, the court said, if the agent who received the message for transmission not knowing that there was no office at the point of destination had, upon learning his mistake, sought the sender and informed her of the fact, leaving the responsibility with her, a different question would have been presented.

Where the company, by mistake, undertook to transmit and deliver a message to a station where it had no office, the court held that it was bound by its contract, since it could have transmitted the message to an office which it maintained only a few miles from the place named; but during the discussion the court said that, upon discovering the mistake, the agent should have informed the sender that it had no office at the place addressed, and that it could not perform its contract. *Western U. Teleg. Co. v. Hargrove*, 14 Tex. Civ. App. 83, 36 S. W. 1077.

It is negligence which may render the company liable, where the agent at the terminal point, upon finding difficulty in delivering a message which on its face is important, violates the rules of the company in failing to ask for a better address or further instructions. *Sherrill v. Western U. Teleg. Co.* 116 N. C. 655, 21 S. E. 429.

Such negligence is not excused by the fact
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that the receiving operator thought the sending one had given all the information that he could. *Sherrill v. Western U. Teleg. Co.* 117 N. C. 352, 23 S. E. 277.

Many of the cases of nondelivery have resulted from the fact that the addressee resided beyond the free-delivery limits, and the question arose whether the sender should be notified of that fact and given an opportunity to provide the necessary expense of delivery. The Alabama court has held that the duty of ascertaining the addressee's address rested on the sender, and that the company owed him no duty in that regard. It says: Placing the duty on the sender of the telegraph message, of ascertaining whether the person to whom the message is addressed resides within the free-delivery limits, is a reasonable rule. It is reasonable because, in most cases, the sender will know where the addressee resides, and can inform the operator. In the event that the sender does not know the residence or business office of the addressee, it is but reasonable to require him to inform himself, or to make arrangements for delivery beyond the limits should it be found that the residence is beyond them. When a message is handed in for transmission it casts no duty on the terminal operator other than to copy the message correctly and to deliver it with all convenient speed if the addressee resides within the free-delivery limits. *Western U. Teleg. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419.

But that rule has not met the approval of the other courts.

In *Western U. Teleg. Co. v. Moore*, 12 Ind. App. 136, 54 Am. St. Rep. 515, 39 N. E. 874, the court says: We are of opinion that a rule which would require prepayment of additional charges before a message would be delivered beyond the free-delivery limits, although the sender is ignorant that the charge would be made, would be unreasonable and oppressive in many instances, and should not be enforced. And the court expressly disapproves *Western U. Teleg. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419.

In *Bryan v. Western U. Teleg. Co.* 133 N. C. 603, 45 S. E. 938, where the addressee lived beyond the free-delivery limits, and the rule of the company required an extra compensation for delivering the message there, the court said the company could have sent the message on to the addressee, collected the charges of the special delivery of her, or, if not willing to risk

Houghton. On the said 1st day of May, 1901, at about 9:15 A. M., the defendant, at its public office in Houghton, Michigan, received from said Horace J. Stevens, of Houghton, Michigan, a communication to be telegraphically transmitted and delivered to the plaintiff herein in words and figures as follows:

"Houghton, Mich, May 1, 1901.

"Dr. C. Joseph Swan,

"34 Washington St., Chicago.

"Ten to twenty dollars quick rise in Mohawk. Has Wolverine lode rich as Quincy beside million dollars worth 'Mohawkite' almost spot cash opened in three upper levels. Advise quick purchase.

"Horace J. Stevens."

And about 4 o'clock in the afternoon of the said 1st day of May, 1901, the defendant delivered to the plaintiff, and he paid the charges on, a typewritten message in words and figures as follows:

"253. CH. MD. JO. 31 Collect,

"Houghton, Michigan, May 1, 1901.

"Dr. C. Joseph Swan,

"34 Washn St Chgo,

"Ten to twenty dollars quick rise in Mohawk. Has Wolverine lode rich as Quincy beside million dollars worth 'Mohawkite' almost spot cash opened in three upper levels advise quick purchase.

"Horace J. Stevens.

"3 27 PM"

that, it was negligent not to wire back to the sender demanding payment or guaranty of cost of delivery beyond the free-delivery limits. In that case, however, it appeared that, instead of attempting to make a delivery or get a better address, the receiving operator merely wired back, "Party not known."

And the Bryan Case was followed in Hood v. Western U. Teleg. Co. 135 N. C. 622, 47 S. E. 607.

In Bright v. Western U. Teleg. Co. 132 N. C. 317, 43 S. E. 841, it is intimated that the fact that the sendee resides out of the free-delivery limits is no defense to an action for failure to deliver the message, unless that fact is brought to the attention of the sender.

The sender must be notified of an office regulation at the terminal point that messages will not be delivered without an extra charge beyond a designated limit, and that the sendee resides beyond such limit. Braasbears v. Western U. Teleg. Co. 45 Mo. App. 433.

If the sendee is found to reside beyond the free-delivery limits it is the duty of the company at least to notify the sender of the message that it cannot be delivered without an additional charge. Anderson v. Western U. Teleg. Co. 84 Tex. 17, 19 S. W. 285.

The company cannot defeat its liability for neglect to deliver out of its free-delivery limits a message which it received and attempted to deliver at that point, without notifying the sender of any objection to such delivery, upon the ground that under its rules it was not bound to deliver at that point without extra compensation. Western U. Teleg. Co. v. Sweetman, 19 Tex. Civ. App. 439, 47 S. W. 676.

Whether failure to comply with a custom for the receiving office to notify the sending office of necessary extra charges is negligence is a question for the jury. Evans v. Western U. Teleg. Co. (Tex. Civ. App.) 56 S. W. 609.

Terminal office closed.

There is more conflict in the decisions as to the duty to inform the sender that the terminal office is closed.

One Federal case held that it is not the duty of a corporation whose offices are scattered all over the United States to keep the employees of each office informed of the time that their other offices close for the night. Given v. Western U. Teleg. Co. 24 Fed. 119. But the court in that case says: "We do not see any

sufficient reason for believing that, if the sender had been told when he offered his last message that the office at destination was closed for the night, that he could have provided any other means of repairing the evil; and so the information, if communicated to him, would have done no good."

So the Georgia court held that, in the absence of a special contract to transmit immediately, or of an express request for information, it is not obligatory upon the telegraph company to acquaint a customer with the office hours of the company at the point of destination. Western U. Teleg. Co. v. Georgia Cotton Co. 94 Ga. 444, 21 S. E. 835.

And that case was followed in Bateman v. Western U. Teleg. Co. 97 Ga. 338, 22 S. E. 920.

And the Texas court held that one seeking the transmission of a telegram at an unusual hour is bound to ascertain whether or not the receiving office is open at that time, and cannot hold the company liable for failure to deliver the telegram before regular hours in case the office is not open at the time, and he takes no steps to ascertain the facts with reference to it. Western U. Teleg. Co. v. Neel, 86 Tex. 368, 40 Am. St. Rep. 847, 25 S. W. 15.

And that case was followed in Western U. Teleg. Co. v. Neel (Tex. Civ. App.) 25 S. W. 661; Western U. Teleg. Co. v. May, 8 Tex. Civ. App. 176, 27 S. W. 760; and Western U. Teleg. Co. v. Hill (Tex. Civ. App.) 26 S. W. 252.

However, in an earlier case it had held that, if it is impossible to send a message because the terminal office is closed for the night, the sender should be informed of the fact. Western U. Teleg. Co. v. Bruner (Tex.) 19 S. W. 149.

But in Western U. Teleg. Co. v. Harding, 103 Ind. 505, 3 N. E. 172, the court, in construing a statute requiring telegraph companies to receive dispatches during the usual office hours as meaning that they must be received and transmitted within the hours during which both initial and terminal office are open, says the question arises whether the telegraph company should not keep its agents at all points informed concerning the office hours at all other points, so that when a message is presented for transmission the sender may be apprised of any probable delay which may intervene at the other end. If the question shall be as to the mere civil liability of the company for damages, there might a case arise in which such a require-

The plaintiff had no notice that the message accepted as aforesaid by the Houghton office of the defendant would be, or had been, delayed in the transmission and delivery beyond the time ordinarily required for the transmission and delivery of such a message or for more than one-half hour after its acceptance by the defendant. The message first above quoted was accepted by the defendant from the said Stevens in manner and form as follows, *viz.*: The entire message, except the name and address of the sendee, was written by Stevens on one sheet of paper, and on a number of other sheets were written the names and addresses of 294 sendees, including the plaintiff. When the said message and lists of sendees were presented by Stevens at the Houghton office of the defendant a consultation was had between Stevens and the manager of the said office as to the most expeditious and convenient method of transmitting the message; and at the suggestion of the said manager it was arranged that the body of the message should be wired to Chicago and followed by the list of addresses for Chicago and points beyond, the Chicago office to relay the message to such further points. Thereupon the sheets of addresses were rearranged by Stevens, and numbered in red pencil, and the sheet bearing the plaintiff's name and address became the first sheet, with the plaintiff's name number 17 on the list, and preceded by 13 addresses for Chicago and points beyond and 3 "local" addresses. The said manager of the defendant advised Stevens that the transmission of the matter so accepted would be promptly proceeded with, and the said Stevens had no notice that the message to the plaintiff would be delayed beyond the time that would ordinarily be required for the transmission and delivery of such a message so accepted.

On the said 1st day of May, 1901, there were, besides the service of the defendant, two other available means of rapid communication from Houghton, Michigan, to

Chicago, Illinois, *viz.*, the service of the Postal Telegraph Company and the long-distance telephone, the latter directly connecting with the office of the plaintiff. From the opening up to the hour of noon on the Boston Stock Exchange on the said 1st day of May many hundred shares of Mohawk stock sold at 39, and on said day until the noon hour there was not more than $\frac{1}{2}$ of one point of fluctuation from 39 in the sales of said stock. Thereafter the said stock rose, and the last sales before the close of said exchange at 3 p. m. of the said day were at 47, and the following morning the market opened at 51. The plaintiff could have communicated by telephone with his brokers in Chicago, Wm. H. Colvin & Co., at any time on the said 1st day of May, and the said brokers then had such security for the plaintiff's orders that they would at once have proceeded to execute by telegraph his telephone order to buy 100 shares of Mohawk on the Boston Exchange. The plaintiff would testify that he inferred that the message delivered to him as aforesaid had been transmitted within the time ordinarily required for such a message, and had been sent by the said Stevens after the close of the Boston Stock Exchange, whereon Mohawk was listed, on the said 1st day of May, and that such message applied to the market of the following or 2d day of May, 1901. The plaintiff would testify that he further inferred and understood, and was not informed to the contrary, that the hour-date of "3 27 PM" appearing directly under the signature of the said Stevens on the said message indicated the hour at which the said message had been delivered by the said Stevens to the defendant. On the morning of the 2d day of May, 1901, about 10:30 A. M. (Central time), the aforesaid brokers of the plaintiff, at his order to buy "under 50," bought for him on the Boston Exchange 100 shares of Mohawk at 49 $\frac{1}{2}$, which was as high as any subsequent sale of that day, and several points below a few earlier sales of the same morning; and he would testify

that information must be given to the sender if conditions are such that the message is likely to be delayed. And the same statute exists in Ohio and Missouri. Ohio Rev. Stat. § 3464; Mo. Rev. Stat. 1879, § 885. And the court has held that the penalty imposed by the Missouri statute is for the benefit of the one applying to send the despatch. *Thompson v. Western U. Teleg. Co.* 32 Mo. App. 191. So in *Smith v. Western U. Teleg. Co.* 57 Mo. App. 259, it was stated that the Missouri statute expressly provides that it shall be the duty of the agent to whom the message is tendered for transmission to inform the sender that the lines are not in working order, if he knows that to be the fact.

Statutes.

Nebraska Laws 1883, chap. 80, § 13, provided 67 L. R. A.

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H. P. F.

that he ordered such purchase about 10 A. M. on the ground of the advices contained in the aforesaid message, and upon his aforesaid inferences and understanding as to the time of sending of said message. Later on the said 2d day of May and on the next following day Mohawk fell, and on the 3d day of May, 1901, closed at 42, and thereupon the plaintiff made inquiry of the said Stevens by long-distance telephone as to the reason for such fall, and then and there for the first time it became known to the plaintiff and to the said Stevens that the above-stated delay of the message of Stevens had occurred. Thereupon the plaintiff made inquiry on the said 3d day of May, 1901, at the Chicago office of the defendant, as to the cause of the aforesaid delay and the Chicago office wired the inquiry to the Houghton office, and the latter wired back that "wire trouble" had "delayed (Houghton) business all around (on May 1, 1901);" and the said Chicago office referred the plaintiff to the New York office of the defendant as to any claim for damages, and such claim was forthwith made in writing by the plaintiff, and from time to time repeated until the beginning of the present suit. The plaintiff would testify that the 100 shares of Mohawk purchased as aforesaid were held by him until the autumn of 1901, and finally sold at 49, and while so held their value at one time decreased to about 30, and at another time the plaintiff was called upon to pay, and did pay, an assessment of \$300 on the said shares; and he also paid to his brokers one eighth of one point per share for buying and one eighth of one point per share for selling said 100 shares; and while so holding said shares he was deprived of all interest that might have accrued from the moneys so invested.

This suit was not brought until after the refusal of the defendant to settle the aforesaid claims of the plaintiff. And the foregoing statement of facts shall constitute all and the only evidence to be submitted by either party on the trial of this cause.

Chicago, June 30th, 1902.

C. Joseph Swan,

By Henry Love Clarke, His Attorney.
Western Union Telegraph Co.,

By Henry D. Estabrook, Its Attorney.

The court below, upon the hearing, after overruling several proper special requests to find for the plaintiff, rendered judgment in favor of the defendant. We think this was error, and that judgment should have been given in favor of the plaintiff for \$1,050 and interest, that being the amount of damages sustained by him by reason of the defendant's neglect in not giving notice of the obstruction in its telegraph lines between Houghton and Chicago; the stipulation 67 L. R. A.

showing that at the first opportunity after the receipt of the message he paid \$49.50 per share for 100 shares which would have cost him \$39 per share if the message had been sent in due course of business on the morning of May 1st, within a reasonable time after its receipt at the defendant's office in Houghton. It seems evident that the duty was with the defendant company to send the message in due course, or, if it was unable from obstruction of its lines to do so, then to notify the sender of that fact so that he might avail himself of one of the two other methods of quick communication that were open to him. It does not appear from the statement of facts whether the obstruction in the lines existed at 9:15 A. M. of May 1st, the hour when the message was handed in at the Houghton office, or came in after that time. If we were to indulge in any presumption from the facts that are in evidence, it would seem reasonable to suppose that the inability existed at the time of receiving the message, when, according to the stipulation of facts, the company's manager advised Mr. Stevens that the transmission of the message would be promptly proceeded with. Thirty minutes would probably have given ample time for transmitting the message if proceeded with according to such promise, but it was not sent until nearly seven hours after its receipt. So that, if the lines were not down at the receipt of the message, they were but shortly after; otherwise the message would have been sent. But that question does not seem to be material, as the obligation resting upon defendant would be of a similar character in either case. If the lines were already down, it was the duty of the defendant to so inform the sender so that he could avail himself of another line of communication, or, if he chose, to take the chances on the defendant's restoring its service in time. If communication was obstructed after the message was received, this fact being unknown to Mr. Stevens, it was equally incumbent upon the defendant to give him timely notice of that fact. Without any explanation or excuse for the delay in sending the message from 9:15 in the morning to 4 o'clock in the afternoon, or of notifying the sender of the disability to send, the inference of culpable neglect is palpable; and, to aggravate the case, the company at some point, whether at Houghton or Chicago does not appear, placed under the sender's name the figures "3 27 PM," from which the plaintiff understood that the message was received by the company at Houghton at that time, which would have given the very reasonable time of thirty-three minutes for its transmission from the Houghton office to Chicago. But under the stipulation we are not at liberty to lay any stress.

upon this circumstance. There is nothing in the case to show what these figures placed under the sender's name import,—whether they are to note the time of the receipt of the message at Houghton, the time of sending, or the time of its receipt at the office in Chicago. It was open to the plaintiff to make inquiry, if he did not know what the figures meant. There is no evidence that he did so. He assumed that the figures noted the time the message was received by the company at its office in Houghton. These figures placed by the company under the sender's name are relied upon by the plaintiff as one ground of negligence, but we place the decision of the case solely on the ground of the negligence of the defendant in failing to give notice that its lines were obstructed so that the message could not be sent. Whether the obstruction in the lines existed when the message was delivered, or occurred after that time, it was equally incumbent upon the company to notify the sender of the fact, so that he could send the message by another line of communication. That the defendant's line was out of order was a fact unknown to the sender, but must have been well known to the defendant. Under these circumstances it was the plain duty of the defendant to give timely notice of its inability to send the message.

We have assumed thus far that there was delay due to wire trouble as stated by the Houghton office. Counsel for appellee, however, insists that, though there is thus a showing of delay, there is no showing that the delay was unreasonable, or that the Houghton office had such knowledge concerning the delay as imposed upon it the duty to inform the parties interested that the message had been delayed; and in support of this insistence point to the opening paragraph of the stipulation that "the plaintiff makes no claim against the defendant on account of negligent delay in transmitting and delivering the message in controversy, and said claim may be considered by the court as eliminated from the case." While such paragraph exempts appellee from damages in this suit on account of negligent delay in transmitting the message, it works no exemption from damages growing out of the negligent failure to give notice of the delay; for appellee is expressly charged in the stipulation with negligently failing to give due notice of the delay. The two grounds of action thus indicated—the one eliminated and the other clung to—are distinct. It is with respect, then, to the second ground, only, that the fact of delay cuts any figure. The stipulation shows the fact of delay; but leaves it open whether the cause and nature of the delay were such that the agent should have given notice to the parties interested; 67 L. R. A.

and on this open question of fact, the evidence of which was wholly within the possession of appellee, the burden of proof, in our opinion, was on the appellee.

Our view may be summed up thus: The suit being for damages growing out of the agent's failure to give notice of the delay, and the bare fact of delay appearing in the stipulation, the burden was on appellee to show the nature and cause of the delay; and, in the absence of such showing, it will be presumed that the agent at Houghton had such information as imposed on him the duty of informing the parties interested,—a duty that was not in fact performed. The case is not distinguishable in principle from *Fleischner v. Pacific Postal Tele. Cable Co.* 55 Fed. 738, Affirmed by the circuit court of appeals for the ninth circuit in 14 C. C. A. 166, 29 U. S. App. 227, 66 Fed. 899. The general rule applicable in that case was laid down by that court as follows: "As has been said, plaintiff in error contracted to transmit and deliver this message. At the time its wires were down, and there was an impossibility in performing the contract as required. The general rule is that, when the impossibility of performance is known to the promisor, but not known to the promisee, the former is liable in damages for failure to perform. 3 Am. & Eng. Enc. Law, subd. 73, p. 898, title, *Contract*; 2 Parsons, *Contr.* 673."

The analogous rule more specifically adapted to telegraph companies is laid down by Gray in his work entitled "Communication by Telegraph" (§ 18), as follows: "If at any time a telegraph company is unable, through a disarrangement of its lines or other cause, to do what it makes a business of doing, it must inform those who wish to employ it of the fact, and thus acquaint them with the advantage of employing other means. A telegraph company offers and is employed solely to effect the rapid communication of a message. The excuse for a failure to effect that communication that the company, when it made the contract, knew that it could not perform it, can hardly be deemed a valid one."

That rule, as there laid down, commended itself to the United States circuit court of appeals in the case afore cited, and commends itself to this court as applicable to the case in hand.

It appears from the agreed facts that the plaintiff was one of 294 persons to whom this same message was to be sent. A list of these persons was prepared, with the plaintiff's name standing as No. 17 in the list, preceded by 13 other addressees for Chicago and beyond and 3 local addressees. There was to be but one despatch for these 294 customers, so that the profits, considering

the amount of work to be done, would no doubt be considerable. It does not appear whether or not this circumstance had any influence upon the conduct of the company in retaining the despatch for so many hours without giving notice to Mr. Stevens, who had an office in Houghton, was a public character, and well known to the local office of the defendant at Houghton, that an obstruction in the wires rendered it impossible to transmit the message. But whether the inducements for retaining and sending the message, rather than having another company do it, were great or small, the defendant had a duty to perform. Although not a common carrier in the sense of being insurers, a telegraph company owes an obligation to the public analogous to that of a common carrier.

On the question of damages we have encountered no such difficulty as seems to have been experienced by the court below in finding a proper measure of damages for the case. If the plaintiff was entitled to recov-

er even nominal damages, that would be better than to give a judgment for costs against him. The proper measure of damages is what the plaintiff lost through the negligence of the defendant, which was the difference between what he had to pay for the stock on the morning of May 2d and what it would have cost him in the forenoon of May 1st, when he should have received the despatch, or notice that it could not be sent.

The judgment of the court below is reversed, and judgment ordered in favor of the plaintiff in error for the sum of \$1,050, with interest from the 2d day of May, 1901, besides costs.

Petition for rehearing denied with an amendment of the opinion which is included in the above report April 20, 1904.

Petition for writ of certiorari denied by Supreme Court of United States October 17, 1904.

OREGON SUPREME COURT.

FIREMEN'S FUND INSURANCE COMPANY *et al.*, *Respts.*,

v.

OREGON RAILROAD & NAVIGATION COMPANY, *App't.*

(.....Or.....)

The suit should be at law, and not in equity, where an insurer, who has paid part of the loss caused by a fire negligently set out, and been subrogated to the rights of the property owner, and the property owner, join in a suit to recover the entire loss caused by the negligence.

(June 13, 1904.)

A PPEAL by defendant from a judgment of the Circuit Court for Umatilla County in favor of plaintiffs in an action brought to recover damages for the destruction of certain property by fire alleged to have been negligently set out by defendant. *Affirmed.*

Statement by **Wolverton, J.:**

The plaintiff the Northwestern Warehouse Company being the owner of a quantity of wheat stored at Barnhart Station, in Umatilla County, insured it with its coplaintiff, the Firemen's Fund Insurance Company, in the sum of \$1,250, which was less than its

value. The wheat was destroyed by fire, which it is alleged originated through the negligence of the defendant company. The insurance company paid the warehouse company the amount of the insurance, and, by articles of subrogation, took an assignment of all right or claim which the latter company had by reason of the damages sustained, to the extent of the amount so paid, and both companies join in an action against the railroad company for the entire amount of damages sustained by reason of the fire. Sam Davis was the owner at the same time of a quantity of wheat which was also destroyed. Having since assigned his claim for damages against the railroad company to plaintiffs, they sue upon this demand, also, as a second separate cause of action. A demurrer was interposed to each of these causes of action, but, being overruled, judgment was rendered against the defendant from which it appeals.

Messrs. Cotton, Teal, & Minor, H. F. Conner, and Carter & Raley, for appellant:

Assuming the wheat to have been burned by defendant's negligence, this gave rise to a single and indivisible cause of action at law in favor of the warehouse company.

Swarthout v. Chicago & N. W. R. Co. 49 Wis. 625, 6 N. W. 314; *Ætna Ins. Co. v. Hannibal & St. J. R. Co.* 3 Dill. 1, Fed. Cas. No. 96; *Norwich Union F. Ins. Soc. v. Standard Oil Co.* 8 C. C. A. 433, 19 U. S. App. 460,

NOTE.—For a case in this series holding that an action at law is the proper remedy of an insurance company on subrogation to a claim against the party negligently causing the loss, see *St. Louis, A. & T. R. Co. v. Fire Asso.* 28 L. R. A. 83.
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59 Fed. 984; *Over v. Lake Erie & W. R. Co.* 63 Fed. 34; *Field v. New York*, 6 N. Y. 179, 57 Am. Dec. 435; *Cook v. Genesee Mut. Ins. Co.* 8 How. Pr. 514; *Norwich Union F. Ins. Soc. v. Standard Oil Co.* 8 C. C. A. 433, 19 U. S. App. 460, 59 Fed. 984.

This cause of action cannot be split, without defendant's consent, so as to give two rights of action at law; and no consent of the defendant to the partial assignment is alleged.

Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423; *Ætna Ins. Co. v. Hannibal & St. J. R. Co.* 3 Dill. 1, Fed. Cas. No. 96; *Mandeville v. Welch*, 5 Wheat. 277, 288, 5 L. ed. 87, 90; *Field v. New York*, 6 N. Y. 179, 57 Am. Dec. 435; *Cook v. Genesee Mut. Ins. Co.* 8 How. Pr. 514.

No action at law can be maintained in the name of the assignor of a part of the cause of action set out in the first cause of action for his own benefit and that of his assignee.

Bellinger & Cotton's Anno. Codes & Statutes (Or.) § 27; 1 Pom. Rem. & Rem. Rights, § 126; *Field v. New York*, 6 N. Y. 179, 57 Am. Dec. 435.

By the subrogation no legal title in the cause of action or any part thereof was acquired by the insurance company. The interest acquired by it is purely equitable, and enforceable only in equity.

Norwich Union F. Ins. Soc. v. Standard Oil Co. 8 C. C. A. 433, 19 U. S. App. 460, 59 Fed. 984; *Over v. Lake Erie & W. R. Co.* 63 Fed. 34; *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423; *Hassie v. God Is With Us Congregation*, 35 Cal. 378; *State Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 563, 26 Pac. 838; 1 Pom. Eq. Jur. §§ 146, 148; *Little v. Portland*, 26 Or. 235, 37 Pac. 911; 7 Enc. Pl. & Pr. p. 763, title, *Equitable assignments*; *Field v. New York*, 6 N. Y. 179, 57 Am. Dec. 435; *Cook v. Genesee Mut. Ins. Co.* 8 How. Pr. 514; *Sykes v. First Nat. Bank*, 2 S. D. 242, 49 N. W. 1058; *James v. Newton*, 142 Mass. 366, 56 Am. Rep. 700, 8 N. E. 122; *Childs v. Alexander*, 22 S. C. 169; *The Elmbank*, 72 Fed. 610; *Etheridge v. Vernoy*, 74 N. C. 800.

The distinction between actions at law and suits in equity still exists in Oregon.

Burrage v. Bonanza Gold & Quicksilver Min. Co. 12 Or. 169, 6 Pac. 766; *Beacannon v. Liebe*, 11 Or. 443, 5 Pac. 273; *Over v. Lake Erie & W. R. Co.* 63 Fed. 34; *Scott v. Neely*, 140 U. S. 106, 35 L. ed. 368, 11 Sup. Ct. Rep. 712; *Cates v. Allen*, 149 U. S. 451, 37 L. ed. 804, 13 Sup. Ct. Rep. 883, 977.

So far as the first cause of action is concerned, the plaintiffs have mistaken the forum. Under the facts pleaded resort must be had to equity where the rights of all the parties may be adjusted in a single suit.

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Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423; *Little v. Portland*, 26 Or. 235, 37 Pac. 911; *Hassie v. God Is With Us Congregation*, 35 Cal. 378; *Field v. New York*, 6 N. Y. 179, 57 Am. Dec. 435.

Messrs. Balleray & McCourt, for respondents:

An action at law lies by an insurance company against a wrongdoer for damages, by which the property of a person injured by such company has been damaged or destroyed by such wrongdoer, to the extent of the amount paid by the insurer, he being subrogated, as a matter of law, to the rights of the owner.

Swarthout v. Chicago & N. W. R. Co. 49 Wis. 625, 6 N. W. 314; *Pratt v. Radford*, 52 Wis. 114, 8 N. W. 606; *Allen v. Chicago & N. W. R. Co.* 94 Wis. 93, 68 N. W. 873; *Connecticut F. Ins. Co. v. Erie R. Co.* 73 N. Y. 393, 29 Am. Rep. 171; *State Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 563, 26 Pac. 838; *Home Mut. Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 569, 23 Am. St. Rep. 151, 26 Pac. 857.

Where injury by a wrongdoer to property insured exceeds the value of the insurance, and the insurer pays the amount of the insurance, but one cause of action arises from the wrongful act and the insured or owner and insurer must join in one action to recover the amount of damages so occasioned by the wrongdoer.

Pratt v. Radford, 52 Wis. 114, 8 N. W. 606; *Swarthout v. Chicago & N. W. R. Co.* 49 Wis. 625, 6 N. W. 314; *State Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 563, 26 Pac. 838; *Home Mut. Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 569, 23 Am. St. Rep. 151, 26 Pac. 857; *St. Louis S. W. R. Co. v. Miller*, 27 Tex. Civ. App. 344, 66 S. W. 139.

A claim or chose in action arising out of a tort, except rights for such injuries as die with the person, is assignable, and the assignee may maintain an action thereon in his own name.

Bellinger & Cotton's Anno. Codes & Statutes, §§ 27, 29, 379, 380; *Hill's Anno. Laws (Or.)* §§ 27, 29, 369, 370, note to § 27, pp. 139, 150; *Pom. Rem. & Rem. Rights*, §§ 146-148; *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551; *Butler v. New York & E. R. Co.* 22 Barb. 110; *McArthur v. Green Bay & M. Canal Co.* 34 Wis. 152; *State Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 563, 26 Pac. 838; *Horne Mut. Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 569, 23 Am. St. Rep. 151, 26 Pac. 857.

Where all the parties interested in one legal demand however numerous they may be, join in an action at law they can recover upon such demand.

Swarthout v. Chicago & N. W. R. Co. 49 Wis. 625, 6 N. W. 314; *Pratt v. Radford*, 52 Wis. 114, 8 N. W. 606; *Allen v. Chicago &*

N. W. R. Co. 94 Wis. 93, 68 N. W. 873; *Connecticut F. Ins. Co. v. Erie R. Co.* 73 N. Y. 399, 29 Am. Rep. 171; *State Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 563, 26 Pac. 838; *Home Mut. Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 569, 23 Am. St. Rep. 151, 26 Pac. 857; *Hart v. Western R. Corp.* 13 Met. 99, 46 Am. Dec. 719; *Monmouth County Mut. F. Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107.

Wolverton, J., delivered the opinion of the court:

The questions for our consideration arise upon the demurrer. The first ground of demurrer as to each cause of action is that the complaint does not state facts; the second ground, as to the first cause, is that the plaintiffs' right of action is equitable; the third, that plaintiffs have attempted to unite an equitable cause of suit in favor of the insurance company with another equitable cause in favor of the warehouse company; and the fourth, that two causes of action—one in favor of each plaintiff—are improperly united. The second ground of demurrer to the second cause of action is that such cause has been improperly united with the causes of action contained in the first count. The demurrer also goes to the entire complaint, on two grounds: First, that several causes of action have been improperly united; and, second, that a cause of action at law has been united with two equitable causes of suit. Error is assigned in overruling the demurrer as to each of the grounds designated, but the real and crucial objections center about the first count or cause of action; the latter being unobjectionable, except that it is attempted to be combined with the first in one action.

It is insisted that plaintiffs have mistaken the forum, and that they should have proceeded upon the equitable side of the court, and not at law. This is the sum and substance of the whole controversy, and we will discuss it singly, without confusing it, if possible, with the other seemingly inconsistent grounds assigned by the demurrer. The contention is that the claim or demand arising from the destruction of the wheat through the negligence of the defendant was one wholly in favor of the warehouse company and against defendant, purely legal in character, single and indivisible, and was insusceptible of assignment at law, except in its entirety; that it was assignable in part or by piecemeal alone in equity; that the alleged assignment was not of a joint or undivided interest, but of a separable or distinct part or portion of the claim or demand; and that its legal effect was so to split up the cause of action that neither company could enforce its right acquired or remaining, either singly or collectively, in a

court of law, but could only have redress in a court of equity. It may be premised that it is the distinction between forms of action at law that is abolished by our Code, not that which formerly existed between actions of law and suits in equity. Although administered by the same court or tribunal, the latter distinction still remains, and the cause is only cognizable in law or in equity as the especial facts will warrant. *Beaannon v. Licbe*, 11 Or. 443, 5 Pac. 273; *Burrage v. Bonanza Gold & Quicksilver Min. Co.* 12 Or. 169, 6 Pac. 766. But, whether the cause be an action or suit, the rule is the same; requiring it to be prosecuted in the name of the real party in interest. *Bellinger & Cotton's Anno. Codes & Statutes*, §§ 27, 393. It is settled law that a party having an entire demand against another cannot split it up so as to subject the debtor to several actions, and, if he sue for a part only of such demand, the judgment obtained will operate to bar any further recovery. Nor can he assign a part only, so as to confer a right of action upon the purchaser, unless the debtor assents to it, in which event there arises a new and distinct contract or assignment; being sustained by the debtor's promise to the assignee, which operates to discharge the debtor of the original debt *pro tanto*. The reason assigned for the principle is that the debtor's undertaking is to pay an integral sum to his creditor, it being no part of his contract that he shall pay in fractions or by piecemeal, either to the creditor or his assignees; hence he has the right to stand upon the singleness of his original obligation, and cannot be subjected, without his consent, to divers actions or embarrassments not contemplated thereby, as would otherwise be the case. *Mandeville v. Weloh*, 5 Wheat. 277, 5 L. ed. 87; *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423; *James v. Newton*, 142 Mass. 366, 56 Am. Rep. 692, 8 N. E. 122. Assignments of choses in action or legal demands were anciently unknown to the common law. Latterly, however, they have been treated as merely equitable, but as conferring the right to use the name of the assignor, and thereby to authorize a recovery by an action at law. This relates to the entire demand. But our Code has changed the rule, and the procedure is more direct, requiring all actions to be prosecuted in the name of the real party in interest; thus treating the assignment as legal, and as conferring a legal right upon the assignee, not only as it respects the title to the demand, but in regard to the manner of its enforcement, also. A partial assignment may be said to be good at law between the parties, for, if the assignor should collect the funds, he would be regarded as holding it in trust for the assignee. It is such a demand, how-

ever, as is cognizable in equity as between all the parties,—the debtor as well as the creditor and the assignee. It confers, not a legal, but an equitable, right in the demand, enforceable alone in equity; the legal title remaining in the assignor, so that logically the assignee must go into a court of equity to enforce his claim, and, under the Code practice, must prosecute the suit in his own name, he being the real party in interest. It is said that in a court of equity "the objections to a partial assignment of a demand, which are formidable in a court of law, disappear. In equity the interests of all parties can be determined in a single suit. The debtor can bring the entire fund into court, and run no risks as to its proper distribution. If he be in no fault, no costs need be imposed upon him, or they may be awarded in his favor. If he be put to extra trouble in keeping separate accounts, he can, if it is reasonable, be compensated for it. In many ways a court of equity can, while a court of law, with its present modes, cannot, protect the rights and interests of all parties concerned." *National Exch. Bank v. McLoon*, 73 Me. 498, 505, 40 Am. Rep. 388. The subject is exhaustively treated in this case, and also in a masterly opinion by Judge Morrow in the case of *The Elmbank*, 72 Fed. 610. See also *Texas Western R. Co. v. Gentry*, 69 Tex. 625, 8 S. W. 98; *Cook v. Genesee Mut. Ins. Co.* 8 How. Pr. 514; *Public Schools v. Heath*, 15 N. J. Eq. 22. So that the rule against the splitting up of a demand, and denying the assignee a right of action for a part only of the claim, does not deny the right to sell and transfer an undivided part thereof, or militate against or inhibit the enforcement of the right of such an assignee in a court of equity: and, if all the owners unite in one suit upon it, the fact of the assignment of a part constitutes no defense. *Whittemore v. Judd Linsced & Sporn Oil Co.* 124 N. Y. 565, 21 Am. St. Rep. 708, 27 N. E. 244.

Now, arguing from these principles and premises, defendant contends that the insurance company, by its subrogation assignment, has but an equitable interest in the demand of the warehouse company against the defendant for the damages, enforceable alone in equity, and that there remains but an equitable interest in the warehouse company, enforceable alike only in equity, and that, though the insurance company and the warehouse company have joined as plaintiffs, the proceeding is still equitable, and not one cognizable in a court of law. It should be remarked in this connection that the alleged assignment confers no greater right than was conferred by operation of the subrogation to which the insurance company was entitled after having paid the

amount of its insurance. Plaintiffs' counsel, upon the other hand, contend that, having united their interest by joining as plaintiffs in a common cause, the proceeding is at law, and not in equity, and was rightfully maintained. This points the exact difference between the parties. If a part being assigned should be reassigned to the original owner, or the owner should assign the balance of his demand to the assignee of a part, the remedy for the enforcement of the whole would undoubtedly be in a court of law, and the objection that the cause had been split could not obtain, as the action would be single, and not contrary to the obligation of the debtor. The equities carved out of the legal entity would thus disappear, and become again merged in the holder of the entire demand, and he would be relegated to a court of law. The argument of counsel for plaintiffs is that the same result would, in effect, follow if the parties, all joined as plaintiffs to enforce the demand. Whether this is so as a general rule we are not called upon to inquire, but that it is so in a case like the present seems to be supported by authority. The relations existing between the insured and the insurer are peculiar in themselves. In respect to the ownership of the property, and the risk incident thereto, from the time of the insurance, the insurer has a pecuniary interest in the thing insured, and the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from one who is responsible for the loss. The insurer stands practically in the position of surety to the owner, stipulating that the property should not be lost or destroyed in consequence of the peril insured against, and whenever he has indemnified the owner for the loss he is entitled to all the means for indemnity which the satisfied owner held against the party primarily liable. The right rests upon familiar principles of equity,—the doctrine of subrogation, which is dependent not at all upon privity of contract, but is worked out through the inherent right of the owner or creditor. "The liability of the railroad company is, in legal effect," says Mr. Chief Justice Shaw in a case similar to the present, "first and principal, and that of the insurer secondary, not in order of time, but in order of ultimate liability." *Hart v. Western R. Corp.* 13 Met. 99, 105, 46 Am. Dec. 719. To the same purpose, see also, *Hall v. Nashville & C. R. Co.* 13 Wall. 367, 20 L. ed. 594; *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.* 139 U. S. 223, 35 L. ed. 154, 11 Sup. Ct. Rep. 554; *Norwich Union F. Ins. Soc. v. Standard Oil Co.* 8 C. C. A. 433, 19 U. S. App. 460, 59 Fed. 984. The subrogation is not the equivalent of an

assignment. It is the putting of one party in the place of another,—the party who pays the debt in the place of the creditor,—allowing the former to enter into the rights of the latter. Bouvier, Law Dict.; *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.* 41 Fed. 643. If the insurance equals or exceeds the amount of the loss, and the loss is wholly paid by the insurer to the owner, the subrogation operates as an equitable assignment, and gives to the insurer a right of action at law, which he could formerly maintain under the common law in the name of the insured, but which he must now maintain under the Code in his own name; he being the real party in interest. The owner, having no interest remaining, is without any right of action, nor can he by any act of his defeat the right of the insurer. *Connecticut F. Ins. Co. v. Erie R. Co.* 73 N. Y. 399, 29 Am. Rep. 171; *Swarthout v. Chicago & N. W. R. Co.* 49 Wis. 625, 6 N. W. 314; *Pratt v. Radford*, 52 Wis. 114, 8 N. W. 606; *Allen v. Chicago & N. W. R. Co.* 94 Wis. 93, 68 N. W. 873; *Norwich Union F. Ins. Soc. v. Standard Oil Co.* 8 C. C. A. 433, 19 U. S. App. 460, 59 Fed. 984. So the rule was formerly declared to be that, when the value of the property exceeds the insurance money paid, the action must be brought in the name of the assured. *Aetna Ins. Co. v. Hannibal & St. J. R. Co.* 3 Dill. 1, Fed. Cas. No. 96; *Norwich Union F. Ins. Soc. v. Standard Oil Co.* 8 C. C. A. 433, 19 U. S. App. 460, 59 Fed. 984, and cases there cited. In such case, "an assignment of the claim," says Mr. Wood, "cannot be enforced, but the assured becomes trustee for the insurer, and by necessary implication the payment of the loss operates as an equitable assignment to the insurer to the extent of the sum paid under the policy." 2 Wood, Ins. 2d ed. § 499. This by right of subrogation, for the learned author is discussing the doctrine as invoked in insurance cases. The result is that there is not a splitting of the claim, either in a legal or equitable sense. The insurer, it is true, acquires an interest in the claim purely equitable, but he bears the relationship of *cestui que trust* to the insured as trustee. The interest acquired is with the owner, and in cause of action that he has, but it does not give rise to a new and separate cause of action. Thus the insurer and the insured become jointly interested in a single liability or cause of action, and united they are the real parties in interest, and entitled in that capacity to prosecute a joint action against the wrongdoer. Until the loss is paid, the insurer can have no right of action against the wrongdoer, but, having paid it, he is subrogated to the right of the insured to the extent of the payment. If it covers the entire loss,

his right of action becomes absolute at law, and he must now bring it in his own name; but, if it covers a part only, his subrogation entitles him to an interest merely equitable, which he has and holds in joint capacity with the assured, and they together may maintain an action for the entire loss against the wrongdoer. Such has been the determination of this court in two cases,—*State Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 563, 26 Pac. 838, and *Home Mut. Ins. Co. v. Oregon R. & Nav. Co.* 20 Or. 569, 23 Am. St. Rep. 151, 26 Pac. 857.

It is insisted, however, that what was said in those cases upon the subject was not necessary to a determination of the controversy involved, and therefore that they are not authoritative as precedents. In the *State Ins. Co. Case* the precise question was whether the company, having paid under its policy of insurance, being but a part of the loss sustained, could prosecute an action singly against the railroad company for the amount paid by it to the assured, and it was held that it could not. The very same contention, however, was maintained by counsel for the railroad company at the hearing there as is urged here, and in response thereto the court, speaking through Mr. Justice Lord, said: "There is but one wrongful act complained of, causing one loss and creating but one liability. It is a single wrongful act, giving rise to but one liability upon a claim which is indivisible. It is immaterial whether the insurer acquires his right or interest by subrogation or assignment. When the property destroyed exceeds the value of the insurance money paid, he only acquires a joint right or interest with the owner of such property in a single cause of action or liability. Where there is but one liability or cause of action, those united in interest must adjust their loss in a single action." And again: "While at common law this liability would be enforced in the name of the insured, under the Code, except where the insurance company has paid the full value of the property, the loss of which was occasioned by the negligent act complained of, and the insurer [insured] by reason thereof has no interest, the insurer and owner of the property may join to recover the whole loss in one action. Together they have a united interest in a single cause of action or liability to which the negligent act of the defendant gave rise. The insurer acquires, not a new and separate cause of action, but only a right or interest with the owner of the property in a single cause of action or liability, and cannot, therefore, in such case, sue in his own name alone. It is upon this principle, which preserves the indivisibility of the action arising out of one loss and one liability, that

under the old practice the action would have been brought in the name of the insured for the benefit of all concerned; but, the Code requiring the action to be brought in the name of the real party in interest, the insurance companies and the owners of the property destroyed, constituting such party, would have to join in the recovery. In other words, the insurance companies would join the owner in bringing one action to determine the liability of the defendant." If the issue did not really arise from the facts of the case, it was argued and insisted upon, and was at least germane to a discussion of the real question; and, having received careful consideration, the determination is persuasive and forcible as argument, if not, in legal effect, as a precedent. The *Home Mutual Insurance Co. Case* was a similar action. The defendant answered that the owner had previously sued the railroad company for the damages occasioned by its negligence and had recovered; that the railroad company had paid the judgment in full, whereby the owner had been fully compensated; and that he held the money thus obtained in trust for the insurer; and, for a further defense, set up that by virtue of the commencement of the action the insurance company had full knowledge of the destruction of the property, that the action was about to be commenced, and was requested by the owner to prosecute or join with him in the action, but refused, and disclaimed any interest therein, and that the defendant had not, prior thereto or at the time of the commencement or trial of said action in the trial court, any knowledge of the insurance, or that the insurance company had paid the assured anything upon his policy. To each of the separate answers a demurrer was filed and overruled, and the question in this court was as to the correctness of the rulings. It will be noted that the further answer did present the question whether the owner should be joined with the insurance company in bringing the action. What the contention of the counsel was at the hearing, the record does not disclose, but the court, again speaking through Mr. Justice Lord, after an exhaustive review of the authorities, said: "From all this the conclusion results that, where the wrongful act is single and indivisible, there can be but one liability or cause of action. Since the Code, the cause of action remains as before, single and indivisible, and the insurer acquires only a right or interest with the owner of the property in the cause of action or liability, and not a new and separate cause of action. He cannot, therefore, sue in his own name alone, in any case, under the Code, except where the amount paid by him has exceeded or equaled the value of the property destroyed, and no interest remains in the owner. When the amount of the insurance money paid is less than the value of the property destroyed by the negligent act, all the authorities agree that the insurer must either sue in the name of the insured, or join with him in bringing an action against the wrongdoer. None allows that in such case he can sue in his own name alone, for the reason that the wrongful act is single and indivisible, and gives rise to but one liability or cause of action. In that cause of action he acquires a joint right with the owner therein, and not a new and separate right of action, and therefore must prosecute it jointly with him. They have a joint interest in a single liability, and united are the real parties in interest." Thus it is that the principles and doctrines here discussed have received ample and exhaustive consideration in these cases, and the conclusion reached is so cogent and impressive that we feel bound by it, and hence conclude that this case was properly instituted by the insurer and assured jointly. The judgment was single against the defendant, and what is said in the complaint as to the damages sustained respectively by the joint plaintiffs did not change the nature of the action, and, being mere surplusage, was properly disregarded.

These considerations affirm the judgment of the trial court, and it is so ordered.

Petition for rehearing denied.

STATE of Oregon *ex rel.* R. LIVINGSTONE
et al., Repts.,

v.

George H. WILLIAMS, Mayor of Portland,
et al., Appts.

(.....Or.....)

1. **Mandamus will not lie to compel the arrest without warrant of certain designated persons for the alleged commission of a misdemeanor.**
2. **Mandamus will not lie to compel a judge to issue bench warrants, where the pleadings do not show it to be his duty to do so, and the statute imposes the duty upon the clerk of the court.**
3. **Where the statute imposes the duty upon a police officer to prosecute**

NOTE.—As to arrest without warrant for a misdemeanor, see also cases in note to *State v. Hunter*, 8 L. R. A., on page 531; and the later cases in this series of *Scott v. Eldridge*, 12 L. R. A. 379; *Com. v. Wright*, 19 L. R. A. 206; *State v. Lewis*, 19 L. R. A. 449; *Burroughs v. Eastman*, 24 L. R. A. 859; *Baltimore & O. R. Co. v. Cain*, 28 L. R. A. 688; *White v. State*, 37 L. R. A. 642; and *Tillman v. Beard*, 46 L. R. A. 215.

gamblers, a writ of mandamus to compel him to do so should not join the mayor and common council for the purpose of compelling them to direct him to perform his duty, since their co-operation is not necessary to secure the end sought.

4. That municipal officers have entered into a conspiracy to license gambling houses under the guise of periodical fines does not require the joining of anyone but the chief of police in a writ of mandamus to compel him to perform his statutory duty to prosecute gamblers, since in such case he cannot claim to have been directed to neglect his duty by any lawful command of a superior officer.
5. When a demurrer is sustained to an alternative writ of mandamus because several causes of action were improperly united, the plaintiff can proceed only by filing an amended complaint containing the cause of action which he elects to pursue.

(August 8, 1904.)

APPPEAL by respondents from a judgment of the Circuit Court for Multnomah County granting a writ of mandamus to compel the arrest and prosecution of certain persons who were alleged to have violated the statutes against gambling. *Reversed.*

Statement by Moore, Ch. J.:

This is a mandamus proceeding instituted on the relation of R. Livingstone and others against George H. Williams, as mayor of Portland; Charles H. Hunt, as chief of police; H. W. Hogue, as municipal judge; and Charles F. Beebe and others, as members of the executive board of that city, to compel the arrest and prosecution of certain persons for alleged violations of a clause of the city charter, of the provisions of a municipal ordinance, and of the requirements of a statute of the state prohibiting gambling. Alternative writs were issued, one to the members of the executive board as a body, and one to each of the other defendants, who severally demurred thereto on the grounds: (1) That they did not state facts sufficient to entitle the relators to the relief demanded; (2) that it appeared therefrom that a plain, speedy, and adequate remedy in the ordinary course of law existed for the suppression of the evil alleged; (3) that the court did not have jurisdiction of the persons of the defendants, nor of the subject-matter involved; and (4) that several alleged causes of special proceeding were improperly united. These demurrers being overruled, and the defendants declining further to plead, the writs were made peremptory, and they severally appeal.

Messrs. L. A. McNary and J. P. Kavanaugh, for appellants:

Mandamus is a writ of discretion, not a 67 L. R. A.

writ of right, and the court will consider the existing facts and examine the whole case, with due regard to the consequences of its action, in granting or refusing the writ.

Ball v. Lappius, 3 Or. 55; *People v. Ketchum*, 72 Ill. 212; *Brokaw v. Highway Comrs.* 130 Ill. 482, 6 L. R. A. 161, 22 N. E. 596; 19 Am. & Eng. Enc. Law, 2d ed. p. 751.

The discretion with which the court is vested is not an arbitrary discretion, and cannot be capriciously exercised. It is a sound legal discretion to be exercised in accordance with the established rules of law, and is subject to review on appeal.

Hardee v. Gibbs, 50 Miss. 802; *Brooke v. Widdicombe*, 39 Md. 387; *People ex rel. Emigration Comrs. v. Richmond County*, 22 How. Pr. 275; *Sheridan v. Fleming*, 93 Mo. 322, 5 S. W. 813.

Mandamus does not supersede legal remedies, but it is intended to supply the want thereof and prevent a failure of justice, and it will not lie where the law provides another plain, speedy, and adequate remedy.

Bellinger & Cotton's Anno. Codes & Statutes, § 605; *Ball v. Lappius*, 3 Or. 55; *Durham v. Monumental Silver Min. Co.* 9 Or. 41; *Oregon City v. Moore*, 30 Or. 221, 46 Pac. 1017, 47 Pac. 851; *Kimball v. Union Water Co.* 44 Cal. 173, 13 Am. Rep. 157.

Another legal remedy that will defeat mandamus is one that will place the relator in the same position he occupied before the omission of the duty complained of, or would have occupied had the duty been performed.

Coos Bay R. Co. v. Wieder, 26 Or. 453, 38 Pac. 338; *Habersham v. Sears*, 11 Or. 431, 50 Am. Rep. 481, 5 Pac. 208; *State ex rel. Bradley v. Cone*, 40 Fla. 409, 74 Am. St. Rep. 150, 25 So. 279.

Mandamus will not be awarded to compel municipal officers to arrest and prosecute alleged offenders against the state laws and city ordinances where the state laws provide an adequate remedy by indictment or information for the same offense.

Highway Comrs. v. People, 66 Ill. 339; *Highway Comrs. v. People*, 73 Ill. 203; *State ex rel. Thornton v. Yant*, 134 Ind. 121, 33 N. E. 896; *Tapping, Mandamus*, 76.

Municipal officers will not be compelled by mandamus, without warrant or complaint, to arrest and prosecute persons charged with violation of the state laws and city ordinances.

State ex rel. Thatcher v. Horner, 16 Mo. App. 191; *Alger v. Seaver*, 138 Mass. 331; *State ex rel. Wear v. Francis*, 95 Mo. 44, 8 S. W. 1; *People ex rel. Clapp v. Listman*, 84 App. Div. 637, 82 N. Y. Supp. 784.

When the writ is directed to an officer who is vested with judicial or ministerial dis-

cretion in relation to the performance of the duty enjoined, it will compel him to act, but not to decide, in a particular manner.

People v. School Trustees, 42 Ill. App. 60; *Ex parte Hays*, 26 Ark. 510.

The writ cannot be awarded to compel a series of acts, or general course of conduct, where it is impossible for the court to supervise or control the performance of the acts or duties.

State ex rel. Rosenfeld v. Einstein, 46 N. J. L. 479; *Diamond Match Co. v. Powers*, 51 Mich. 145, 16 N. W. 314; *State ex rel. Star Pub. Co. v. Associated Press*, 159 Mo. 410, 51 L. R. A. 151, 81 Am. St. Rep. 368, 60 S. W. 91.

The writ will not issue in doubtful cases, and can only be invoked where the relator shows a clear legal right to the performance of the duty, and where he has no plain, speedy, or adequate remedy in the ordinary course of law.

United States ex rel. Redfield v. Windom, 137 U. S. 636, 34 L. ed. 811, 11 Sup. Ct. Rep. 197; *Gregory v. Blanchard*, 98 Cal. 311, 33 Pac. 199; *Lamoreaux v. Ellis*, 89 Mich. 146, 50 N. W. 812; *State ex rel. Faïres v. Buhler*, 90 Mo. 560, 3 S. W. 68; *Slemmons v. Thompson*, 23 Or. 215, 31 Pac. 514; *People v. Hatch*, 33 Ill. 140; *Durham v. Monumental Silver Min. Co.* 9 Or. 41.

Messrs. Pipes & Tift and Miller Murdock, for respondents:

Mandamus lies to compel municipal officers to perform specific duties in enforcing municipal law.

Goodell v. Woodbury, 71 N. H. 378, 52 Atl. 855; *Wood v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766; *State ex rel. Kelleher v. St. Louis Public Schools*, 134 Mo. 296, 56 Am. St. Rep. 503, 35 S. W. 617; *Re Whitney*, 24 N. Y. S. R. 968, 3 N. Y. Supp. 838; *People ex rel. Dakin v. Byrne*, 9 Abb. N. C. 127, note; *State ex rel. Clark v. Police Board*, 10 Ohio Dec. Reprint, 256.

Mandamus lies to compel the judge to issue a warrant of arrest.

Benners v. State, 124 Ala. 97, 26 So. 942; *State ex rel. Thomas v. McOutcheon*, 20 Neb. 304, 30 N. W. 58; *People ex rel. Robinson v. Swift*, 59 Mich. 529, 26 N. W. 694; *Atty. Gen. ex rel. Calvin v. Police Justice*, 40 Mich. 631; 1 Bishop, Crim. Proc. § 1403; *Merrill, Mandamus*, § 203; *State ex rel. Harris v. Laughlin*, 75 Mo. 358; *State ex rel. School District v. Cummings*, 17 Neb. 311, 22 N. W. 545.

Where the duty is of a public nature no demand is necessary.

19 Am. & Eng. Enc. Law, p. 760; *Northern P. R. Co. v. Washington Territory*, 142 U. S. 492, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283; *Oroville & V. R. Co. v. Plumas County*, 67 L. R. A.

37 Cal. 354; *People ex rel. Atty. Gen. v. Reis*, 76 Cal. 269, 18 Pac. 309.

Where permissive language is used in conferring power upon an officer, and the public or third persons have an interest in the exercise of the power, its exercise is imperative.

Kohn v. Hinshaw, 17 Or. 308, 20 Pac. 629; *Smith v. King*, 14 Or. 10, 12 Pac. 8; *McLeod v. Scott*, 21 Or. 94, 26 Pac. 1061, 29 Pac. 1.

Discretion of an inferior officer must be exercised reasonably and fairly, and its abuse may be controlled by mandamus.

Ex parte Bradley, 7 Wall. 377, 19 L. ed. 219; *State ex rel. Adamson v. Lafayette County Court*, 41 Mo. 226; *Glencoe v. People*, 78 Ill. 389; *People ex rel. Oelricks v. Superior Court*, 10 Wend. 285; *Stockton & V. R. Co. v. Stockton*, 51 Cal. 339; *Wood v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766; *McLeod v. Scott*, 21 Or. 109, 26 Pac. 1061, 29 Pac. 1; *State ex rel. Foerstel v. Higgins*, 76 Mo. App. 328.

Where an officer must be satisfied it is his duty to be satisfied upon sufficient proofs, and mandamus lies.

Stockton & V. R. Co. v. Stockton, 51 Cal. 339.

Where a city police board, in bad faith and by the abuse of its discretion, refuses to enforce the statute prohibiting the sale of intoxicating liquors on Sunday, the court of common pleas may order the board to enforce it by mandamus.

State ex rel. Clark v. Police Board, 10 Ohio Dec. Reprint, 256; *People ex rel. Hamilton v. Barnes*, 66 Cal. 594, 6 Pac. 698.

The relators need have no special interest where the matter concerns a public duty.

State ex rel. Shaw v. Ware, 13 Or. 380, 10 Pac. 885; *State ex rel. Durkheimer v. Grace*, 20 Or. 157, 25 Pac. 382.

Moore, Ch. J., delivered the opinion of the court:

It is contended by defendants' counsel that errors were committed in overruling these demurrers. Let us first consider whether or not the alternative writs state facts sufficient to warrant the granting of the relief demanded. They show the right of the relators to institute these proceedings; allege the incorporation of the city of Portland, and the several duties of the respective defendants, so far as involved herein; that since March, 1903, defendants have wilfully conspired to obstruct and defeat the enforcement of the provisions of the city charter, of the municipal ordinance, and of a statute of the state prohibiting gambling, and to thwart the conviction and punishment of persons engaged in gaming, or who keep or

frequent gambling houses, and refuse to perform the duties imposed upon them in relation to such prohibition; that every day and night since the unlawful agreement was entered into a number of persons have openly and notoriously been engaged in keeping and conducting gaming and gambling houses, rooms, and premises, and playing the games so prohibited, which places have been and now are kept and used as common gaming houses for playing therein for wager of money at games of chance, some of the persons so employed and of the rooms in which they are engaged being as follows: John Thomas, 130 Fifth street, H. Shapiro, 185 Third street, George Fuller, . . . Fred Fritz, 242 Burnside street, E. Blazier, 248 Burnside street, and A. D. Martini, 81 First street; that at all times and now the defendants had and have information satisfactory to each of them that such houses and rooms were and are constantly used for gambling, but, in pursuance of their unlawful agreement, the chief of police, with the sanction and approval of his codefendants, pretends to subscribe and verify complaints against such persons, feigning to charge them severally, in due form of law, with violating the ordinances relating to gambling, files the same in the municipal court, and, without any order therefrom fixing their bail, induces them to deposit sums of money, pretending that they are in lieu of bail, and the municipal judge, in furtherance of such unlawful combination professes to order such money forfeited and paid into the city treasury, the defendants intending that the persons so charged should not appear in court for trial, they consenting thereto, relying upon the defendants' advice that they were not to be tried on such charges if twice each month they would deposit the sums agreed upon as simulated bail; that in pursuance of such conspiracy all persons conducting common gaming houses, including those hereinbefore named, have been charged by the chief of police twice each month with the offense of gambling, and in every instance they have deposited a specified sum of money in lieu of bail, which has invariably been forfeited, the municipal judge refusing to proceed with their trials; that at intervals between the time of such deposits the defendants had, and now have, satisfactory information, and know that the persons so charged are keeping gaming houses, but the defendants wilfully neglect and refuse to charge them therewith, or cause them to be arrested therefor, or to be brought to trial, and in doing so the defendants have not exercised any discretion, but act arbitrarily, and with intent to permit public gambling in violation of law; that the municipal

judge, well knowing that the persons making such deposits are in the city, at their several gambling houses, engaged in playing prohibited games, wilfully neglects to issue bench warrants for their arrest, "as required by law," with intent that they shall continue to violate the city charter, municipal ordinance, and statute of the state, so as to derive from them an illegal and corrupt revenue for the city; that the largest gambling house is known as the "Portland club" at No. 130 Fifth street, which is, and at all times mentioned herein has been, kept and conducted by Peter Grant, Jack Grant, Lawrence Sullivan, Harvey Dale, and Nate Solomon; that in March, 1903, and thereafter at regular intervals, the chief of police has pretended to file in the municipal court verified complaints against one of the persons last mentioned under the fictitious name of John Thomas well knowing the true name of the person intended to be charged, who would thereupon deposit in that court, under the pretense of bail, about \$250, but on November 23, 1903, the sum left for that purpose was \$300, which the judge pretended to forfeit,—whereby gambling has continued in violation of law, and the persons engaged therein and pretended to be charged therewith and arrested therefor under the name of John Thomas have, in pursuance of such conspiracy, never appeared in the municipal court for trial; and that the relators have no plain, speedy, or adequate remedy in the ordinary course of law.

The four alternative writs are alike in every particular, except the 37th paragraph thereof, which relates to the respective commands enjoined upon the several defendants; the one addressed to the mayor, omitting the choice of showing cause, being as follows: "Now, therefore, you are commanded that immediately after the receipt of this writ you forthwith direct Charles H. Hunt, as chief of police of said city, to enter, or cause a proper police officer to enter, the common gaming houses described in this writ, and particularly the premises at 130 Fifth street, known as the 'Portland club,' which is a common gaming and gambling house, and forthwith arrest or cause to be arrested the person or persons who may be found there violating the gambling law and ordinances, and particularly the person who has heretofore been charged by the said chief of police in the municipal court of said city with violating the laws and ordinances of said city under the name of John Thomas, and the persons, to-wit, Peter Grant, Jack Grant, Lawrence Sullivan, Harvey Dale, and Nate Solomon, who are keeping and using said gaming and gambling house, and to seize all instruments of gam-

ing that may be found therein, and bring the same into the municipal court, and to vigorously prosecute said persons therefor, or that you show cause," etc. The command addressed to the executive board is almost identical with that to the mayor, and that directed to the chief of police was to execute the orders of the mayor and of the executive board, as contained in the mandates to them. The municipal judge was required to perform the following service: "Now, therefore, you are commanded that immediately after the receipt of this writ you issue bench warrants for all persons charged with offenses against the ordinances of said city relating to gambling, whose bail has been forfeited by order of your court, and who have not appeared for trial in the several actions against them, and particularly for the persons charged under the name of John Thomas, charged in the months of May, June, July, August, September, October, and particularly about November 30, 1903, and that you cause the said persons to be brought before you and proceed to the trial thereof."

Section 194 of the charter of the city of Portland, which is relied on as imposing upon the mayor and the executive board the duties sought to be enforced against them in this proceeding, is, so far as deemed involved herein, as follows: "Whenever the mayor or the executive board ascertains or receives satisfactory information that any house, room, or premises within such city . . . is being kept or used as a common gaming house or common gambling premises for playing therein for wager of money at a game of chance, . . . it shall be lawful for the mayor or the executive board to authorize and direct the chief of police, or any officer of the force, to enter such house, room, or premises, and forthwith arrest all persons therein found offending against any law, and to seize all instruments of gaming . . . and bring the said articles into court." Or. Special Laws, 1903, p. 83. Assuming, without deciding, that the clause "it shall be lawful," in the section quoted, is not merely permissive, but mandatory, imposing upon the mayor and the executive board the duty of directing the chief of police as therein specified, had these officers the power, and could the court compel them, to order the arrest, without a warrant, of any person not found offending against any law? The statute prescribing when an arrest may be made without written authority is as follows: "A peace officer may, without a warrant, arrest a person, (1) For a crime committed or attempted in his presence; (2) when the person arrested has committed a felony, although not in his presence; (3) when a felony has in 67 L. R. A.

fact been committed, and he has reasonable cause for believing the person arrested to have committed it." Bellinger & Cotton's Anno. Codes & Statutes, § 1611. Ordinance No. 3,983 of the city of Portland, approved October 13, 1883, prohibiting gambling, and in force when the writs herein were issued, imposes for a violation of its provisions a punishment by imprisonment not exceeding ninety days, or by a fine not exceeding \$300, or by both such fine and imprisonment. It will thus be seen that by this municipal enactment the crime of gambling is only a misdemeanor, as it is likewise regarded by statute of this state. Bellinger & Cotton's Anno. Codes & Statutes, § 1944. It would have been lawful for the mayor or for the executive board to have directed the chief of police to enter any gambling house in the city of Portland and arrested all persons found therein offending against any law, for the individuals so discovered would be guilty of a crime committed or attempted in the presence of a peace officer. Id. § 1611. When, however, the mayor and the executive board were commanded in the alternative writs, without either the filing of a complaint or the issuing of a warrant, to direct the arrest of the persons named, we do not think any authority existed therefor; for, if the persons designated were found offending against any law, the insertion of their names in the alternative writs was unnecessary, but, if not so found, their alleged crimes being only misdemeanors, and not committed in the presence of the court (Id. § 1615), it was powerless to command their apprehension. *State ex rel. Wear v. Francis*, 95 Mo. 44, 8 S. W. 1. In that case it was held that a writ of mandamus would not be issued to compel the board of police commissioners of the city of St. Louis to arrest and prosecute certain named persons for a violation of the law of Missouri prohibiting the sale of fermented liquors on Sunday. In rendering the decision Mr. Justice Sherwood, speaking for the court, says: "Again, on the mere admission of the respondents that four citizens have done certain acts, the latter are to be arrested and prosecuted without affidavit and without warrant. This is further, it seems to me, than the mandatory authority of a court extends. Indeed, I have found no precedent for a mandamus for the arrest of anyone. It is the duty of a sheriff, as conservator of the peace, to cause all offenders against law, in his view, to enter into recognizance with surety to keep the peace, etc. 1 Rev. Stat. [1879] § 3889. It is also his duty to quell and suppress assaults and batteries, riots, affrays, and insurrections, to apprehend and commit to jail all felons and traitors, and execute all proc-

ess directed to him by legal authority. 1 Rev. Stat. [1879] § 3891. And yet it is believed that no instance can be found where a mandamus has issued commanding a sheriff to quell a riot or to arrest a criminal. The fact that no such precedent can be found argues very strongly against the exercise of such authority. It is very easy to see that, if the process of mandamus could be employed in this ordinary way, that extraordinary writ would soon descend from its high plane and become very commonplace."

To secure freedom from illegal restraint for trivial causes, the wisdom and experience of ages have sanctioned the use of certain forms of procedure which must be observed before an alleged criminal can lawfully be arrested for a misdemeanor not committed in the presence of a magistrate or of a peace officer. A formal charge must be made and filed, showing that the court has jurisdiction of the subject-matter and authority to issue a warrant, in pursuance of which a peace officer may apprehend the person therein named, and be exonerated from all consequences that may possibly result from a wrongful imprisonment, by producing the writ if it appears therefrom that the court issuing it had such jurisdiction, and there is nothing disclosed to notify him of any lack of such authority. Crocker, Sheriffs, § 48; Murfree, Sheriffs, § 1161; 3 Cyc. Law & Proc. 880; 2 Am. & Eng. Enc. Law, 2d ed. pp. 869, 893; *Savacool v. Boughton*, 5 Wend. 170, 21 Am. Dec. 181; *Re Way*, 41 Mich. 299, 304, 1 N. W. 1021. In *Goodell v. Woodbury*, 71 N. H. 378, 52 Atl. 855, relied upon by the relators as supporting the judgment rendered herein, a writ of mandamus was issued to compel the chief of police of Manchester, New Hampshire, to enforce the provisions of a statute of that state prohibiting the sale of intoxicating liquors; but the officer was commanded to prosecute, not to arrest, the persons named in the writ. In deciding that case Mr. Chief Justice Blodgett, referring to the duties of the chief of police, says: "The defendant is not merely a peace officer; he is also a prosecuting officer. The ordinances of Manchester (1892) provide that 'he shall carry into execution within the city the laws of the state and all the ordinances of the city, and be vigilant to detect and bring to punishment all violations thereof. . . . He shall receive all complaints made to him of any violation of the laws or of any ordinance of the city, and shall, in behalf of the city, cause all offenders against such laws and ordinances to be promptly prosecuted before the police court of the city of Manchester, and shall attend, on behalf of the city, at their trial.'" In the case at bar the chief of police was required to arrest and vigorously prosecute

the persons named in the alternative writ addressed to him, but, as such order was a recital of the language of the city charter (§ 195), we do not think the command can be construed, in the extraordinary remedy invoked, as a direction to file formal charges against the persons so named, before arresting them, and that a reasonable interpretation of the language used means that the officer was required (1) to apprehend such persons; (2) to bring them into the municipal court; (3) to prefer charges against them; and (4) to secure the attendance of witnesses whose testimony might lead to their conviction.

The Congress of the United States, fearing an infringement of the citizen's right of locomotion, and believing that the Constitution originally adopted did not sufficiently "secure the blessings of liberty" guaranteed by that instrument, proposed at an early day, and secured the ratification of the 4th Amendment to the fundamental law, which, so far as applicable herein is as follows: "The right of the people to be secure in their persons . . . against unreasonable . . . seizures shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing . . . the persons . . . to be seized." In *Re Way*, 41 Mich. 299, 1 N. W. 1021, Mr. Chief Justice Campbell, commenting on the mode of apprehending persons, says: "It must not be forgotten that there can be no arrest without due process of law. An arrest without warrant has never been lawful except in those cases where the public security requires it; and this has only been recognized in felony, and in breaches of the peace committed in presence of the officer." In *Bright v. Patton*, 5 Mackey, 534, 60 Am. Rep. 396, it was ruled that an officer had no right to arrest without a warrant, after an offense had been committed, where the punishment is only a fine and imprisonment in jail. The illegal arrest of a person without a warrant entitles him to compensation for the damages sustained by reason of the false imprisonment. *Thorne v. Turck*, 94 N. Y. 90, 46 Am. Rep. 126. In *McConnell v. Kennedy*, 29 S. C. 180, 7 S. E. 76, the court, in distinguishing between false imprisonment and malicious prosecution, says: "The foundation of the cause of action in the one case is the right which even a guilty man has to be protected against any unlawful restraint of his personal liberty, while in the other it is founded upon the right of an innocent man to be compensated in damages for any injury he may sustain by bringing against him a groundless charge, even though such charge may be presented and prosecuted in accord-

ance with the strictest forms of law." The statute of this state, emphasizing the love of personal liberty entertained by a free people as expressed in the 4th Amendment to the Federal Constitution, impliedly prohibits the arrest, without a warrant, of any person for the commission of a misdemeanor, unless the offense was attempted or consummated in the presence of a magistrate or of a peace officer (Bellinger & Cotton's Anno. Codes & Statutes § 1611); so that, if the chief of police had obeyed the command of the alternative writ directed to him, and, without a warrant, arrested the persons so designated, their alleged crimes being only misdemeanors, he would probably have been liable to them in nominal damages, at least, for a false imprisonment, unless he apprehended them in the act of violating the law, notwithstanding they may theretofore have been guilty of offending against the statute and city ordinances prohibiting gambling. "An officer," says the editor of Am. & Eng. Enc. Law (vol. 19, 2d ed. p. 729), "cannot be compelled to do more than the statute requires of him;" and hence the issuance of the alternative writs addressed to the mayor, to the executive board, and to the chief of police, in so far as they commanded the arrest without a complaint or warrant of the persons so named, was an exercise of power not authorized, and therefore void.

A compliance by the municipal judge with the command directed to him would have necessitated an examination of the journals of the municipal court from the time of its organization until the writ was returned to ascertain the names of the persons whose bail had been ordered forfeited and who had not appeared for trial in the several actions instituted therein against them, that bench warrants might be issued for their arrest, regardless of the fact that many of those intended to be included in the order may possibly have died in the long interim. The statute makes a distinction between bail and money deposited in lieu thereof (Bellinger & Cotton's Anno. Codes & Statutes, § 1338), so that a literal compliance by that officer with the alternative writ directed to him to "issue bench warrants for all persons charged with offenses against ordinances of said city relating to gambling where bail has been forfeited by your court, and who have not appeared for trial in the several actions against them," would not have resulted in punishing the persons alleged to have been guilty of violating the law prohibiting gambling, nor possibly corrected the evil sought to be suppressed by these proceedings, assuming, as the writs allege and the demurrers admit, that, in pursuance of the con-

spiracy entered into by the defendants, money, in each instance, was deposited in lieu of bail.

The alternative writs, in referring to the duties imposed on the municipal judge, contain the following averment: "Among the provisions of law not otherwise provided in said charter are that a defendant shall be admitted to bail by an order of the court, and after such order is made he may deposit in lieu thereof with the clerk the sum of money mentioned in the order; and if, without sufficient excuse, the defendant neglect or fail to appear for arraignment or upon any other occasion when his presence in court may be lawfully required, the court must direct the fact to be entered in the journal, and the undertaking of bail or the money deposited in lieu thereof, as the case may be, is thereupon forfeited. When, by reason of the defendant's neglect or failure to appear, he has incurred a forfeiture of his bail or money deposited in lieu thereof, it is the duty of the court, by an order entered upon its journal, to direct the arrest of the defendant, and his commitment to the officer to whose custody he was committed at the time of giving bail, and his detention until legally discharged. It is then the duty of the court to proceed to trial in ordinary course until final determination." The charter provides that the municipal court shall be a court of record having a seal. § 328. All proceedings before such court or the judge thereof are governed and regulated by the general laws of the state applicable to the justice of the peace or justices' courts in like cases, except as in the charter otherwise provided. § 332. The executive board is authorized to appoint a clerk of such court, who is to keep the seal thereof and affix it to any process emanating therefrom. § 331. The demurrers having admitted the duty of the municipal judge to enter in the journal of his court a memorandum of the forfeiture of the money deposited in lieu of bail, and of orders in such cases directing the arrest of the persons whose money had been forfeited, as alleged, it must be presumed, in the absence of any averment to the contrary, that such official duty has been regularly performed (Bellinger & Cotton's Anno. Codes & Statutes, § 738, subd. 15), and, this being so, the issuing of the bench warrants did not devolve upon the judge, as stated in the command addressed to him, but on the clerk of the municipal court, who is required to affix the seal thereof to any process. Charter of Portland, § 331. Though it is alleged in the alternative writs that the municipal judge wilfully neglects to issue bench warrants, "as required by law," for the arrest of persons whose money deposited in

lieu of bail has been declared forfeited, it is not averred that it is incumbent on him to issue such warrants, unless the duty in this respect can be implied from the qualifying phrase "as required by law." It was necessary to state, as a major premise: (1) The facts constituting the duty which the law enjoins on the defendants; and, as a minor premise, (2) their failure, neglect, or refusal to comply therewith, from which the court deduces the conclusion sought to be established. Bliss, Code Pl. 3d ed. § 137. The writs having stated that the municipal judge neglected to issue bench warrants "as required by law," the phrase quoted is only a legal conclusion, and not the averment of a material fact, stated as the foundation of an enforceable right. It will be remembered that the sufficiency of the alternative writs was challenged by demurrer and in such case the probative facts alone are admitted, and not the conclusions of law so stated. *Longshore Printing Co. v. Howell*, 26 Or. 527, 28 L. R. A. 464, 46 Am. St. Rep. 640, 38 Pac. 547. It not having been alleged that it was incumbent upon the municipal judge to issue bench warrants, and, as we have seen, this duty is imposed by the city charter on the clerk of the municipal court, it follows that the alternative writs do not state facts sufficient to constitute a cause of special proceeding against the former.

Considering the fourth ground of the demurrer interposed to the alternate writs,—that several causes of alleged special proceedings have been improperly united,—it has been held that one writ of mandamus against all officers concerned in the separate but co-operative steps for levying and collecting a tax is the proper and effective remedy to secure its exaction. *Labette County v. United States*, 112 U. S. 217, 28 L. ed. 698, 5 Sup. Ct. Rep. 108. In deciding that case Mr. Justice Matthews, in speaking for the court on the procedure, said: "There is no incongruity in such a writ. It would not be complete or effective without it embraced all the particulars which, in law are essential to the full duty contemplated by it, the performance of which is necessary to secure its benefits to the party who sues it out. So here the object of this writ, though including many particular steps in obeying it, is nevertheless single. In that it is intended to obtain an end which is the result of the means prescribed. The command of the writ is to perform the general duty, which is obeyed by performing the successive steps which constitute it. Clearly, the writ would not be chargeable with duplicity if addressed to one person, although it commanded the performance of a series of acts, each of which was a condition of the performance of its

successor, where the right of the relator consists in the result legally flowing from the combined whole. It can make no difference in principle that in a particular case the law, instead of casting the performance of the entire duty upon a single person, has divided it among several, each to perform but one act in the series, and each acting independently, and not as responsible to any of the others but all required to co-operate in the attainment of the single result, and by a continuous and uninterrupted succession, so as to preserve the integrity and unity of the performance of an entire duty. The relator is entitled to an effective writ, and he can have it only on the terms of joining in its commands all those whose co-operation is by law required, even though it be by separate and successive steps in the performance of those official duties which is necessary to secure to him his legal right. Otherwise the whole proceeding is liable to be rendered nugatory and abortive." To the same effect, see *State ex rel. Byers v. Bailey*, 7 Iowa, 390.

In the case at bar it will be remembered that § 194 of the city charter provides that it shall be lawful for the mayor or the executive board, on the receipt of satisfactory information, etc., to direct the chief of police to enter common gaming houses in the city and arrest all persons therein found offending against any law. The statute of this state makes it the duty of a police officer to inform against and diligently prosecute any and all persons whom he shall have reasonable cause to believe guilty of violating the provisions of an act prohibiting gambling. *Bellinger & Cotton's Anno. Codes & Statutes*, § 1950. This enactment made the chief of police of the city of Portland a prosecuting officer (*Goodell v. Woodbury*, 71 N. H. 378, 52 Atl. 855), and, if he had reasonable cause to believe that any person was violating such law, also imposed on him the duty of enforcing its provisions without any direction to that effect from the mayor or from the executive board. The obligation thus enjoined results from an office (*Bellinger & Cotton's Anno. Codes & Statutes*, § 605), and for a refusal by the chief of police to comply with the duty which the law prescribes a peremptory writ of mandamus addressed to him would be as effectual to suppress public gambling as though the mayor and the executive board were also commanded to direct him to do the same thing. This result can be secured by commanding the chief of police to perform a plain duty devolving upon him, and, as a writ of mandamus will not lie to compel the execution of vain and useless things (10 Am. & Eng. Enc. Law, 2d

ed. p. 757), no necessity existed for joining a cause of special proceeding against the mayor or the executive board, the discharge of whose duties, if it be assumed they are imperative, was not an indispensable or successive step in the procedure to suppress the evil of which the relators complain. In discussing this feature of the case we have not overlooked the legal principle that a public officer cannot be compelled to do a particular act which his superior in office has lawfully ordered him not to do. 19 Am. & Eng. Enc. Law, 2d ed. p. 731; *Butterworth v. United States*, 112 U. S. 50, 28 L. ed. 656, 5 Sup. Ct. Rep. 25. Assuming, as the demurrers admit, that a conspiracy existed whereby the defendants sought to raise a revenue by a method tantamount to licensing public gambling, the scheme alleged to have been adopted was unlawful, and, the agreement entered into being void, the chief of police was not bound thereby, nor under any obligation to obey the orders of his superiors, the mayor or the executive board; and hence mandamus will lie to compel him diligently to prosecute any and all persons whom he has reasonable cause to believe guilty of a violation of the provisions of the statute prohibiting gambling. *Bellinger & Cotton's Anno. Codes & Statutes*, § 1950; *Goodell v. Woodbury*. 71 N. H. 378, 52 Atl. 855.

The relators are entitled to an effective writ, and, having prayed for greater relief than they of right can demand, an amendment may be desired. The statute prescribes what shall constitute the pleadings in mandamus proceedings, and provides that these formal allegations of the parties are to have the same effect, and may be amended in the same manner, as pleadings in an action. *Bellinger & Cotton's Anno. Codes & Statutes*, § 612. In *State v. Crites*, 48 Ohio St. 142, 26 N. E. 1052, it was ruled that where, upon a petition in mandamus, an alternative writ is issued commanding a number of acts, either separate or connected, to be done by the defendant, the relator is entitled to a peremptory writ for such distinct acts or parts of connected acts as he may show a right to have performed, where there is no such mutual dependence between the several acts or parts of acts that they cannot be separated or divided. A mandatory

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writ, properly framed, alleging the required facts, and addressed to all the officers of the city of Portland who are indispensable in taking the necessary successive steps required successfully to prosecute persons for violating the law prohibiting gambling, will, in our opinion, tend to suppress the evil. If the chief of police refuses or wilfully neglects to inform against and diligently prosecute any and all persons whom he shall have reasonable cause to believe guilty of a violation of the provisions of the act prohibiting gambling, he shall be deemed guilty of a misdemeanor, and on conviction thereof in a criminal action instituted for that purpose will be punished, and the court so trying him will declare his office vacant for the remainder of his term. *Bellinger & Cotton's Anno. Codes & Statutes*, § 1951.

The command of an alternative writ of mandamus is equivalent to a conclusion of law, deducible from the facts alleged, showing the particular act which the law specifically enjoins as a duty resulting from an office, trust, or station (*Bellinger & Cotton's Anno. Codes & Statutes*, § 605); the failure, neglect, or refusal of the defendant to comply therewith; and the right of the relator to insist upon its specific performance. It is to the mandatory part of the writ, however, that a party defendant must look to discover the specific act which he is commanded to perform. Though it may be possible that the right to part of the relief sought against the chief of police may be stated in the writs, the rule in this state is that, when a demurrer to a complaint is sustained on the ground that several causes of action have been improperly united, the complaint is completely overthrown, and the plaintiff can only proceed by filing an amended complaint containing the cause of action which he elects to pursue. *Cohen v. Ottenheimer*, 13 Or. 220, 10 Pac. 20.

As an alternative writ of mandamus stands for a complaint in an ordinary action (*McLeod v. Scott*, 21 Or. 94, 26 Pac. 1061, 29 Pac. 1), the judgment must be reversed, the peremptory writs set aside, and the cause remanded, with directions to sustain the demurrers in the particulars indicated herein, and for such other proceedings as may be necessary, not inconsistent with this opinion: and it is so ordered.

SOUTH DAKOTA SUPREME COURT.

Lottie A. RICHARDS, *Resp't.*,
v.
TRAVELERS' INSURANCE COMPANY,
Appt.

(.....S. D.....)

1. The contention that the evidence does not show that the death of one insured against accident resulted from external, violent, and accidental means cannot prevail where it is alleged in the complaint and admitted by the answer that assured fell from cars and received injuries from which he died.
2. Recovery on an accident insurance policy upon a person whose occupation is stated as "cattle dealer or broker visiting yards," the duties of which require him to ride on trains of cattle cars from place to place in the freight yards, is not prevented by the fact that a clause in the policy provides that it shall not cover accidents received while being in any part of a car not provided for occupation by passengers.

(July 13, 1904.)

APPEAL by defendant from a judgment of the Circuit Court for Lawrence County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of accident insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Frawley & Laffey and E. J. Frawley, for appellant:

Evidence introduced by plaintiff failed to show that the death of Arthur L. Richards was the result of external, violent, and accidental means.

Southard v. Railway Pass. Assur. Co. 34 Conn. 574; *Barry v. United States Mut. Acci. Asso.* 23 Fed. 714; *Feder v. Iowa State Traveling Men's Asso.* 107 Iowa, 538, 43 L. R. A. 693, 70 Am. St. Rep. 212, 78 N. W. 252; *Carnes v. Iowa State Traveling Men's Asso.* 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683; 1 Am. & Eng. Enc. Law, 2d ed. p. 330; *Taylor v. Pacific Mut. L. Ins. Co.* 110 Iowa, 621, 82 N. W. 326; *Bon v. Railway Pass. Assur. Co.* 56 Iowa, 664, 41 Am. Rep. 127, 10 N. W. 225; *Whitlatch v. Fidelity & C. Co.* 149 N. Y. 45, 43 N. E. 405; *Pollock v. United States Mut. Acci. Asso.* 102 Pa. 230, 48 Am. Rep. 204; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661, 32 L. ed. 308, 8 Sup. Ct. Rep. 1363.

The contract cannot be varied, changed,

enlarged, and modified by testimony of usage and custom.

Travelers' Protective Asso. v. Small, 115 Ga. 455, 41 S. E. 628; *Deacon v. Mattison*, 11 N. D. 190, 91 N. W. 35; *Healey v. Mannheimer*, 74 Minn. 240, 76 N. W. 1126, 77 N. W. 1117; *Heumphreus v. Fremont, E. & M. Valley R. Co.* 8 S. D. 103, 65 N. W. 466; *Strunk v. Smith*, 8 S. D. 407, 66 N. W. 926; *Brantingham v. Huff*, 174 N. Y. 53, 95 Am. St. Rep. 545, 66 N. E. 620; *Mead v. Dunlevie*, 174 N. Y. 108, 66 N. E. 658; *Grubbs v. Boon*, 201 Ill. 98, 66 N. E. 390; *Overbeck v. Travelers' Ins. Co.* 94 Mo. App. 453, 68 S. W. 236; *Columbus & H. Coal & I. Co. v. Tucker*, 48 Ohio St. 41, 12 L. R. A. 577, 29 Am. St. Rep. 528, 26 N. E. 633; *Liverpool, L. & G. Ins. Co. v. T. M. Richardson Lumber Co.* 11 Okla. 579, 69 Pac. 936; *Vollrath v. Crowe*, 9 Wash. 374, 37 Pac. 474; *Anderson v. Rogge* (Tex. Civ. App.) 28 S. W. 106; 22 Enc. Pl. & Pr. p. 406; 16 Am. & Eng. Enc. Law, 2d ed. p. 966; 27 Am. & Eng. Enc. Law, pp. 851, 882.

The evidence introduced in this cause shows that the injury which resulted in the death of Richards was received by him while he was in a state of voluntary intoxication, and was the result of such intoxication. Where the policy excepts death or injury happening while the insured was intoxicated, or in consequence of his having been under the influence of intoxicating liquors, the exception applies to prevent a recovery, whether the condition of the insured was the cause of the injury or not.

1 Am. & Eng. Enc. Law, 2d ed. p. 318; *Shader v. Railway Pass. Assur. Co.* 66 N. Y. 441, 23 Am. Rep. 65; *Shader v. Railway Pass. Assur. Co.* 5 Thomp. & C. 643; *Standard Life & Acci. Ins. Co. v. Jones*, 94 Ala. 434, 10 So. 530; *Muir v. Railway Pass. Assur. Co.* 37 L. T. N. S. 356; *Travelers' Ins. Co. v. Snowden*, 45 Neb. 249, 63 N. W. 392.

The condition is valid and protects the insurer in case of accident so happening.

1 Am. & Eng. Enc. Law, 2d ed. p. 312; *Hull v. Equitable Acci. Asso.* 41 Minn. 231, 42 N. W. 936; *Miller v. Travelers' Ins. Co.* 39 Minn. 548, 40 N. W. 839; *Huston v. Traveler's Ins. Co.* 66 Ohio St. 246, 64 N. E. 123; *Travelers' Ins. Co. v. Snowden*, 45 Neb. 249, 63 N. W. 392.

NOTE.—As to what constitutes an accident within the meaning of a life-insurance policy, see also note to *Fidelity & C. Co. v. Johnson*, 30 L. R. A. 206; and the later cases in this series of *Modern Woodmen Acci. Asso. v. Shryock*, 39 L. R. A. 826; *Kasten v. Interstate Casualty Co.* 40 L. R. A. 651; *Western Commercial Travelers' Asso. v. Smith*, 40 L. R. A. 653; *Feder v. 67 L. R. A.*

Iowa State Traveling Men's Asso. 43 L. R. A. 693; *Smith v. Aetna L. Ins. Co.* 56 L. R. A. 271; *Preferred Acci. Ins. Co. v. Robinson*, 61 L. R. A. 145; *Fetter v. Fidelity & C. Co.* 61 L. R. A. 459; *Horsfall v. Pacific Mut. L. Ins. Co.* 63 L. R. A. 425; *Delaney v. Modern Acci. Club*, 63 L. R. A. 608; and *Maryland Casualty Co. v. Hudgins*, 64 L. R. A. 349.

The injury received by the deceased, which resulted in his death, was received by him while he was voluntarily exposing himself to unnecessary danger.

DeLoy v. Travelers' Ins. Co. 171 Pa. 1, 50 Am. St. Rep. 787, 32 Atl. 1108; *Carpenter v. American Acci. Co.* 46 S. C. 541, 24 S. E. 500.

His act as disclosed by the evidence was not only extremely risky, but entirely unnecessary.

Willard v. Masonic Equitable Acci. Asso. 169 Mass. 288, 61 Am. St. Rep. 285, 47 N. E. 1006.

The danger was obvious, the exposure unnecessary, the want of ordinary care and diligence clear, and the injury resulted from said voluntary exposure and carelessness, which not merely contributed thereto, but was the sole contributing and controlling cause.

Carpenter v. American Acci. Co. 46 S. C. 541, 24 S. E. 500; *Neill v. Travellers' Ins. Co.* 7 Ont. App. Rep. 573, 12 Can. S. C. 55; *Shaffer v. Travelers' Ins. Co.* (Ill.) 22 N. E. 589, Affirming 31 Ill. App. 112; *Follis v. United States Mut. Acci. Asso.* 94 Iowa, 435, 28 L. R. A. 78, 58 Am. St. Rep. 408, 62 N. W. 807; *Travelers' Ins. Co. v. Jones*, 80 Ga. 541, 12 Am. St. Rep. 270, 7 S. E. 83; *Morel v. Mississippi Valley L. Ins. Co.* 4 Bush, 535; *Bean v. Employers' Liability Assur. Corp.* 50 Mo. App. 459; *Williams v. United States Mut. Acci. Asso.* 133 N. Y. 366, 31 N. E. 222; *Willard v. Masonic Equitable Acci. Asso.* 169 Mass. 288, 61 Am. St. Rep. 285, 47 N. E. 1006; *Standard Ins. Co. v. Langston*, 60 Ark. 381, 30 S. W. 427; *Travellers' Ins. Co. v. Seaver*, 19 Wall. 531, 22 L. ed. 155; *Conboy v. Railway Officials & Employees' Acci. Asso.* (Ind. App.) 43 N. E. 1017; *Hoffman v. Travellers' Ins. Co.* (N. Y.) cited in 7 Am. L. Rev. 594; *Miller v. Travelers' Ins. Co.* 39 Minn. 548, 40 N. W. 839; *Huston v. Travelers' Ins. Co.* 66 Ohio St. 246, 64 N. E. 123.

The contributory negligence of the insured will not always defeat a recovery upon such a policy.

Equitable Acci. Ins. Co. v. Osborn, 90 Ala. 201, 13 L. R. A. 267, 9 So. 869; *Fidelity & C. Co. v. Sittig*, 181 Ill. 111, 48 L. R. A. 359, 54 N. E. 903; *Travelers' Ins. Co. v. Randolph*, 24 C. C. A. 305, 47 U. S. App. 260, 78 Fed. 759; *Commercial Travelers' Mut. Acci. Asso. v. Springsteen*, 23 Ind. App. 657, 35 N. E. 973; *Lehman v. Great Eastern Casualty & Indemnity Co.* 7 App. Div. 424, 39 N. Y. Supp. 912.

No recovery can be had unless the insured was in the exercise of ordinary care.

Shevlin v. American Mut. Acci. Asso. 94 Wis. 180, 36 L. R. A. 52, 68 N. W. 866; 67 L. R. A.

Sargent v. Central Acci. Ins. Co. 112 Wis. 29, 88 Am. St. Rep. 946, 87 N. W. 796; *Lovell v. Accident Ins. Co.* 3 Ins. L. J. 877; *Sawtelle v. Railway Pass. Assur. Co.* 15 Blatchf. 216, Fed. Cas. No. 12,392; *Smith v. Preferred Mut. Acci. Asso.* 104 Mich. 634; 62 N. W. 990; *Tuttle v. Travellers' Ins. Co.* 134 Mass. 175, 45 Am. Rep. 316; *Metropolitan Acci. Asso. v. Taylor*, 71 Ill. App. 132; *Collins v. Fidelity & C. Co.* 63 Mo. App. 253.

Messrs. Moody, Kellar, & Moody and S. C. Polley, for respondent:

The cause of the injury to the deceased was either accidental or suicidal, and the latter will never be presumed.

Carnes v. Iowa State Traveling Men's Asso. 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683.

The rate fixed upon and paid by deceased was for a person engaged in the business as a "dealer and broker visiting yards." When defendant took the risk on a person engaged in that business it necessarily and knowingly assumed all the risks incident to that business.

Dailey v. Preferred Masonic Mut. Acci. Asso. 102 Mich. 289, 26 L. R. A. 171, 57 N. W. 184, 60 N. W. 694; *Brown v. Railway Pass. Assur. Co.* 45 Mo. 221; *Plinsky v. Germania F. & M. Ins. Co.* 32 Fed. 47; *Michigan Shingle Co. v. State Invest. & Ins. Co.* 94 Mich. 389, 22 L. R. A. 319, 53 N. W. 945.

The risk was not an unnecessary one, but one that was highly necessary, unless he abandoned the very purpose for which he was there.

Keene v. New England Mut. Acci. Asso. 161 Mass. 149, 36 N. E. 891; *Nolan v. Brooklyn City & N. R. Co.* 87 N. Y. 63, 41 Am. Rep. 345.

Fuller, J., delivered the opinion of the court:

As the beneficiary named in an accident policy held by her husband at the time of his death plaintiff recovered the full amount claimed, and the defendant appeals.

The injury resulting in the death of Mr. Richards occurred in the afternoon of the 7th day of April, 1900, in the vicinity of the Sioux City stockyards, near the Seventh street crossing. When first seen in that locality, he was lying face downward on the top of a freight car loaded with horses belonging to him, and which he had shipped from Whitewood, in this state. At this time the car was standing still, but the railroad employees were making up a train; and, as soon as this particular car was reached, the yardmaster discovered Richards lying in the position above mentioned, on top of the car, with his head on

the running board. Concerning the matter, one of the witnesses testified in part as follows: "When the cars were coupled, a railroad man—I think it was the yardmaster—went up to this man Richards, took him by the shoulder, and shook him, and told him he would have to get down and go into the way car, as the train was about to pull out. The fellow did get up, and commenced to look around as though he didn't know where to get down. The railroad man told him to come down this way, and come down the ladder. The railroad man went down the ladder. Mr. Richards, instead of going down the ladder, took hold of the brake on the other car, and stepped over onto the next car. By this time the yardmaster had got down onto the ground, and we were looking up to see what kind of a move the fellow was going to make next. Just then he staggered off the foot-board on the side of the car, and fell off. One of the railroad men cried: 'Look out! the man is going to fall. For God's sake! let's catch him.' The three of us stepped up to the side of the car and put our hands up to save the man from falling, but, instead of rolling off as we expected he would, he turned, and staggered and fell, and went right through our arms, and struck on the rail next to the track adjoining the track where the cars stood. The distance between the rail on which his head struck and the next rail underneath the car from which he fell I would say was about 4 or 6 feet. After he struck the rail he was unconscious." The foregoing testimony is fully corroborated by the yardmaster, who further testified that Richards had ridden on the top of this car from the Union Stockyards to the place where the car stood when the accident occurred, and that the car was to be taken into a freight train to go north at about 3:50 P. M. Concerning the time, place, and circumstances, he further stated that "the accident occurred at about 3:30 P. M. When I first saw Richards, he was lying down on top of the car, his feet toward the outside, his face resting on his arms, and his head about the middle of the car. His feet were just about the outer edge. After this car came up from the stockyards with Richards riding on it, we were waiting for these two cars, and shoved them into the head end of the train. I rode the two cars in, stopping them north of the Seventh street crossing, as the rest of the train was below Seventh street. After stopping them, I spoke to Richards. I next spoke to Richards on top of the car, asking him if that was his car. He said it was, and asked me where the caboose was. I showed him the caboose on the rear end of the train and told him he would have to

come down that side ladder,—the one I was just coming down. Then he sat up as I was coming down, but he had not stood up. I then went down the ladder to the ground. I next saw him just as he was stepping to the next car south or west, when he was in a staggering position. He was just in the act of stepping over to the next car. His body was on the other car, and I think he had hold of the brake wheel. He next took two or three steps first one way and then the other. He balanced for a moment on one foot on the edge of the car, and then pitched head-first to the ground."

The insured is classified in the policy as "a cattle dealer or broker visiting yards by occupation," and the insurer is obligated to pay his widow \$1,250 in case death resulted from bodily injuries "effected during the time of this insurance through external, violent, and accidental means," provided, among other things, that "this insurance shall not cover injuries from voluntary exposure to unnecessary danger, or from intoxication or while intoxicated. Nor shall this insurance cover accident, injuries, or death, or loss of limb or sight, resulting directly or indirectly from entering or trying to enter or leave a moving conveyance using steam as a motive power (except cable and electric cars) or while being in any part thereof not provided for occupation by passengers."

It being alleged in the complaint, and admitted in the answer, "that on or about the 7th day of April, 1900, while said policy was in full force and effect, said Arthur L. Richards fell from the cars in the city of Sioux City, and received injuries from which he afterward died," there is no merit in the contention that the evidence fails to show that the death of the insured resulted from external, violent, and accidental means. The word "fall," as here used, implies the happening by chance of an undesigned and involuntary event which in this case resulted in bodily injuries effecting the death of the insured through external, violent, and accidental means, clearly within the terms of the policy. Moreover, the evidence offered on the part of the defense, after its motion for a directed verdict was denied, conclusively shows that Richards did all in his power to avoid falling, and thus obviate the accident which proved fatal. Under any view of the case, it clearly appears that the injury was not self-inflicted, nor the immediate result of voluntary exposure to unnecessary danger. *Scheiderer v. Travelers' Ins. Co.* 58 Wis. 13, 46 Am. Rep. 618, 16 N. W. 47; *Wilson v. Northwestern Mut. Acci. Asso.* 53 Minn. 470, 55 N. W. 626; *National Ben. Asso. v. Jackson*, 114 Ill. 533, 2 N. E. 414.

The jury having found, from sharply conflicting testimony, submitted under proper instructions, that Mr. Richards was not intoxicated, it becomes important to determine whether a person rated, classified, and insured as "a cattle dealer or broker visiting yards by occupation" may be restricted by his policy to the occupancy of cars provided for the transportation of passengers, by the use of steam as a motive power, or whether he may climb upon and ride on the top of a freight car whenever it becomes necessary in order to pursue his business in the ordinary and usual manner.

That the rate of insurance was based upon the nature of the business in which he was engaged clearly appears from the following letter written by the company concurrently with the issuance of the policy:

St. Louis, Mo., Sept. 5, '99.

Mr. A. L. Richards,
Whitewood, S. D.

Dear Sir:—

I am just in receipt of a letter from you which I note is dated July 19th, 1899; the letter, however, was received to-day, and of course it will be necessary for me to adjust the matter referred to as of current date. In view of the fact that your occupation is that of "cattle dealer and broker" and as you probably visit yards, etc., the proper rate to be charged you is \$10.00 for each \$1,000 insurance with \$5.00 weekly indemnity, and as you paid Mr. Olney \$12.50 this would purchase a policy of \$1,250.00 with \$6.25 weekly indemnity, \$12.50 premium. I therefore have written and enclose herein policy No. 1,332,471 in these amounts which I trust will dispose of the matter to your satisfaction.

Upon the theory that a person insured as "a cattle dealer or broker visiting yards by occupation" may do whatever is customary among reasonably prudent men engaged in the same occupation, respondent was permitted to prove that it was the usual practice and absolutely necessary for persons thus employed to ride upon the top of cars from the chute where live stock is loaded in Sioux City to the railway yards where trains are made up and, on account of the distance from the stockyards to the railway yards, and the great number of tracks therein, there is no other way to know the location of his cars, and get out of the city on the train into which they are taken. Modern courts very justly hold restrictions in accident policies inoperative, which render the insurance nugatory and valueless by attempting to avoid liability for injuries sustained by the insured while performing necessary acts embraced in his classified occupation.

In the case of *Dailey v. Preferred Masonic Mut. Acct. Assn.* 102 Mich. 289, 26 L. R. A. 171, 57 N. W. 184, 60 N. W. 694, the supreme court of Michigan denied the right of the insurer to insist upon a provision in a policy issued to a railway passenger conductor to the effect that nothing would be paid for injuries or death occasioned by an attempt to enter or leave moving conveyances using steam as a motive power, and that such acts were necessary and justified on the part of the insured was judicially noticed. So a provision in a policy issued to a railway engineer attempting to limit the liability of the insurer to "death caused by an accident while traveling by public or private conveyance provided for the transportation of passengers" was adjudged to be ineffectual, and it was held that, while an engine is not a conveyance provided for the transportation of passengers, the company was liable for the death of the engineer, who was killed while operating his locomotive. *Brown v. Railway Pass. Assur. Co.* 45 Mo. 221. In an action on a fire insurance policy covering a stock of candies, confectionery, toys, fruit, and all such other stock as is usually kept for sale in confectionery stores, and containing a provision that such policy should "cease and determine if . . . fireworks should be kept temporarily or otherwise," it was shown that such prohibited articles were in fact kept in the stock, and testimony was admitted to prove that such articles are usually kept for sale in confectionery stores; and it was held that the custom was sufficient to destroy the effect of the condition, and that plaintiff was entitled to recover. *Plinsky v. Germania F. & M. Ins. Co.* 32 Fed. 47. Again, in an action on a policy to recover for an injury sustained by a cattle dealer while attempting to climb to the top of a car that was under full headway, in order to avoid being left at a way station, it was held competent for the insured to show that it was the customary practice of men engaged in his business to accompany their stock to market and board freight cars whenever it becomes necessary to do so in order to get animals upon their feet that have fallen or lain down upon the floor. Speaking for the circuit court of appeals concerning the proposition, Judge Caldwell says: "In the matter of accompanying his cattle to market, and caring for them when in the course of transportation, the plaintiff could rightfully do whatever was customary with other cattle dealers under like circumstances and conditions. The plaintiff had a right, if it was not his duty, to incur all the risk and danger incident to caring for and looking after his cattle in the cars, while en route

to their destination, in the time and manner customary among reasonably prudent and careful shippers; and such risks and dangers, no matter how great they are, do not constitute any violation of the provisions of the policy requiring the plaintiff to use due diligence for his personal safety and protection. Nor is the incurring of such risks and dangers a voluntary exposure to unnecessary dangers, within the meaning of that clause in the policy. Whether the assured at the time he received his injury was engaged in doing something outside of the occupation covered by his policy, or whether, though in the pursuit of an occupation covered by the policy, he exposed himself to unnecessary danger, and did not

exhibit due regard for his personal safety, such as an ordinarily prudent man charged with the same duty, and placed in like circumstances, would have done, were questions of fact for the determination of the jury." *Pacific Mut. L. Ins. Co. v. Snowden*, 7 C. C. A. 264, 12 U. S. App. 704, 58 Fed. 342.

The view we have taken renders it unnecessary to specially discuss the remaining assignments of error, all of which have received careful consideration.

As no error of law occurred at the trial, and the verdict is abundantly sustained by the evidence, *the judgment appealed from is affirmed.*

NORTH CAROLINA SUPREME COURT.

STATE of North Carolina

v.

John MARSH, Appt.

(134 N. C. 184.)

1. A motion for arrest of judgment for defect in the indictment in a criminal case may be made for the first time in the appellate court.
2. The omission from an indictment for rape of the words "against her will," or their equivalent, renders the indictment fatally defective.

On Rehearing.

3. A supreme court which has arrested a judgment of conviction in a criminal case because of a fatal defect in the indictment as presented to it may, even after the close of the term, grant the state the opportunity to correct the record so as to show that the alleged defect did not exist, and proceed to hear the appeal upon the corrected record.

(*Douglas and Walker, JJ., dissent.*)

(March 31, 1903.)

NOTE.—Amendment of record to cure defect for which motion in arrest of judgment has been made.

- I. Amendment in the trial court.
 - a. Amendment of pleading.
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This note does not include cases where the 67 L. R. A.

defect on which the motion in arrest of judgment is based, is supplied by legal intendment or presumption, or held cured by verdict or statutory provision.

I. Amendment in the trial court.

a. Amendment of pleading.

1. In general.

At common law the court had power to allow an amendment of the pleadings in any case until final judgment and after motion in arrest of judgment. *Chaffee v. Rutland R. Co.* 71 Vt. 384, 45 Atl. 750.

In Georgia a motion in arrest of judgment can be sustained only for such defects appearing on the face of the pleadings as are not amendable. *Merritt v. Bagwell*, 70 Ga. 579.

In *Daley v. Atwood*, 7 Cow. 483, an amendment of plaintiff's oyer was granted after trial and verdict for him, though the defendant's attorney supposed the oyer to be correct until the trial, and relied on moving in arrest of judgment, of which privilege he was deprived by the amendment.

2. To supply omitted averments.

The omission from the complaint of certain averments, which might have been supplied by amendment, on application before or after judgment, is not ground for a motion in arrest. *Brickman v. South Carolina R. Co.* 8 S. C. N. S. 173.

On a motion in arrest of judgment, based on

APPPEAL by defendant from a judgment of the Superior Court for Union County convicting him of rape. *Judgment arrested and case subsequently restored to docket.*

The indictment, the validity of which was called in question, was as follows:

"The jurors for the state upon their oaths present that John Marsh, late of the county of Union, on the 27th day of October in the year of our Lord one thousand nine hundred and two, with force and arms at and in the county aforesaid, in and upon one Alice Carelock in the peace of God and the state then and there being, unlawfully, wilfully, violently, and feloniously did make an assault, and her, the said Alice Carelock, then and there unlawfully, wilfully, and feloniously did ravish and carnally know, against the form of the statute in

such case made and provided, and against the peace and dignity of the state."

Messrs. Redwine & Stack and Armfield & Williams, for appellant:

A petition to rehear does not lie in criminal cases.

State v. Jones, 69 N. C. 16; *State v. Council*, 129 N. C. 511, 39 S. E. 814.

In civil cases a motion like this does not lie.

2 Cyc. Law & Proc. p. 586; 3 Cyc. Law & Proc. p. 214; *United States v. Adams*, 9 Wall. 557, 19 L. ed. 584; *Cook v. Moore*, 100 N. C. 295, 6 Am. St. Rep. 587, 6 S. E. 795.

The clerk of the court below is the custodian of the record, and only his statement of it would be accepted.

This case was submitted by the state, and

the ground that the record does not show diversity of citizenship of the parties, the court may permit the amendment of the pleadings to show such fact under U. S. Rev. Stat. § 954, U. S. Comp. Stat. 1901, p. 696, providing that any court of the United States may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall, in its discretion or by its rules, prescribe. *Maddox v. Thorn*, 8 C. C. A. 574, 23 U. S. App. 189, 60 Fed. 217.

After a motion in arrest of judgment has been sustained conditionally, in an action for divorce, for want of an averment as to the residence of the plaintiff in the county, but who was alleged to be a resident of the state, the court may grant leave to the plaintiff to amend her complaint by suitable averments as to her residence, and a final decree may be entered for the plaintiff without formally setting aside the order arresting the judgment. *Johnson v. Johnson*, 30 Colo. 402, 70 Pac. 692.

Plaintiff in an action for malpractice, who fails to allege freedom from contributory negligence, for the want of which averment a motion in arrest of judgment is made, may cure the defect by amendment under Iowa Code, § 3760, providing for the amendment of defective pleadings on motions in arrest of judgment. *Decatur v. Simpson*, 115 Iowa, 348, 88 N. W. 839.

A motion in arrest of judgment was made on the ground that a specified count of the declaration in assumpsit was defective in not stating any promise; which was true as to the copy of the declaration served, but the draft of the declaration and the nisi prius record contained that clause. The motion was denied because not made in time, but the court said that, if it had been made in season, they would have allowed an amendment. *Norris v. Durham*, 9 Cow. 151.

The omission from the declaration of the words "for money payable," in an action to recover freight, is a defect to cure which the court may permit an amendment after judgment and on motion in arrest. *Wilkinson v. Sharland*, 11 Exch. 33, 1 Jur. N. S. 405.

In an action on a promissory note, where a motion in arrest of judgment was made on the ground that the declaration shows no right in the plaintiffs to sue in their own names, an amendment of the declaration was permitted on 67 L. R. A.

payment of the costs of the motion in arrest of judgment. *Martin v. Wilber*, 9 U. C. C. P. 75.

The judgment should be arrested in an action upon the bond given by an administratrix whose husband is joined as a party defendant, where the declaration fails to aver that the cause of action accrued before marriage, and that she has a separate estate; but leave to amend may be granted if the plaintiff shows probable grounds for believing that the final decision, as to the averments suggested, will be in his favor. *Kirchhoffer v. Ross*, 11 U. C. C. P. 467.

A motion in arrest of judgment should be sustained in an action by a principal to recover from his agent sums of money collected by the latter, where the plaintiff fails to aver any demand for the payment of such money, and the court is without power to permit an amendment of the complaint, by averring a demand on application made therefor some twenty days after the verdict of the jury had been returned, and while a motion for a new trial was pending. *Heddens v. Younglove*, 46 Ind. 212.

So, in an action of trespass *quare clausum fregit* and carrying away the goods of the plaintiff, where the declaration is faulty for failure to specify the goods taken, the judgment will be arrested; nor can the defect be amended, since, after verdict, no new count can be added, nor can the form of the declaration be essentially varied. *Mayfield v. White*, 1 Browne (Pa.) 241.

After a judgment had been arrested for failure to aver in the complaint the performance of a condition precedent the plaintiff's counsel moved to amend, upon payment of costs, by inserting such an averment. This was opposed as being too late after judgment was arrested. Lord Mansfield said: As it is doubtful whether this can be done or not, and as it is certain that the difference between paying costs to amend and beginning afresh is very trifling in this case, it is better to let the judgment stand arrested. *Collins v. Gibbs*, 2 Burr. 899.

The judgment may be arrested, after verdict for the plaintiff, for want of a *stipuliter*, the absence of which is a defect not amendable. *Cooper v. Spencer*, 1 Strange. 641.

But see *Sayer v. Pocock*, 1 Cowp. 407, holding that after verdict a replication will be amended, as against a motion in arrest, by adding a

argued upon the very point as to whether or not the bill of indictment would suffice, without any motion for a certiorari. The motion at bar necessitates a certiorari. Whatever might have been the practice at common law, this court has uniformly held that a petition for a certiorari comes too late after argument.

State v. Blackburn, 80 N. C. 477; *State v. Harris*, 114 N. C. 830, 19 S. E. 154; *Garner v. State*, 36 Tex. 693; *Cory v. State*, 55 Ga. 236; *State v. Daugherty*, 59 Mo. 104; *Fielden v. People*, 128 Ill. 595, 21 N. E. 584; *Cruiser v. State*, 18 N. J. L. 206.

Mr. Robert D. Gilmer, Attorney General, for the State:

The Constitution of North Carolina, art. 8, § 4, declares that "the supreme court shall have power . . . to issue any re-

stitutio, the omission of which was a clerical error.

3. To cure insufficient or erroneous allegations.

In *Betts v. Hoyt*, 13 Conn. 471, holding that, in ordinary cases a court will refuse to sanction amendments of pleadings after they have been adjudged insufficient upon motion in arrest, it is said that by doing so a negligence and laxity in pleading and practice might be encouraged, which would prove very inconvenient, both to the bar and the court. But it is added that, if serious and irretrievable loss would result to the party from a refusal of the amendment, a just exercise of the discretionary power of the court would sanction the amendment.

In an action on the case for deceit, where a general verdict was rendered, the court arrested judgment on the ground that both counts in the declaration were bad, and refused leave to amend the declaration. *Fenwick v. Grimes*. 5 Cranch, C. C. 439, Fed. Cas. No. 4,733.

A motion in arrest of judgment is properly sustained, when the complaint is insufficient and leave to amend the same is properly denied, where the amendment sought to change the entire character of the action, and would still have left the complaint radically defective. *Crawford v. Crockett*, 55 Ind. 220.

But in an action of trespass *vi et armis*, where the issue was thus closed, "which the defendant prays may be inquired of by the court," and after verdict it was moved in arrest of judgment that, the issue being closed to the court, the jury could not legally return any verdict in the case, the court permitted the record to be amended by inserting the word "country" in the closing of the pleadings, instead of the word "court." *Phelps v. Sanford*, Kirby, 343.

A complaint in an action for a breach of promise of marriage may, after proof of the promise, be amended as to the consideration for such promise by showing the plaintiff's agreement to go to a specified place for the purpose of marrying the defendant; and it is immaterial that the amendment cures a defect which would render the declaration bad upon motion in arrest of judgment. *Harvey v. Johnston*, 6 Dowl. & L. 120.

Where a suit is commenced in vacation by declaration entitled generally as of the pre-

ceding writ necessary to give it a general supervision and control over the proceedings of the inferior courts." The power is not only constitutional, but inherent.

Ea parte Biggs, 64 N. C. 202; *State v. Jefferson*, 66 N. C. 311.

Mistakes made by this court, or by its clerk, through inadvertence, may be corrected after the mandate has gone down to the superior court, either at the term at which the mistake occurred, or at a subsequent term.

Scott v. Queen, 95 N. C. 340; *Cook v. Moore*, 100 N. C. 294, 6 Am. St. Rep. 587, 6 S. E. 795; *Summerlin v. Cowles*, 107 N. C. 459, 12 S. E. 234; *Scroggs v. Stevenson*, 108 N. C. 260, 12 S. E. 1031; *Bernhardt v. Brown*, 118 N. C. 710, 36 L. R. A. 402, 24 S. E. 527, 715.

ceding term, and the cause of action has arisen since such term, on a motion in arrest after verdict, plaintiff will be permitted to amend such clerical error. *Thomas v. Leonard*, 11 Wend. 53.

So, a declaration which claims rent to a date subsequent to the first day of the term in which it is entitled may be amended upon a motion in arrest of judgment so as to show the fact that the suit was commenced at a later date. *Zule v. Zule*, 24 Wend. 76, 35 Am. Dec. 600.

A declaration in assumpsit, which erroneously laid the assumption as of a date subsequent to the commencement of the action, may be amended by inserting a prior date, and a motion in arrest of judgment, based on such defect, be rejected after the amendment. *Bailey v. Musgrave*, 2 Serg. & B. 219.

In *Amphlett v. Warrington*, 3 West. L. J. 380, a motion in arrest of judgment, filed in an action of slander, because the declaration alleged the speaking of the words at a day subsequent to the commencement of the suit, was overruled, and leave was given to the plaintiff to amend.

That the declaration is in the name of one who, as administratrix, instituted the suit, but who was removed and a successor appointed before the alias summons issued, which change was suggested to the court, is not a good ground, after issue joined and verdict found, for arresting the judgment; but the court may order the declaration to be amended in accordance with the record by substituting the proper plaintiff. *Hirst v. Randall*, 9 W. N. C. 349.

A judgment recovered by a husband and wife for slanderous words spoken of the wife will not be arrested for a clerical mistake, whereby the word "plaintiff," instead of "plaintiffs," was used in the claim to damages in the declaration. In a dissenting opinion by Alvey, J., it is said: I think there can be no doubt of the power of the court to allow amendment of a defect like the one in the case before us, after verdict, and after motion in arrest made. I think, therefore, instead of resisting the motion in arrest for a plain defect, by relying upon construction and intentment not warranted by the language employed, the plaintiff should have applied to amend; but, failing to make such application, the court below could not have done otherwise than arrest the judgment. *Newcomer v. Kean*, 57 Md. 121.

This court has power to grant the motion prayed for by the state under § 274 of the Code, relating to an order, judgment, verdict, or other proceeding taken through mistake, inadvertence, surprise, or excusable neglect.

Wiley v. Logan, 94 N. C. 564; *Wade v. Newbern*, 73 N. C. 318; *Farrar v. Staton*, 101 N. C. 78, 7 S. E. 953; *Williamson v. Boykin*, 104 N. C. 100, 10 S. E. 87.

The law required the appellant to send up a correct transcript. This he has failed to do. It appears unseemly that he should be permitted to reap any benefit from his own wrong.

Howell v. Harrell, 71 N. C. 161; 2 Tidd, Pr. *1137; *Ætina L. Ins. Co. v. McCormick*, 20 Wis. 265; *Legg v. Overbagh*, 4 Wend.

188, 21 Am. Dec. 116; *The Palmyra*, 12 Wheat. 10, 6 L. ed. 534; *Rowland v. Kroyenhagen*, 24 Cal. 52; *Lovett v. State*, 29 Fla. 356, 11 So. 172, 30 Fla. 142, 17 L. R. A. 705, 11 So. 550.

Clark, Ch. J., delivered the opinion of the court:

The prisoner's counsel moves in this court in arrest of judgment for defect in the indictment, which is set out above in the statement of the case. This he had a right to do, though no objection on that ground was taken in the court below. *State v. Watkins*, 101 N. C. 702, 8 S. E. 346; *State v. Caldwell*, 112 N. C. 854, 16 S. E. 1010; rule 27 of this court (128 N. C. 662, 39 S. E. XIV).

See *Girard v. Stiles*, 4 Yeates, 1, *infra*, I. c. 1.

4. By striking out.

Where defendant moves in arrest of judgment upon the ground that an action for personal injuries to the plaintiff, and an action for damages resulting from the death of his child, which was injured in the same accident, are improperly joined, the plaintiff may be permitted to amend his statement by striking from it all claim for damages arising from the death of the child, and the motion in arrest of judgment may be refused. *Specht v. Pennsylvania R. Co.* 7 Pa. Co. Ct. 54, 24 W. N. C. 317.

In an action by husband and wife to recover damages sustained by the latter from being bitten by a dog, the declaration was allowed to be amended, after motion in arrest of judgment for insufficiency of the declaration, by striking out the averment of damages to the husband by reason of expense and loss of the wife's services. The court said: The declaration, when amended, stated the cause of action, and the only cause of action upon which the trial was had, and which the jury under the instructions of the court could have considered. The only purpose to be accomplished by it was to avoid a technical objection which might have been made under a general verdict. *Bates v. Cilley*, 47 Vt. 1.

b. Amendments concerning indictments, informations, or complaints.

1. As to verification.

The error in overruling a motion to quash an information on the ground that the seal of the notary public was not attached to the affidavit upon which the information depended is not cured by permitting the notary public to attach his seal, after a motion in arrest of the judgment has been made, but which was overruled when the notarial seal was attached. *Miller v. State*, 122 Ind. 355, 24 N. E. 156.

A motion in arrest of judgment, based on the ground that it does not appear by the record why the complaint was sworn to before a special justice instead of the justice of the police court, should be granted where no amendment of the record was offered. *Com. v. Fay*, 151 Mass. 380, 24 N. E. 201. 67 L. R. A.

2. As to organization of grand jury.

A motion in arrest of judgment, made by one convicted of homicide, on the ground that the transcript of the record sent on change of venue to the county in which he was tried did not show that the indictment was found by a legally organized jury, is properly overruled, where the transcript of the record returned on certiorari shows the due impaneling of the grand jury. *Green v. State*, 19 Ark. 178.

On a motion in arrest of judgment, based on the ground that the foreman of the grand jury which found the indictment under which the defendant was convicted was not selected as required by law, and that the grand jury was illegally drawn, the court may correct its minutes so as to make them correspond with the truth, and show that the foreman was properly chosen and the grand jury legally drawn. *State v. Branch*, 25 La. Ann. 115.

In *State v. Seaborn*, 15 N. C. (4 Dev. L.) 319, where a motion in arrest of judgment was based on a variance between the names of the jury contained in the original venire and the names on the list of grand jurors, the court considered the defect waived by the prisoner going to trial on the plea of not guilty to the indictment, but intimated that, if the case was open for a motion to amend any of the mistakes of the clerk in transcribing the record of the case, that the motion ought to be granted.

3. As to finding, return, or filing of indictment.

The court has power to direct an entry to be made in its minutes altering the record during the same term so as to show that the witnesses on whose evidence an indictment was found were sworn by the court on the bill, and were sent with it to the grand jury, although the ground of a pending motion in arrest of judgment is thereby removed. *State v. Roberts*, 19 N. C. (2 Dev. & B. L.) 540.

The omission to set out in the caption of an indictment that it was found at a special court of sessions may be supplied by amendment as against a motion in arrest of judgment, made on that ground. *State v. Williams*, 2 M'Cord, L. 301.

A motion in arrest, based on the absence of a formal entry of the fact that an indictment was found by the grand jury and returned by them into court, is properly denied, where the actual

Code 1883, § 1101, defines "rape" as the "ravishing and carnally knowing any female of the age of ten years or more, forcibly and against her will," with the further statement as to what constitutes rape when the female is under that age. All the authorities concur that the word "ravish" is indispensable. Hale, P. C. 628; 2 Rawle's Bouvier, Law Dict. 825; Co. Litt. 184, note *p*; *Gouglemann v. People*, 3 Park. Crim. Rep. 15. It takes its place with "feloniously," "burglariously," and "malice aforethought," which have been held indispensable (*State v. Arnold*, 107 N. C. 861, 11 S. E. 990; *State v. Barnes*, 122 N. C. 1036, 29 S. E. 381), wherever appropriate, because they have no synonyms (2 Hawk. P. C. chap. 23, § 77). As to the words

"carnally know," there are authorities which hold that they are not indispensable, being implied in the word "ravish." Wharton, Crim. Pl. & Pr. 9th ed. § 263. But there are others that rather intimate that these words should be also used. The word "feloniously" is, of course, indispensable (*State v. Scott*, 72 N. C. 461), as, indeed, it is in all indictments for felonies (*State v. Bunting*, 118 N. C. 1200, 24 S. E. 118). But all three of the above terms are used in the indictment in this case. The defect alleged is the absence of the words "forcibly" and "against her will." As to the word "forcibly," in *State v. Jim*, 12 N. C. (1 Dev. L.) 142, it was held that an indictment omitting both terms "forcibly" and "against her will" was defective. In *State v. John-*

presentment of the indictment is not controverted, and the records may be amended *nunc pro tunc* to show such fact. *Johnson v. State*, 24 Fla. 162, 4 So. 535.

After a motion in arrest of judgment on the ground that the record does not show that the bill was returned into court by the grand jury, the court has power to amend the record so as to make it speak the truth, and show that the grand jury did return the bill into court. *State v. Bordeaux*, 93 N. C. 560.

But in *Felker v. State*, 54 Ark. 489, 16 S. W. 663, where a motion was made to arrest the judgment on the ground that it did not appear from the record that the indictment upon which the defendant was tried was returned into court by the grand jury, the court held that the omission could not be supplied by a *nunc pro tunc* order made in the absence of the defendant, and, while not deciding whether such an objection to the indictment could be properly raised after conviction, intimated that the proper practice would be to raise the objection by motion to set aside the indictment.

The trial court may order the clerk to indorse an indictment as filed, by a *nunc pro tunc* entry, and then overrule a motion in arrest of judgment, made on the ground of the omission of such indorsement. *James v. State*, 41 Ark. 451.

4. To cure omissions.

A motion in arrest of judgment, in a criminal case, made on the ground that the commonwealth failed and neglected to join issue with the defendant on his plea of not guilty, is properly overruled, where the want of a *stipulatio* to join the issue in the plea of not guilty was cured by amendment. *Com. v. Ault*, 10 Pa. Super. Ct. 651.

5. To cure errors or insufficiency.

Defects in an indictment which may be cured by amendment are not good grounds in arrest of judgment. *State v. Lark*, 64 S. C. 350, 42 S. E. 175.

The caption of an indictment may be amended at any time, and although a motion in arrest of judgment has been made because of a defect therein. *State v. Creight*, 1 Brev. 169, 2 Am. Dec. 656.

A judgment will not be arrested because the information did not specify the particular ani-

mal of the cow kind which the defendant is charged to have stolen, since the information might be amended in that regard by leave of the court. *State v. Johnson*, 29 La. Ann. 717.

So, a description in an indictment for larceny of the property stolen as "1 beef of the cow kind," while loose pleading, is not ground for arrest of judgment, since, under La. Rev. Stat. § 1047, the court might have permitted the indictment to be amended and made more specific had the objection been raised by demurrer or motion to quash. *State v. Perkins*, 49 La. Ann. 310, 21 So. 839.

A motion in arrest of judgment will not lie on the ground of variance between the indictment and the proof, where, during the trial, an amendment of the indictment to conform to the proof in regard to the ownership of the property stolen was permitted. *Com. v. Livingston*, 5 Pa. Dist. R. 666, 18 Pa. Co. Ct. 236, 27 Pittsb. L. J. N. S. 153.

But in a prosecution for larceny, where the indictment alleges that the prosecutor knew that the property was stolen, the court is without power to amend the indictment after verdict and motion in arrest of judgment by substituting the name of the defendant for that of the prosecutor. *Reg. v. Larkin*, 6 Cox, C. C. 377.

c. Amendments concerning verdict or judgment.

1. General verdict rendered on declaration containing several counts.

The court will amend a general verdict after motion in arrest by entering it on that one of two counts which is good, where it appears by the judge's notes that the jury calculated the damages on evidence applicable to the good count only. *Williams v. Breedon*, 1 Bos. & P. 329.

A verdict may be amended by judge's notes after motion in arrest, on the ground that the verdict was general and the counts inconsistent, where the evidence only goes to the consistent counts. *Eddowes v. Hopkins*, 1 Dougl. K. B. 375.

So, where there are some good counts and some bad in the declaration, and a general verdict is rendered on the whole, if the evidence has been on the good counts only the verdict may be amended from the judge's notes after notice of motion in arrest of judgment. *Union Turnp. Co. v. Jenkins*, 1 Calnes, 392; *Stafford v. Green*, 1 Johns. 504; *Highland Turnp. Co. v.*

son, 67 N. C. 55 it was held that the omission of the word "forcibly" was not fatal, when the charge was "against her will, did feloniously ravish;" the court saying, through Reade, J., that any equivalent word would answer in lieu of "forcibly;" that, though the word "ravish" would seem to imply force, yet that word is not an express charge of force, standing alone, but that the addition thereto of the words "feloniously" and "against her will" was sufficient, under our statute, as an express charge of force. In *State v. Powell*, 106 N. C. 635, 11 S. E. 191, where both words "forcibly" and "against her will" were omitted, it was held, following *State v. Jim*, 12 N. C. (1 Dev. L.) 142, that the bill was defective. This last case was for an assault with intent to commit rape, and was overruled in *State v. Peak*, 130 N. C. 711, 41

S. E. 887, but only on the ground that, in an indictment for assault to commit rape, it was not necessary to describe rape in the words which must be used to charge the offense of rape itself. Thus, on a review of our authorities, it will be seen that it has been held that the absence of both "forcibly" and "against her will" are fatal, but that "forcibly" can be supplied by any equivalent word; that it is not supplied by the use of the word "ravish," but it is sufficiently charged by the words "feloniously and against her will." In all the cases above reviewed where the words "against her will" are omitted, the bill was held defective. No doubt, the words "against her will" can be supplied by an equivalent as well as the word "forcibly," but we do not find such equivalent in this bill. The words "unlawfully, wilfully, and

M'Kean, 11 Johns. 98; Sayre v. Jewett, 12 Wend. 135; Barnes v. Hurd, 11 Mass. 57.

And this may be done on hearing the motion. *Norris v. Durham*, 9 Cow. 151.

In an action of assumpsit, where one of the counts in the declaration is bad and a general verdict is found for the plaintiff, the verdict may, after a motion in arrest of judgment, be amended so as to find for the plaintiff upon one count only, upon the certificate of the judge that all the counts in the declaration were in fact for one and the same cause of action. *Barnard v. Whiting*, 7 Mass. 358.

But an order directing that a verdict for general damages be entered for the party upon one good count in the declaration and for the defendant on all the other counts is erroneous on motion in arrest of judgment, where the evidence applied generally to the declaration. *Empson v. Griffin*, 11 Ad. & El. 186.

In an action on covenant, where a recovery was had for sums due on a lease and for amounts on agreements, but in a sum in excess of the damages demanded in the declaration, and a motion in arrest of judgment was entered, the court refused to amend the verdict so as to separate the amounts recovered upon the lease and agreements respectively, or to permit the amount of damages claimed in the declaration to be increased, but, upon the plaintiff's agreement that the verdict be set aside and a new trial be granted, permitted him to amend his declaration. *Girard v. Stiles*, 4 Yeates, 1.

2. Misjoinder of counts.

In an action where the declaration contains two counts, in one of which the plaintiff sues an administrator, and in the other in his own personal right, for which misjoinder of counts the judgment is arrested, the court may properly set aside the order arresting the judgment a year after it was made, and allow the verdict to be amended by entering the same *nunc pro tunc* on the first count only, where the evidence justifies a verdict on either count. *Murphy v. Stewart*, 2 How. 268, 11 L. ed. 261.

3. Verdict in a criminal case.

A failure to enter a verdict of a jury returned on an indictment on the minutes of the 67 L. R. A.

court at the term when it was returned does not afford a sufficient ground to arrest the judgment; but the court may, at the next succeeding term, order the verdict to be regularly entered on the minutes of the court *nunc pro tunc*. *Hall v. State*, 3 Ga. 18.

After a motion has been made in arrest of judgment upon the ground that the verdict does not show on which count of the indictment the defendant was convicted, the court may, by order *nunc pro tunc* at the same term, perfect the record so that it will show the fact that the prosecuting officer was required to elect upon which count of the indictment he would proceed, and that he elected to proceed upon a specified count. *Camp v. State*, 91 Ga. 8, 16 S. E. 379.

4. Amendment of judgment.

The court may, pending a motion in arrest, dismiss the suit as to a married woman, and permit the judgment to be amended accordingly. *La Riviere v. La Riviere*, 77 Mo. 512.

d. Amendment of record.

Motions in arrest of judgment may be defeated by an amendment of the record in any matter that is legally amendable. *Green v. State*, 19 Ark. 178.

The court may, on the trial of an indictment, order defects in the minutes of the court, assigned as ground of a motion in arrest, to be corrected so as to conform to the facts. *State v. Valere*, 39 La. Ann. 1060, 3 So. 186.

Upon a motion in arrest of judgment, made in a criminal case and based upon alleged defects in the minutes, the judge may order the minutes to be corrected so as to conform to the facts, where they are within his knowledge and recollection. *State v. Lewis*, 39 La. Ann. 1110, 3 So. 348.

The trial court has power during the same term, but subsequent to the trial of one accused of crime, to amend or correct its minutes in accordance with the facts, so as to show the observance of certain formalities because of the silence of the record concerning which a motion in arrest of judgment has been made. *Mobley v. State*, 46 Miss. 501.

The court may, at the time a motion in arrest of judgment is to be argued, amend its record

feloniously" did "ravish and carnally know" do not charge it was "against her will," except by implication; and it is held in *State v. Johnson*, 67 N. C. 55, that they do not even sufficiently charge that the act was "forcibly" perpetrated, in the absence of the words "against her will."

It is a subject of regret that a trial of so serious a nature, occupying so much of the public time, should thus go for naught, but we do not feel at liberty to overrule the above repeated decisions of this court. Those decisions were so easily accessible, and, indeed, were so well known to the draftsman of this bill, that the omission of the words "against her will" must have been accidental. But we will repeat here what was said in *State v. Barnes*, 122 N. C. 1038, 29 S. E. 383: "The accustomed and approved forms are accessible, and should

be followed by solicitors till (as with murder, perjury, and in some other instances) they are modified and simplified by statute,"—further adding that solicitors would best serve the object of the statute (Code 1883, § 1183) passed to disregard refinements and informalities, and to secure trials upon the merits "by observing approved forms, so as not to raise unnecessary questions as to what are refinements and informalities, and what are indispensable allegations."

The form set out in 1 Archbold, Crim. Pr. & Pl. 999, is (after charging the assault), "and her, the said C. D., then violently and against her will feloniously did ravish and carnally know." This form, while omitting "forcibly," retains, it will be noted, the words "against her will," and

in a criminal case, although after the term at which the trial was had, so that it will conform to the truth and show that the jurors were duly sworn, were put in charge of a sworn officer, were permitted to separate upon each adjournment with the consent of the defendant, and that each juror assented to the verdict upon being polled. *Blansky v. State*, 3 Minn. 427, Gil. 813.

The court may properly amend its journal by inserting the omitted name of a juror, so that the minutes will truthfully show that the jury consisted of twelve persons instead of but eleven, although a motion in arrest of judgment has been made on the ground of such omission. *Woods v. Green*, Wright (Ohio) 503.

After a motion in arrest of judgment has been filed, on the ground that the transcript of the record transmitted on change of venue does not show the opening of the court at the term at which the indictment purports to have been found, and contains no entry showing the impaneling of the grand jury, a certiorari may be ordered; and, upon the return of the transcript, embracing the entries omitted in the original transcript, the motion in arrest of judgment will be overruled. *Binns v. State*, 35 Ark. 118.

II. Amendment in the appellate court.

a. To cure errors or omissions.

If the record contains errors, blunders, irregularities, alterations, erasures, and interlineations, the judgment will be arrested and a new trial granted, with permission to place the case upon the trial list upon the order of the court, when the record shall have been properly amended. *Hilty v. Knox*, 22 Pittsb. L. J. N. S. 325.

If the damages assessed in an action exceed those laid in the writ and declaration, and the variance was overlooked in the trial court, the supreme court may, on motion in arrest of judgment, allow the plaintiffs to remit the excess on payment of the costs of the appeal. *Williamson v. Canaday*, 25 N. C. (3 Ired. L.) 349.

In an action on the case for deceit in a sale of land, where the declaration falls to allege that the defendant at the time of the alleged sale

and conveyance owned any right, title, or interest in or to the land, a motion in arrest of judgment will be sustained in the supreme court, and the plaintiffs will not be allowed to avoid it by amendment. The court said: An amendment of this kind at this stage of the case should be allowed only when it is clear that the matter was an issue on trial, and as fully litigated as though it had been raised by the pleadings; for otherwise great injustice might be done to the defendant by being cast on an issue of which he had no notice, and which he did not come prepared to try. *Baker v. Sherman*, 73 Vt. 26, 50 Atl. 633.

b. On certiorari or certificate.

In an inquisition of forcible entry and detainer, and upon a motion in arrest of judgment, made on the ground that the record and papers in the case exhibited no warrant of forcible entry and detainer, the court may properly permit a copy of the warrant, made out by the magistrate from the same form from which he transcribed the original, and brought up on certiorari, to be filed as a substitute for the original. *Logan v. Smith*, 2 A. K. Marsh. 53.

A motion in arrest of judgment is properly sustained if the indictment was not returned into open court by the grand jury; and upon appeal the record must affirmatively show that it was so returned. If such fact does not appear, the settled practice of the supreme court forbids the correction of the record by certiorari on rehearing. *State v. Dixon*, 97 Ind. 125.

In a complaint for maintaining a liquor nuisance, where the record filed in the superior court shows that the defendant was tried for maintaining such nuisance on a specified date, whereas the complaint charges him with keeping it on various days between such date and a designated later date, such defect, appearing for the first time in the papers transmitted to the supreme court, and affecting its jurisdiction, is open to the defendant after verdict by motion in arrest; but, since the municipal court can amend its record, and certify a copy thereof as amended to the superior court, and a new trial can be had the judgment will not be arrested, but the verdict should be set aside. *Com. v. Galligan*, 118 Mass. 203.

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is substantially the bill that was sustained in *State v. Johnson*, 67 N. C. 55.

The attorney general cites us to the following foreign authorities which sustained indictments omitting the words "against her will." In *Harman v. Com.* 12 Serg. & R. 69, it was held "not necessary to charge that the offense was committed forcibly and against the will of the woman," that matter being embraced "in the charge 'feloniously did ravish and carnally know;'" Tilghman, Ch. J., citing English authorities freely to sustain his ruling. The same ruling, exactly, is made in *Gibson v. State*, 17 Tex. App. 574. In *Leoni v. State*, 44 Ala. 110, the court sustained an indictment charging simply, "before the finding of this indictment, G. L. forcibly ravished E. L.;" and in *O'Connell v. State*, 6 Minn. 279, Gil. 190, the court sustained an indictment, "did feloniously ravish C. D." In these last two cases no assault is charged and the indictments are drawn under statutes simplifying the form and which our legislature, it may be, might also adopt to prevent such instances as this, for it gives full information to the prisoner. But we cannot do this. The adoption of simpler forms of indictments for murder, perjury, etc., was by action of the legislature, not of the courts. As the prisoner has not been in jeopardy, he may still be put to trial upon a proper bill. *State v. Lee*, 114 N. C. 844, 19 S. E. 375; *State v. England*, 78 N. C. 552, and other cases collected in Wharton, *Crim. Pl. & Pr.* 9th ed. §§ 457, 507.

Judgment arrested.

A motion having been made by the state for a writ of certiorari to correct the record and for a rehearing, **Clark**, Ch. J., on October 20, 1903, handed down the following additional opinion:

This case was before us last term. 132 N. C. 1000, ante, 182, 43 S. E. 828. There were numerous exceptions, none of which were considered, because a motion in arrest of judgment was made and allowed for the absence from the indictment (for rape), as sent up in the record, of the words "against her will." This objection was not taken below. It now appears, by the inspection of the indictment by the judge below, and his finding of fact thereon, that those words were in fact in the indictment as found by the grand jury, and upon which the prisoner was tried, and were omitted by the clerk in making up the record. This case has heretofore not been before us, and the state asks for the correction of the indictment by a certiorari to insert the words omitted by the clerk and that the case may be argued upon the record and the exceptions taken at the trial.

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If this were an application to rehear a criminal cause the court would not entertain it. *State v. Council*, 129 N. C. 511, 39 S. E. 814, and cases there cited. A rehearing is based on an allegation that the court committed an error of law in the previous opinion and asks the reconsideration of that opinion. It is an appeal from the court to itself, on the ground of error in its rulings of law, just as an appeal is taken from the superior court. Here there was no error of law. The decision at last term is correct, as the record stood. This is a motion to correct the record to speak the truth, and to place the true record before us for the first time, and to consider the exceptions taken, they not having been passed on. The same point, after similar action upon an untrue record caused by the false certificate of the clerk of the lower court, has been passed upon by the supreme court of Florida, and the motion to restore the cause to the docket allowed (*Lovett v. State*, 29 Fla. 384, 16 L. R. A. 313, 11 So. 176), in an able and well-considered opinion by Chief Justice Raney. In that case a new trial had been granted on the ground that the record in a trial for murder did not show that the prisoner was personally present at the trial. Subsequently, it being made to appear to the court that the record did show such fact, but that such paragraph had been omitted in the transcript by the clerk, the court ordered a certiorari to correct the omission, and restored the cause to the docket for argument upon the exceptions taken at the trial, and it was so heard upon the true record. 30 Fla. 142, 17 L. R. A. 705, 11 So. 550. The same power is vested in this court by article 4, § 8, of the Constitution which gives it power to issue any remedial writ necessary for a general supervision and control of the lower courts. Instances of supervision to insure justice are *Ex parte Biggs*, 64 N. C. 202, and *State v. Jefferson*, 66 N. C. 311. In *Lovett v. State*, 29 Fla. 384, 16 L. R. A. 313, 11 So. 176, the court said (pp. 404, 405, 407, 29 Fla., pp. 316, 317, 16 L. R. A., and pp. 180, 181, 11 So.): "No advantage can be gained from any action of this tribunal upon an untruthful representation of that record, however ignorant the convict or the counsel may be of the real status of the record, or of the incorrectness of the transcript, and however free from blame the clerk may have been in the mistake characterizing his transcript and certificate. . . . The fact still remains that a false record has been brought here on behalf of the convict, and a reversal has been obtained in his behalf on it, such reversal being based solely upon its false feature; and this fact is not changed nor its result modified, by the in-

nocence of the prisoner, his counsel, and the attorney general, but the extent of the imposition and of the mistake is only made the greater. . . . We have been misled into reversing a judgment on a false record; into acting in a cause when that cause, as it really is and only can be acted on by us, has not been before us. . . . The state is not prohibited by any principle of law known to us from arresting the reversal which has been made of her judgment upon such false representation. She is entitled to require the party seeking relief from such judgments to bring to the appellate court the record of the cause in which it was obtained, for, without this, that cause is not before the appellate tribunal for consideration. Any other doctrine than this must result in the frequent consummation of fraud upon the courts, and its constant encouragement." And at page 395, 29 Fla., page 314, 16 L. R. A., and page 178, 11 So., the chief justice says that, when the judgment has been granted "upon a false suggestion or under a mistake as to the facts of the case, the court will afford relief after the adjournment of the term and, if necessary, recall the remittitur and stay proceedings in the court below."

Mistakes of this court or of its clerk, not mistakes of law, but of fact, have been often corrected after the mandate has gone down, and even at subsequent terms. *Scott v. Queen*, 95 N. C. 340; *Cook v. Moore*, 100 N. C. 294, 6 Am. St. Rep. 587, 6 S. E. 795; *Summerlin v. Coules*, 107 N. C. 459, 12 S. E. 234; *Scroggs v. Stevenson*, 108 N. C. 260, 12 S. E. 1031; *Bernhardt v. Brown*, 118 N. C., at page 710, 36 L. R. A. 402, 24 S. E. 527, 715. For as strong a reason, this court can order a correction of a record below when, by reason of the false or erroneous certificate of the clerk, the record, as it was, has never been before us. This is not new practice. "Upon a judgment in the King's bench, if there be error in the process or through the default of the clerks, it may be reversed in the same court, . . . for error in fact is not the error of the judges, and reversing it is not reversing their own judgment." 2 Tidd, Pr. 1137. Also *Etna L. Ins. Co. v. McCormick*, 20 Wis., at page 269, where it is said that "the errors are not errors in the judgment itself. The court, in rendering the judgment, never acted on them." In this case the court, through error for which the appellant is responsible (for it was his duty to bring up a true record), has taken action on a bill of indictment on which the prisoner was not tried, and on nothing whatever that took place at that trial. We are not asked to reverse our judgment, but to correct an error of fact. The prisoner brought up the

record. He presented us, as an alleged error, a statement of a matter which was false. The record he presented stated that the indictment on which he was tried omitted the words "against her will." He relied upon that omission, and asked an arrest of judgment on that account. We allowed it solely on that account. He has no ground to ask to benefit by that untrue statement in the record he presented to us, and it is immaterial that it does not appear how the omission came to be made. The case has never been before us.

In civil cases, counsel on both sides have opportunity to scan the whole record carefully, and, if there is omission or other error, ordinarily a certiorari can and should be applied for before the cause is called for argument. But in criminal actions the rotating solicitor has no opportunity to see the record proper, nor any part of the transcript except "the case on appeal" served on him, and does not see even that after the clerk copies the case "as settled." When, as here, there was no point made below on the bill of indictment, the indictment made no part even of "the case on appeal" served on the solicitor. There is no provision of law, nor any practice requiring solicitors to go back to the county seats, nor to have full transcripts of the record sent them before coming up to this court. The attorney general is bound to rely upon the correctness of the record laid before him. He was not at the trial below. If, therefore, a clerk can omit material parts of the indictment, and the defendant, notwithstanding the duty is on him to bring up a true record, can profit by this error of fact (whether intentional or unintentional could rarely, if ever, be shown), new trials will depend, not upon the correct rulings of the judge below, but upon the greater or less carefulness of the clerk, or of the copyist often furnished him by the appellant. It is not sufficient to say that the appellant can be again put on trial. There is the expense to the public of another trial, and witnesses may have moved away or died. This state is entitled, in the interest of justice, to have the cause presented here on the record as the matter was presented below, and it is the duty of the appellant to bring up such true record. When there is a fatal misstatement of fact therein, appellants must understand that their negligence in presenting a false record (to put it in the mildest form) cannot avail them any more than if they had made the omission fraudulently, which can never be shown. In *State v. Daniel*, 121 N. C. 575, 28 S. E. 255, the court said that the defendant was "derelict in not sending up a proper transcript; and the court would not per-

mit . . . [him] a continuance of the cause for his own neglect, but would send down, *ex mero motu*, an instantan certiorari to cure the defects in the transcript." If the court will not allow an appellan a continuance even for omissions or error in the record, it will certainly not permit him to enjoy a new trial by reason of such default by him.

In England a defendant in criminal cases is allowed no appeal. We allow an appeal, but the burden is on the appellan to assign his errors and bring up a true record. When he fails to do either he cannot take profit from his omission of duty.

The judge below having, from inspection of the record, found that the indictment on which the appellan was tried in fact contains the words "against her will," and that being already certified to this court, the record here can be amended to include them, as upon certiorari, and the cause will be restored to the docket to be heard in its order upon the exceptions taken below, when the district to which it belongs is called, unless, for cause shown, it is placed at the end of the district, or at the end of the docket for this term. It does not appear that the words were omitted by the fraud of the appellan, or of any one for him. If it did, the appeal should properly be dismissed.

The motion to restore the cause to the docket is allowed.

Walker, J., dissenting:

The defendant was indicted in the court below for the crime of rape, and having been convicted, appealed to this court. At the last term we arrested the judgment upon the ground that there was no allegation in the indictment that the offense had been committed "against the will of the prosecutrix." 132 N. C. 1000, *ante*, 182, 43 S. E. 828. The opinion of this court was filed on the 31st day of March, 1903, and the certificate was sent to the superior court on the 1st day of May, 1903, so that the case was retained in this court, under the rule, for the purpose of correction, a full month before it was returned to the lower court. This court adjourned for the term on the 11th day of June, 1903; and it appears, therefore, that the state had ample opportunity, after the filing of the opinion, and before the adjournment at the last term, to have called the alleged error or defect in the transcript to our attention. But it failed to do so. The state is not entitled to any more consideration or indulgence in this court in respect to the trial of cases in which it is concerned, than other litigants, except that the causes in which it is a party may be advanced sometimes, when they affect the public interest, and a speedy hear-

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ing is desired. It is bound, however, by the same rules of practice and procedure, and must give the same attention to its cases and exercise the same degree of diligence, as other parties. *State v. Price*, 110 N. C. 599, 15 S. E. 116. In *State v. Cameron*, 121 N. C. 572, 28 S. E. 139, we held that "the law which regulates the matter of appeals is the same in both civil and criminal cases," and that "in criminal appeals the respondent is the state, represented by the solicitor of the district in which the case is tried," and that he is as much the representative of the state in all matters pertaining to the preparation of cases, in all respects, for transmission to this court, as is an attorney of record the representative of his client in a civil case. There is no duty imposed upon an attorney in a civil suit with respect to the settlement of the case on appeal, and the transmission of a transcript of the record to this court, that does not equally rest upon the solicitor in an appeal taken in a criminal case. The only difference between the two classes of cases is one which does not materially affect the question we are now discussing, and that difference is that in a civil case the appellan must pay the fees of the clerk for making out the transcript in advance, if he demands it, while the state is not required to do so when it appeals; but the appellan in a civil case is no more bound to see that the record is correctly copied and transmitted to this court than is the state in a criminal case. The duty of copying and transmitting the record is one which, as this court has frequently decided, appertains to the office of the clerk. It is his official duty to send up a perfect transcript, and not in any sense the duty of the appellan, except as hereinafter stated, in any kind of case. This is made perfectly clear in *State v. Butts*, 91 N. C. 524, 526. In that case it is said by the court that while "it would be well for counsel to see that transcripts are properly made up before they come to this court," in order to protect the interests of their client, yet it is the official duty of the clerk to see that a true and perfect transcript is sent to this court. It may be conceded that, if the record is defective, the appellan in a civil case will not be allowed a continuance in order to have it perfected, or indulged in any other way with respect to it; and, if the defect is one that will injure his client if not corrected, he must abide the consequences of his neglect or omission in not having the record made perfect. He must apply for the necessary process for that purpose in apt time. While this is the rule in civil cases, it also obtains in criminal cases, as to both parties to the record,—the state and the defendant. When

it is said to be the duty of the appellant to see that the record is correctly certified to this court nothing more is or can be meant than that, if the record is not here at the proper time, his appeal will be dismissed, or, if the record is defective, and he does not move in apt time to have it corrected, the case must be heard just as if the record was perfect in form, and the party in default must take the consequences of his neglect. Surely the appellee cannot avail himself of a defect which defeated him in the case, and then apply for and obtain a writ of certiorari after the adjournment of the term, upon the ground that the appellant failed himself to apply for the writ. That would be to permit the appellee to take advantage of the laches of his adversary, where he unreasonably relied upon him to look after and care for his interests in this court. If in a civil case a plaintiff (appellee) should permit his case to be argued and decided in this court without having called our attention to a defect in the record, for example, the careless or inadvertent insertion of a material allegation in his complaint, so that it would appear he has no cause of action, and, by reason thereof the judgment is arrested or the action dismissed, would he be heard at the next term to allege the defect and be granted a writ of certiorari, so that the case could be reheard? The mere statement of the proposition carries with it its own sufficient refutation. How, then, can the state, who occupies substantially the same position in this court as the plaintiff (appellee) in a civil case, and is subject to the same rules, be allowed to do so, when the indictment, as certified to this court, is defective? If it is allowed in the latter case, there is no sound reason why it should not be in the former, unless there is something in the mere sovereignty of the state, or her peculiar prerogative, which gives her rights and privileges in this court not enjoyed by a citizen: and no such claim was made by our learned and able attorney general, who lets no point escape him, and it is not even suggested in the opinion of the court. The Supreme Court of the United States has ruled that the government, when it comes into the Federal courts to litigate with one of its citizens, must submit to the rules of practice and procedure of its courts, and its rights and privileges at every stage in the trial of the cause are substantially in every respect the same as those of the citizen, and it cannot have any superior advantages. *Fink v. O'Neil*, 106 U. S. 272, 27 L. ed. 196, 1 Sup. Ct. Rep. 325; *United States v. Union P. R. Co.* 105 U. S. 263, 26 L. ed. 1021; *United States v. Thompson*, 93 U. S. 586, 23 L. ed. 982; *Carr v. United*

States, 98 U. S. 433, 25 L. ed. 209; *Sibbald v. United States*, 12 Pet. 489, 9 L. ed. 1168.

When it is conceded, as it must needs be, that the state and its citizens stand before this court on terms of perfect equality, and that right and justice under the law must be administered in the same way to each of them, the fallacy of the reasoning by which the conclusion of the court is reached, and its insufficiency to justify that conclusion, is clearly seen, unless we propose to overrule many cases heretofore decided in this court in which it has been held that parties must be diligent in applying for remedial writs for the purpose of perfecting the transcript, and that an application for a certiorari, upon the suggestion of a diminution of the record, cannot be made after the term to which the appeal is taken, and at which the case is decided, and not even at that term unless it is made before the argument commences. A complete reversal of this wise and safe rule is the logical result of the decision in this case, but a consequence more dangerous in its tendency may follow, for no limit of time is set by the ruling of the court for such an application to be made. If it can be made at the first term after the one at which the case is decided, why not at the second term, and so on without limit? It will not answer the argument to say that in the court below the state is represented by one officer, the solicitor, and in this court by another, the attorney general, for the duty of looking after the interest of the state in the lower court, where the transcript is prepared, and from which it is transmitted, devolves solely upon the solicitor, as we have seen, unless he is assisted by private counsel, as in this case, or unless he specially appoints some other member of the bar to represent him, which appointment must be made in the manner pointed out by this court. *State v. Cameron*, 121 N. C. 572, 28 S. E. 139; *State v. Clenny*, 133 N. C. 662, 45 S. E. 525. In the case last cited, *Montgomery, J.*, for the court, says: "The solicitor, as we have said in *State v. Cameron*, represents the state in criminal prosecutions, and the statement of the case on appeal in such cases should be submitted to him for acceptance or objection." It appears, therefore, that he is as fully invested with plenary power and authority in all matters affecting the state's interests, with the corresponding duty of taking care of those interests, as the attorney of a party in a civil case. If there is a duty resting upon the latter to examine the transcript of the record before it leaves the hands of the clerk, the same duty rests upon the solicitor, and the consequence to the state must be the same, if this duty has not been performed in a criminal case, as it

would be to a party in a civil case if the duty is neglected by him. There is no greater obligation imposed upon an appellant to examine a transcript than there is upon an appellee, in so far as the party in default may be injuriously affected in this court. The same diligence is required of the appellee as of the appellant in discovering defects and having the record perfected. If there is an omission of matter material to his case, and the appellee fails at the proper time to seek the remedy for supplying it, he must suffer the consequences, just in the same way and in the same degree as the appellant. I must deny the correctness of the proposition impliedly asserted in the opinion of the court that any positive legal duty is devolved upon an appellant or an appellee to see that a true and perfect transcript is sent to this court, and that his failure to do so will be imputed to him as a fraudulent or even a false representation to this court, if the transcript is defective, or is other than a perfect copy of the record below. He makes no representation to this court, but simply relies, as he has a perfect right to do, upon the clerk, whose duty it is to certify the transcript. The appellant's duty is fully performed when he has caused the case on appeal to be settled and filed with the clerk, and paid the latter his fee for sending up the transcript to this court. There his duty ends, and that of the clerk begins, with this possible qualification, if it is a qualification: That, if the record, as certified by the clerk, happens to be defective, and the appellant fails to have it corrected in due time, so that he loses in this court, he must bear the loss, just as the appellant must do if the defect causes him to be cast in the suit, and he has not taken the proper means to have it remedied. It follows from what I have already said that neither the defendant's counsel nor the solicitor was in the least derelict in his duty, as both had the right if they chose to do so, to rely upon the clerk, who is the custodian of the record, and the officer appointed by the law for the purpose of preparing and transmitting a perfect transcript of it to this court; and it is not infrequently the case that counsel and the solicitor thus rely, as they each have a perfect right to do, upon the clerk to perform his duty in the premises. But if the clerk fails, by mere inadvertence or oversight, to make a true copy, the defect may be cured by applying to this court for the proper writ in apt time,—that is, at the term to which the appeal is taken,—and the consequence of the failure to make this application will fall upon him who is prejudiced by it, and who fails to take the necessary steps to protect his interests. This must

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be so in all cases. I am not denying or questioning the power of this court to correct its own records in order to make them speak the truth. That power is fully conceded, but it is not the one which is being exercised in this case. This court may not only amend its own records at any time, but it may supply any defects in the transcript sent to it from the lower courts, by issuing the proper remedial writ, provided it is done upon seasonable application of a party or of its own motion within the time allotted by law. It has been uniformly decided by the court that an application for a writ of certiorari for the purpose of correcting a record must be made except in rare cases before the cause is submitted for argument (*McDaniel v. Pollock*, 87 N. C. 503), and in no case can the writ issue after the expiration of the first term; and especially is this so when the case has been decided, and not merely continued, at that term (*State v. Blackburn*, 80 N. C. 477; *State v. Harris*, 114 N. C. 830, 19 S. E. 154; *State v. Rhodes*, 112 N. C. 857, 17 S. E. 164). In the cases cited it is held that, if a party has good ground for a certiorari, he must move for it at least before the argument upon the merits; and, if he fails to do so, he must abide the consequences of his own neglect, although he may be able afterwards to show by proof ever so conclusive, that there is a material defect in the record, and one, too, which would reverse the decision of the court. There must be an end to litigation somewhere. No man should be permitted to prolong it by his own neglect, and thus to profit by his own wrong. But I think the precise question has been decided by the court in *Wilson v. Lineberger*, 84 N. C. 836. In that case the plaintiff's counsel moved to correct the record at the term next after the case was heard and decided, with the intention of asking for a rehearing. Smith, Ch. J., for the court, said: "The motion is a novel one, and without precedent in the practice of the court. If the evidence shall change the aspect of the case, and make it materially different from what it was when heard, we should be required, not to rehear and correct an error of law, but to try a new case. If there is an error in the former decision, it must be discovered in the case then presented, without modification of facts." And again: "It was the duty of counsel to suggest the diminution before the cause was heard, and then ask for this remedial process, not to wait till the decision, and then demand it. It would be productive of much mischief to relax the salutary rule which requires counsel to see that their cause is properly before the court in the record, and to abide the consequences if it is not." The court

did not confine its decision in that case to the particular character of the amendment required, but simply applied the general principle that no amendment of any kind can be made at a subsequent term so as to present a question different from that appearing in the original record. The court well said that it would introduce a novelty into the practice and procedure of the court, which would be productive of untold mischief and incalculable harm.

When this court has decided a case, and the opinion and judgment have been certified to the court below, its jurisdiction with respect to the case is at an end, at least when the court has adjourned for the term at which the decision was made. The terms of this court are fixed by law (Const. art. 4, § 7; Code, chap. 24, § 953; Acts 1887, chap. 49, p. 100; Acts 1901, chap. 660, p. 897) in the same manner as are the terms of the superior court; and when, under the statute, this court has finished the business of any one term, and adjourned, its jurisdiction of a case decided at that term ceases, and it cannot again acquire jurisdiction of it, except by petition to rehear under the established rule of the court, or by a new appeal. In discussing this question, the court, in *White v. Butcher*, 97 N. C. 7, 2 S. E. 59, says: "The remand arrested further action here at this point. . . . The practical result to be secured was the conveyance of the title to the property, as would have been the case here, had the jurisdiction over the cause been retained. But it was no longer in this court for any further order unless, perhaps, the transmission of the papers and transcript; but the neglect to transmit them did not retain the cause itself after the order, nor impair the efficiency of the order." In *Ruffin v. Harrison*, 91 N. C. 398, the court, after stating the general proposition that a rehearing will not be granted upon a summary motion to modify a final judgment of this court, proceeds: "The court has no power to amend or modify the final decree, entered at the last term, upon an application like this. After final judgment, the court cannot disturb it, unless upon an application to rehear, or for fraud, accident, or mistake alleged in an independent action, or, perhaps, in some cases, a party might be relieved against a 'judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect,' within a year after the entry of the same. . . . This, of course, does not imply that the court has not power to correct the entry of its orders, judgments, and decrees so as to make them conform to the truth of what the court did in granting them or to set aside an irregular judgment

in a proper case. The practical effect of granting the prayer of the petitioners would be to give them the benefit of a rehearing upon a summary application to change the final decree at a term of the court subsequent to that at which it was granted. We are not aware of any rule of procedure or practice that warrants such action. The application must be denied, and the petition in this respect dismissed." In regard to this subject, the court, in *Cook v. Moore*, 100 N. C. 294, 6 Am. St. Rep. 587, 6 S. E. 795, says in this emphatic language: "It is not contended that this court can reverse, set aside, or modify in any material respect a regular final judgment at a term thereof subsequent to that at which it was entered. It is clear and well settled that it has no such authority, except upon an application to rehear, or because of 'mistake, inadvertence, surprise, or excusable neglect,' as may be allowed by statute." It will not, of course, be contended in the case at bar that this court has the power to correct the judgment at the last term because of "mistake, inadvertence, surprise, or excusable neglect." In *Moore v. Hinnant*, 90 N. C. 163, it is said: "But the court has not the power at a subsequent term to revoke, set aside, alter, or amend a final judgment entered at a former term, except upon application to rehear, or because of 'mistake, inadvertence, surprise, or excusable neglect' as allowed by law. The exercise of such a power is forbidden by principle and the overwhelming weight of authority if, indeed, there can be any well-considered case found that sustains it. . . . It is a fundamental principle of the common law, as the authorities ancient and modern show, that the court cannot change and modify its final judgments at a term subsequent to the term at which they were entered. During the term the record including the judgment is *in fieri*, and may be amended or set aside as to the court may seem proper, but after the term the power to interfere with it no longer exists. . . . This court has seldom had occasion to refer to the subject of the power of a court of record to change its judgments after the term at which they were entered but it has repeatedly incidentally recognized the doctrine that such power does not exist." It is also stated in *Moore v. Hinnant*, 90 N. C. 163, that a judgment regularly entered, if not erroneous, can in no case be altered at a subsequent term, otherwise than by a petition to rehear, except for the purpose of making the record express the intention of the court at that time, upon the record as then before it, so that it may speak the truth as to that record. In that case, from which I have made only a few brief extracts, Merrimon,

J., for the court, goes fully into the question we have under consideration, and denies the existence of the power or jurisdiction now about to be exercised in this case, and concludes that it would give rise to universal distrust, endless strife and confusion, and would violate the cardinal maxim that it is to the interest of the state that there should be an end to litigation. He quotes freely from Coke and Blackstone, and supports the doctrine by the citation of numerous and weighty authorities. His quotation from Coke is an apt one: "During the terme wherein any judicial act is done, the record remaineth in the breast of the judges of the court and in their remembrance, and therefore the roll is alterable during that terme, as the judges shall direct; but when the terme is past, then the record is in the roll and admitteth no alteration, averment, or proof to the contrary." Other and numerous authorities in support of the position will be found collected in *Moore v. Hinnant*, 90 N. C. 163, and *Cook v. Moore*, 100 N. C. 294, 6 Am. St. Rep. 587, 6 S. E. 795.

The case of *Rice v. Minnesota & N. W. R. Co.* 21 How. 82, 16 L. ed. 31, it seems to me, is directly in point. In that case the record upon which the appeal was heard and decided failed to show that there had been a final judgment in the court below, which was required as a basis of a writ of error to the lower court. It was sought at the term next after the decision by writ of certiorari to bring up and file a new record, showing that there had been a final judgment, and to have the former judgment annulled and a rehearing granted. Taney, Ch. J., for the court says: "We think the motion to annul the judgment of the last term and reinstate the case cannot be granted. The suit is a common-law action for a trespass on real property, and the judgment of the court below can be brought here for revision by writ of error only. That writ was issued by the plaintiff in error, returnable to the last term of this court, and it brought the transcript before us at that term. It was judicially acted on, and decided by this court, and when the term closed, that decision was final, so far as concerned the authority and jurisdiction of this court under that writ. The writ was *functus officio*, and, if the parties desire to bring the record of the case again before this court, it must be done by another writ of error." He then refers to the case of *The Palmyra*, 12 Wheat. 1, 6 L. ed. 531, which was cited in support of the petition to rehear, and says that it is not in point, as the appellate jurisdiction of the Supreme Court in admiralty cases is quite different from that in cases at common law; it being

allowable in admiralty cases to amend the pleadings and take new evidence in the Supreme Court, "so as, in effect, to make it a different case from that decided by the court below." In *Sibbald v. United States*, 12 Pet. 492, 9 L. ed. 1169, the court says: "No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes [in the appellate court], . . . or to reinstate a cause dismissed by mistake, . . . from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing." The doctrine is very strongly stated by the court in *Bronson v. Schulten*, 104 U. S. 415, 26 L. ed. 799, thus: "But it is a rule equally well established that, after the term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and, if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which by law can review the decision. So strongly has this principle been upheld by this court, that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court." In *Bank of United States v. Moss*, 6 How. 38, 12 L. ed. 334, the court said: "The action was not regularly on the docket at the new term in May following [the one at which the judgment had been rendered], when the court undertook to set the judgment aside. The power of the court over the original action itself, or its merits, under the proceedings then existing, had been exhausted,—ended. . . . This means the power to decide on it, or to change opinions once given, or to make new decisions and alterations on material points. A mere error in law, of any kind, supposed to have been rendered in a judgment of a court at a previous term, is never a sufficient justification for revising and annulling it at a subsequent term, in this summary way, on motion. . . . We would not be understood by this to deprive a court at a subsequent term of power to set right mere forms in its judgments. . . . Or power to correct misprisions of its clerks. The right to correct any mere clerical errors, so as to conform the record to the truth, always remains."

A case directly in point is that of *State v. Dixon*, 97 Ind. 125, where it appeared from the record as sent to the appellate court that the indictment had not been returned into open court by the grand jury, and the judgment was arrested. A motion was made for leave to amend the record by showing that the indictment had been returned into open court, and then for a rehearing of the case upon the record as thus amended. This is like our case in all respects. The court said: "Counsel for the state accompany their petition for a rehearing with a motion to have the clerk of the court below certify to this court certain portions of the record alleged to be omitted in the transcript. No objection, so far as the record before us is concerned, is made to our decision. The settled practice of this court forbids the correction of the record after a case has been decided." So in *Garner v. State*, 36 Tex. 693, after the judgment was arrested for lack of an essential averment in the bill, a motion similar to the one in this case was made and refused because the court had lost its jurisdiction. In each of the following cases, a motion was made at a term subsequent to that at which the judgment of the appellate court was entered to amend the record and rehear the case: In *Cruiser v. State*, 18 N. J. L. 209, the court says: "These, it is true, are mere mistakes in form; they are clerical errors only; but I have searched in vain for any authority in this court to amend, or order amendment below, after a writ of error in a criminal case. I cannot find a single case in which it has been done." It was said in *State v. Daugherty*, 59 Mo. 104: "If the record was incomplete or defective when the case was here on a former occasion, diminution should have been suggested, and a rule obtained for sending up a perfect transcript. But the party submitted his case upon the record filed in the court, and the judgment rendered thereon is final, and, whilst it remains unreversed, it conclusively bars any further proceedings. If parties were permitted, after a final judgment in this court, to go back to the circuit court, and there get an amended transcript, and bring the case again here, at their mere will and pleasure, there would be no final disposition of cases." So, in *Fielden v. People*, 128 Ill. 599, 21 N. E. 585, it was said by the court: "Amendments not in affirmance, but in derogation, of the judgment, are not allowed at a term subsequent to that at which final judgment is rendered." And again it is said: "This motion not having been made at the same term at which final judgment was rendered, nor until the case had passed beyond the power of this court to stay by its order the execution of the

judgment, clearly comes too late." A strong case, and one also directly in point, is *Cory v. State*, 55 Ga. 239, in which the court uses this language: "It is said that the clerk, in copying the bill of indictment, made a mistake and wrote 'with' when he should have written 'without the consent of the owner.' This may or may not be true. It has not been verified to us in the only way it can legally be done, by the suggestion of a diminution of the record on or before the calling of the case. Code, § 4282, rule 9. Our only course is to adhere to the law and to rule on principle. It may sometimes work seeming injustice. A departure from it would open the floodgates of speculation, and unsettle the entire practice of the court. In this case any wrong done can be but temporary: The party can be tried again, and, if found guilty on the second count, properly framed, he can be punished according to law." See also *United States v. Adams*, 9 Wall. 557, 19 L. ed. 584; *Christopher v. Searcy*, 12 Bush, 171; 3 Cyc. Law & Proc. p. 214, and note 16, where many cases are collected.

The court, in its opinion, relies very much on the case of *Lovett v. State*, 29 Fla. 384, 16 L. R. A. 313, 11 So. 176; but the case is not, in my opinion, an authority for its decision. In the first place, the motion in that case for a certiorari for the purpose of correcting the record so that there could be a rehearing of the case upon the amended transcript was made at the same term at which the case was first heard and decided. This is sufficient to distinguish it from the case at bar. The court merely recalled its remittitur while the case was as it said in its possession and under its control, under its rules of practice; but, even in doing that, it went beyond what this court had repeatedly decided to be the law in such cases under its rules. If the facts of that case were like those of the case we are considering, and the same point had been presented, the authorities cited in support of the decision do not, I think, sustain it. They are, in the main, cases in which the courts asserted the right to amend their own records so that they could be made to speak the truth. The case of *The Palmyra*, 12 Wheat. 1, 6 L. ed. 531, on which that court relied, was, as we have already said, a case in admiralty, and the court gave its decision in it under the rules of the admiralty courts in such cases. But these rules do not apply to cases at common law. The court in *Lovett v. State*, concedes the general doctrine that, after the appellate court has sent down its certificate or remittitur and adjourned for the term, it has lost its jurisdiction of the case, but not so if the motion for a certiorari is submitted during

the term at which the decision was made. "Where a case has been heard," the court says, "upon its merits in an appellate court, according to its rules of practice, and the judgment of the court has been correctly entered, and the time, if any, allowed by statute or its rules for a rehearing having passed, and, no application for a rehearing having been made, the remittitur issues and is lodged in the lower court, it may well be said that the appellate court has lost its jurisdiction of the cause, and has not power to recall or reconsider it. Under these circumstances, it has fairly and duly exercised its appellate functions and exhausted its powers as to the cause. There must be an end of litigation; public policy, as well as the interests of individual litigants, demands it; and the rule just announced is indispensable to such a consummation." The court also says: "It is apparent that the state's motion is made during the term of court at which the judgment which it is sought to have revoked was pronounced and entered, and it is a general rule of the common law that courts have power either to modify or vacate their judgments and decrees during the term at which they were rendered, or while they are *in fieri*." Even in that case the court relied largely upon decisions in civil cases in which the error or mistake occurred in the appellate court. The case of *The Palmyra*, which was also cited by the court, and much relied on in support of its decision, has been fully explained, and shown not to be an authority in support of the court's ruling.

No suggestion of fraud upon the court has been made in this case. Indeed, the attorney general admitted there was no fraud, but a mere inadvertence of the clerk in copying the indictment.

My conclusion is that, on principle and authority, the court is without jurisdiction to grant the relief prayed for by the state. The decision of the court, in my opinion, is in conflict with those cases in which it is held that a petition to rehear will not be entertained in a criminal case, and further establishes a new doctrine,—that a criminal case cannot only be reheard in this court, but that the record may be amended for the purpose of a rehearing. The remedy of the state is to send another bill. To a new indictment the plea of former conviction cannot avail the defendant, though some doubt as to this seems to have been entertained in the court below. In order to sustain the plea of former acquittal or former conviction, it must appear that the former judgment "still remains in full force and effect, and not in the least reversed or made void." *State v. Williams*, 94 N. C. 891.

It is said in the opinion that by article 67 L. R. A.

4, § 8, of the Constitution, this court may issue remedial writs necessary for a general supervision and control of the inferior courts. This is admitted, but it does not follow by any means that they may be issued contrary to the well-established course and practice of the court. In the two cases cited by the court as illustrations of the proper exercise of this power, namely, *Ex parte Biggs*, 64 N. C. 202, and *State v. Jefferson*, 66 N. C. 311, the writs were applied for in apt time, and issued regularly and in strict accordance with the well settled rules of procedure in this court. Again, the court says that "mistakes of this court or of its clerk, not mistakes of law, but of fact, have been often corrected after the mandate has gone down, and even at subsequent terms" and numerous cases are cited to sustain the proposition. Citations are not necessary for that purpose. The proposition is also admitted, but the deduction made from it by the court I do not think is either logical or warranted. The citation from *Tidd's Practice* is, I think, a complete refutation of it. The correction, as Mr. Tidd said, must be made in the same court where the mistake occurred. All the authorities cited by the court in this connection simply refer to the familiar principle that a court may correct its own records so as to make them speak the truth. I venture to assert, with all deference, that there is not a single authority cited by the court which, when properly considered and restricted to its peculiar facts, sustains its conclusion, or which conflicts with the numerous cases decided by this court, and which I have already cited in support of the view I have taken of this case. My deliberate conviction is that the ruling of the court introduces a new and dangerous precedent into its practice and procedure, and unsettles those decisions in which the right to rehear in criminal cases is said not to exist.

The motion of the state, in my opinion, should be denied.

Douglas, J. dissenting:

I fully concur in the able dissenting opinion of Justice Walker which leaves but little for me to say; but there are some parts of the opinion of the court on which I will briefly comment.

The court says: "We are not asked to reverse our judgment, but to correct an error of fact." I do not so understand it. In the first place, we have no power at any time to correct a fact found in the court below, and, even if we give the clerk of the court below any opportunity to correct the record sent up by him, it would do the state no good, as long as our judgment remains, arresting the judgment in the court below.

which in this case would be equivalent to granting the defendant a new trial, as a new bill of indictment could have been sent against him. The motion of the attorney general to correct the "error of fact" is simply preliminary to his further motion to rehear the case on the record as so amended. If the attorney general had simply asked to have the error of fact corrected in the record, without disturbing our judgment, I would not have dissented so strenuously. But when he asks us, after the expiration of the term at which the defendant has been granted an arrest of judgment, to take him back, reverse our judgment and hang him under an old sentence legally set aside at a former term, I must emphatically dissent. It is true, upon the rehearing of the case this court granted the defendant another new trial upon a different ground, but that does not cure the invalidity in the rehearing itself. Suppose that the prisoner had been again tried and acquitted upon a new bill pending the rehearing, and upon the rehearing this court had found no other ground of error; would it have been our duty to have affirmed the judgment and sentence of death? This would have been a greater violation of the letter of the law than the execution of Sir Walter Raleigh,

who was executed fifteen years after sentence, upon a judgment which had, however, never been formally reversed. The opinion does not call it a rehearing, but what else is it? Taking the facts as they are, what other name can we apply to it? The case is taken back and reconsidered, and a new judgment rendered. I do not mean to say that this case could properly be reheard. On the contrary, not a single requisite exists for a rehearing, even if this court had not decided in *State v. Council*, 129 N. C. 511, 39 S. E. 814, that petitions to rehear are not allowable in criminal actions. It may be asked why, having dissented in *Council's Case*, I should also dissent in the case at bar, which practically overrules every principle underlying the decision in *Council's Case*. I do so for the sufficient reason that, even admitting, that the state is entitled to a rehearing it has complied with none of the requisites prescribed by the rules of this court. Moreover the opinion of the court cites *Council's Case* with approval, and it is impossible for both decisions to be right under the same system of jurisprudence. If we cannot rehear a case to do justice to the prisoner by correcting our own error, we surely cannot rehear it simply to hang him.

TEXAS SUPREME COURT.

R. L. BROWN *et al.*, *Appts.*,
v.

AMERICAN FREEHOLD LAND MORTGAGE COMPANY OF LONDON, Limited, *et al.*

(.....Tex.....)

1. **Statements that loan agents are inattentive and neglectful**, and have been guilty of fraudulent conduct, for which their principal has taken the business from them, and that they are insolvent, made for the purpose of breaking them up in business and securing their custom, give them a right of action for the injuries thereby inflicted upon them.
2. **The one-year statute of limitations does not apply** to a cause of action for breaking one up in business, and driving him therefrom by the use of false and malicious statements.

(May 23, 1904.)

NOTE.—As to combinations or boycotts by dealers or persons engaged in business to injure rivals, see, in this series, *Jackson v. Stanfield*, 23 L. R. A. 588; *Brewster v. C. Miller's Sons Co.* 38 L. R. A. 505; *Hartnett v. Plumber's Sup-67 L. R. A.*

QUESTIONS certified by the Court of Civil Appeals for the Third Supreme Judicial District, which arose upon an appeal by plaintiffs from a judgment of the District Court for McLennan County in favor of defendants, in an action brought to recover damages for wrongful acts done by defendants for the purpose of breaking plaintiffs up in business. *Answers favorable to plaintiffs returned.*

The facts are stated in the opinion.

Messrs. Fiset, Miller, & McClendon, for appellants:

The petition was good.

Haldeman v. Martin, 10 Pa. 369; *Van Horn v. Van Horn*, 52 N. J. L. 284, 10 L. R. A. 184, 20 Atl. 485, 53 N. J. L. 514, 21 Atl. 1069, 56 N. J. L. 318, 28 Atl. 669; *Webb v. Drake*, 52 La. Ann. 290, 26 So. 791; *Olive v. Van Patten*, 7 Tex. Civ. App. 630, 25 S. W. 428; *Randolph v. Junker*, 1 Tex. Civ. App.

ply Asso. 38 L. R. A. 194; *Doremus v. Hennessy*, 43 L. R. A. 797; *Boutwell v. Marr*, 43 L. R. A. 803; *Gatzow v. Buening*, 49 L. R. A. 475; and *State ex rel. Durner v. Huegin*, 62 L. R. A. 700.

520, 21 S. W. 551; *International & G. N. R. Co. v. Greenwood*, 2 Tex. Civ. App. 79, 21 S. W. 559; *Wildee v. McKee*, 111 Pa. 335, 56 Am. Rep. 271, 2 Atl. 108; *State v. Hickling*, 41 N. J. L. 208, 32 Am. Rep. 198; *Rourke v. Elk Drug Co.* 75 App. Div. 145, 77 N. Y. Supp. 373; *Hood v. Palm*, 8 Pa. 237; *Riding v. Smith*, L. R. 1 Exch. Div. 91; *Gregory v. Brunswick*, 6 Mann. & G. 205; 2 Hilliard, Torts, 444, 558; Townshend, Slander & Libel, 4th ed. § 118, note 3.

Proof of a conspiracy was not necessary to justify a recovery.

Dodge v. Bradstreet, 59 How. Pr. 104; *Buffalo Lubricating Oil Co. v. Standard Oil Co.* 42 Hun, 153, 106 N. Y. 669, 12 N. E. 825; *Morton v. Metropolitan L. Ins. Co.* 34 Hun, 366, 103 N. Y. 645; *Lafitte v. New Orleans City & Lake R. Co.* 43 La. Ann. 34, 12 L. R. A. 338, 8 So. 701; *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111; *Van Horn v. Van Horn*, 52 N. J. L. 284, 10 L. R. A. 184, 20 Atl. 485; *Booker v. Puyear*, 27 Neb. 340, 43 N. W. 136; *Rourke v. Elk Drug Co.* 75 App. Div. 145, 77 N. Y. Supp. 373; *Jones v. Baker*, 7 Cow. 445; *Buffalo Lubricating Oil Co. v. Everest*, 30 Hun, 588; *Reed v. Home Sav. Bank*, 130 Mass. 443, 39 Am. Rep. 468; *Western News Co. v. Wilmarth*, 33 Kan. 510, 6 Pac. 786; *Hindman v. First Nat. Bank*, 48 L. R. A. 210, 39 C. C. A. 17, 98 Fed. 562; *Casey v. Cincinnati Typographical Union No. 3*, 12 L. R. A. 196, note, 45 Fed. 135.

The court erred in limiting plaintiffs' recovery to damages to their business. Injury to their reputation might also be recovered.

Raymond v. Yarrington, 96 Tex. 443, 62 L. R. A. 962, 97 Am. St. Rep. 914, 72 S. W. 580, 73 S. W. 800; *Jenkins v. Pennsylvania R. Co.* 67 N. J. L. 331, 57 L. R. A. 309, 51 Atl. 705; *Harrison v. Adamson*, 86 Iowa, 693, 53 N. W. 334; *Washburn v. Gilman*, 64 Me. 163, 18 Am. Rep. 246; *Phillips v. Phillips*, 34 N. J. L. 208; *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339; *Learned v. Castle*, 78 Cal. 454, 21 Pac. 13, 18 Pac. 872; *Gunter v. Astor*, 4 J. B. Moore, 12; *Riding v. Smith*, L. R. 1 Exch. Div. 91; *Walker v. San Antonio Light Pub. Co.* 30 Tex. Civ. App. 165, 70 S. W. 555; *Bank of Commerce v. Goos*, 39 Neb. 437, 23 L. R. A. 190, 58 N. W. 84; *Schaffner v. Ehrman*, 139 Ill. 109, 15 L. R. A. 134, 32 Am. St. Rep. 192, 28 N. E. 917; *McDuff v. Detroit Evening Journal Co.* 84 Mich. 1, 22 Am. St. Rep. 675, 47 N. W. 671.

A person has a right, under the law, as between himself and other persons, to pursue his calling or business without interference or obstruction from others, and an infringement of this right by others is an illegal act.

Raymond v. Yarrington, 96 Tex. 443, 62 67 L. R. A.

L. R. A. 962, 97 Am. St. Rep. 914, 72 S. W. 580, 73 S. W. 803; *Read v. Friendly Soc. of Operative Stonemasons* [1902], 2 K. B. 88, 732; *Olive v. Van Patten*, 7 Tex. Civ. App. 630, 25 S. W. 428; *International & G. N. R. Co. v. Greenwood*, 2 Tex. Civ. App. 80, 21 S. W. 559; *Plant v. Woods*, 176 Mass. 492, 51 L. R. A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Van Horn v. Van Horn*, 52 N. J. L. 284, 10 L. R. A. 184, 20 Atl. 485, 53 N. J. L. 514, 21 Atl. 1069, 56 N. J. L. 318, 28 Atl. 689.

To sustain this case, it is not necessary to prove that the means employed were unlawful. The case, both as to pleadings and evidence, is one upon both theories of conspiracy.

Riding v. Smith, L. R. 1 Exch. Div. 91; *Rourke v. Elk Drug Co.* 75 App. Div. 145, 77 N. Y. Supp. 373; *Morassee v. Brochu*, 151 Mass. 567, 8 L. R. A. 524, 21 Am. St. Rep. 474, 25 N. E. 74; *Gregory v. Brunswick*, 6 Mann. & G. 205; *Wildee v. McKee*, 111 Pa. 335, 56 Am. Rep. 271, 2 Atl. 108; *Webb's Pollock, Torts*, p. 406; *Townshend, Slander & Libel*, 4th ed. § 118, note 3; *Keeble v. Hickeringill*, 11 East, 573, note; *Carrington v. Taylor*, 11 East, 571; *Gunter v. Astor*, 4 J. B. Moore, 12; *Tarleton v. McGawley*, Peake N. J. Add. Cas. 207; *Dreuz v. Domec*, 18 Cal. 83; *Davenport v. Lynch*, 51 N. C. (6 Jones, L.) 545; *Smith v. Nippert*, 76 Wis. 86, 20 Am. St. Rep. 26, 44 N. W. 846; *Phelps v. Goddard*, 1 Tyler (Vt.) 60, 4 Am. Dec. 720; *Raleigh v. Cook*, 60 Tex. 438; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Jones v. Baker*, 7 Cow. 445; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. 48; *Farmers' Loan & T. Co. v. Northern P. R. Co.* 25 L. R. A. 414, note, 4 Inters. Com. Rep. 744, note, 60 Fed. 803; *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; *Mapstick v. Range*, 9 Neb. 390, 31 Am. Rep. 415, 2 N. W. 739; *Casey v. Cincinnati Typographical Union No. 3*, 12 L. R. A. 193, 45 Fed. 135; *Lucke v. Clothing Cutters' & T. Assembly No. 7507*, K. of L. 77 Md. 396, 19 L. R. A. 408, 39 Am. St. Rep. 421, 26 Atl. 505; *Ryan v. Burger & H. Breacing Co.* 37 N. Y. S. R. 287, 13 N. Y. Supp. 660; *Buffalo Lubricating Oil Co. v. Standard Oil Co.* 106 N. Y. 669, 12 N. E. 825; *Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.* 3 Misc. 582, 24 N. Y. Supp. 647; *Hood v. Palm*, 8 Pa. 237; *Webb v. Drake*, 52 La. Ann. 290, 26 So. 791; *Gore v. Condon*, 87 Md. 368, 40 L. R. A. 382, 67 Am. St. Rep. 362, 39 Atl. 1042; *Doremus v. Hennessy*, 62 Ill. App. 391; *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, 1 So. 934, 35 Alb. L. J. 224.

A suit on a conspiracy carried out by illegal means sets up a distinct cause of action. The means employed may each give

rise to separate suits, but, if they are steps towards a consummated or a completed plan or scheme to injure, the injured party may ignore the separate causes of action, and sue for his entire damages caused by all the different illegal acts.

Northern P. R. Co. v. Kindred, 3 McCrary, 627, 14 Fed. 81; *Bingham v. Lipman, W. & Co.* 40 Or. 363, 67 Pac. 98; *Oliver v. Perkins*, 92 Mich. 319, 52 N. W. 609; *Rice v. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279; *Dodge v. Bradstreet*, 59 How. Pr. 104; *State v. Howard*, 129 N. C. 657, 40 S. E. 71; *Haldeman v. Martin*, 10 Pa. 369; *State v. Hickling*, 41 N. J. L. 208, 32 Am. Rep. 198; *Van Horn v. Van Horn*, 56 N. J. L. 318, 28 Atl. 669; *Murray v. McGarigle*, 69 Wis. 483, 34 N. W. 528; *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 857; *United States v. Greene*, 115 Fed. 350.

Loss of business is the natural and proximate result of false statements circulated to the injury of the party in business, and which are calculated to frighten off his customers.

International & G. N. R. Co. v. Greenwood, 2 Tex. Civ. App. 80, 21 S. W. 559; *Dels v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111; *Olive v. Van Patten*, 7 Tex. Civ. App. 630, 25 S. W. 428; *Van Horn v. Van Horn*, 52 N. J. L. 284, 10 L. R. A. 184, 20 Atl. 485, 53 N. J. L. 514, 21 Atl. 1069, 56 N. J. L. 318, 28 Atl. 669; *Texas & P. R. Co. v. Durrett*, 57 Tex. 48; *San Antonio & A. R. Co. v. Gwynn*, 4 Tex. App. Civ. Cas. (Willson) p. 338.

It is not necessary to prove an express agreement between coconspirators. Such cases necessarily are established upon circumstances.

United States v. Wrape, Fed. Cas. No. 16,767; *Patnode v. Westenhaber*, 114 Wis. 460, 90 N. W. 472; *Davis v. Johnson*, 42 C. C. A. 111, 101 Fed. 952; *Horton v. Lee*, 106 Wis. 439, 82 N. W. 360; 4 Enc. Pl. & Pr. p. 707; *Page v. Cushing*, 38 Me. 523; *Jernigan v. Wainer*, 12 Tex. 193; *Gardner v. Preston*, 2 Day, 205; 2 Am. Dec. 91; *Redding v. Wright*, 49 Minn. 322, 51 N. W. 1056; *Jones v. Baker*, 7 Cow. 445.

Messrs. Gano, Gano, & Gano and Sleeper & Kendall for appellees.

Brown, J., delivered the opinion of the court:

The court of civil appeals of the third district has submitted the following statement and questions in the above cause:

"R. L. Brown and J. Gordon Brown sued the American Freehold Land Mortgage Company of London, Limited, R. B. King, and T. Mallinson to recover \$150,000 damages. The trial resulted in a verdict and judgment for the plaintiffs for \$100, and they have ap-

pealed. The appellees have filed cross assignments, and having reached the conclusion that appellants' brief points out reversible error, we desire to certify to the supreme court certain questions presented by the cross assignments, which questions are material to the rights of the parties and to a proper disposition of the case.

"The plaintiff's original petition was filed June 27, 1901, and the amended petition, on which the plaintiffs went to trial, was filed February 23, 1903. The latter petition reads as follows:

"[From the petition certified we condense the allegations which we deem necessary to answer the questions submitted as follows: After making the formal allegations of the parties, their residences, etc., the petition alleges, in substance, that R. L. Brown and J. G. Brown, under the firm name of Brown Brothers, had established at Austin and at the city of Waco a business as loan agents, which transacted business throughout the state, and had, from 1888 to the year 1898, conducted the business of lending money on behalf of foreign corporations, receiving for their services a per cent of the annual interest as it accrued upon the loans made; that the plaintiffs had established a good reputation as business men for honesty, promptness, and reliability, and as men who could command money for lending to those who might apply to them to borrow, and, in the transaction of the business of loan agents, had established business relations with many people in Texas who were borrowers of money, who had confidence in plaintiffs and would have continued to do business with them, except for the interference of defendants. Plaintiffs allege that they were appointed agents of the American Freehold Land Mortgage Company of London, Limited, hereafter called the "defendant company," in the year 1888, and continued to transact business as such agents for that company until the year 1898, during which time a profitable business was done for the said defendant company from which the plaintiffs received annually \$8,000. The petition alleges that the plaintiffs were at the same time agents for the English & Scottish Land Mortgage & Investment Company, Limited, a foreign corporation, which business was satisfactory to the said corporation, and was profitable to it and plaintiffs, until said English & Scottish Company was induced by the false representations of defendants to take the business from plaintiffs. It is alleged that in the year 1898 the defendant company determined to change the manner of doing business in Texas, so as to pay salaries instead of commissions, as it had done with the plaintiffs, and determined that it would

secure for itself the agency for the English & Scottish Land Mortgage & Investment Company, Limited, which the plaintiffs then had and would have continued to hold, but for the wrongful acts of the defendants. It is alleged that by reason of the transactions which the plaintiffs had carried on as agents, lending money for the said two corporations, as well as for others, they had established a valuable business, having loaned money to many persons, which loans were about to mature, and said persons would require to renew the loans or to borrow money to pay them; that plaintiffs would have been able to control that business as agents of other companies, after the agencies for the said two companies had been taken from them, and, to prevent this and to secure the plaintiffs' business for themselves, the defendants, the said defendant company, R. B. King, and T. Mallinson, who are alleged to be agents of defendant company, fraudulently and maliciously combined, confederated, and conspired together for the purpose of weakening and destroying plaintiffs' business influence, financial credit, and standing, to break them up and run them out of business, and, for the purpose of causing the English & Scottish Company to transfer its business to the defendant company, the defendants made certain false and malicious representations to the said English & Scottish Company as to the management of its business by the plaintiffs, which caused the said last-named company to take the business agency in Texas from the plaintiffs, and that by means of the fraudulent combination, and their acts done and performed, alleged specifically in the petition, the said defendants succeeded in preventing the plaintiffs from continuing their business with a large number of their clients, who needed to borrow money and whose loans in the other companies were maturing; and, by the fraudulent and false representations in manner alleged in the petition, defendants prevented the said persons from making application to the plaintiffs for such loans, and succeeded in causing the English & Scottish Company to take its business from the plaintiffs, and thereby weakened and in a large measure destroyed the business of the plaintiffs. It is alleged in the petition that the defendants for the wicked, malicious, and fraudulent purpose before charged, circulated and published reports and statements to the effect that the plaintiffs were insolvent and unable to accommodate their customers who might apply for loans and by the various methods alleged interfered and prevented many persons from applying to the plaintiffs for loans, also by such means and by such false and fraudulent representations prevented

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the plaintiffs from acquiring agencies for other companies which otherwise they could have done, so as to enable them to furnish money to those persons who applied to them for loans. The petition alleges that the business of the agency made a return annually of \$15,000 profits, and would have continued for many years to produce that amount, if it had not been for the wrongful and malicious acts done and performed by the defendants, but that by their interference with plaintiffs' business, and the circulation and publication of false and fraudulent statements with reference to their honesty, their business integrity, and solvency, the plaintiffs were damaged in the sum of \$150,000. The petition alleges with great particularity and in detail the many acts, statements, and publications done and performed by the defendants for the purpose of accomplishing the conspiracy charged against them, which it is unnecessary for us to set out. This statement of the contents of the petition will be a sufficient basis for the answer to the questions hereinafter copied.] The trial court sustained exceptions to the sixth, seventh, and twenty-third paragraphs of the petition, overruled other exceptions, and held that the petition stated a cause of action upon a conspiracy to injure the plaintiffs in their business and submitted the case to the jury upon that issue.

"Appellees' first cross assignment of error complains of the action of the court below in overruling their special exception No. 23, which exception was both general and special, and challenged the petition, for the reason, among others, that it showed no cause of action against the defendants. Under the assignment referred to, appellees contend that when the object of a conspiracy is not actionable, nor the means to accomplish the object actionable, no cause of action exists. They also maintain that this case falls within the rule asserted by them; the contention being that it was not unlawful for them as competitors to conspire to obtain the business which the plaintiffs had, thereby breaking plaintiffs up in business, unless in so doing they committed wrongs which were actionable in and of themselves, which they assert the plaintiffs' petition fails to show; and they rely upon the case of *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111, as supporting their contention. Under the second cross assignment of error, appellees complain of the action of the court in overruling special exceptions to paragraphs Nos. 9, 9b, 10, 10b, 11, 12, 13, 14b, 15, 16, 17, 18, and 19, by which exceptions they pleaded the one-year statute of limitations as to the matters complained of in said para

graphs of the petition. As to the questions certified, and showing that they are properly presented for decision, reference is here made to the first seven pages of appellees' brief on their cross assignments of error. With the foregoing statement and explanation, the court of civil appeals of the third district certifies to the supreme court for decision the following questions:

"(1) Eliminating the sixth, seventh, and twenty-third paragraphs of the plaintiffs' petition, to which paragraphs the court sustained exceptions, does the petition state a cause of action against the defendants, and did the trial court err in overruling the defendants' demurrer thereto, as charged in the first cross assignment of error?"

"(2) If the petition states a cause of action, does the one-year statute of limitations apply to the case, and did the trial court err in overruling the special exceptions referred to in the second cross assignment of error?"

We answer that the plaintiffs' petition states a good cause of action against each of the defendants, and the demurrer was properly overruled. The allegations which charge a conspiracy between the defendants to perpetrate the wrong set up in the petition are immaterial in this case, for the reason that the petition charges that each defendant, with the purpose to accomplish the injury to plaintiffs, participated by performing jointly and individually the various acts which caused injury to the plaintiffs; that the acts done separately by each were for the purpose of accomplishing the aim of all, and contributed thereto, and, if the facts alleged show a right of action, then the defendants are liable jointly and severally for the injury produced by their acts, whether performed jointly or severally. 15 Enc. Pl. & Pr. p. 558; Cooley, Torts, 145. Appellees contend that it was lawful for them to break the appellants up in their business and to run them out of business "by lawful means." We agree to that proposition as being correct, even if it be true that the parties thus acting by lawful means were actuated by malice. If, for instance, the appellees, in the transaction of the business of lending in competition with appellants, had offered money for loan at a rate below that which the appellants could furnish it, and thereby induced the customers of the appellants to borrow from the defendant company, and by reason thereof Brown Brothers were unable to maintain their business, and were broken up and compelled to quit, then no cause of action would exist in favor of the appellants against the defendants, because, however malicious the motive, the means used would be lawful. But the facts alleged do

not make such a case; for instance, it is alleged against all of the defendants that "on divers occasions and in the presence of different people in the city of Waco, Texas, and in other parts of McLennan county, Texas, they stated, in substance, that plaintiffs had done a bad business for the defendant company, which, in consequence thereof, had taken its business from plaintiffs, and that plaintiffs had been inattentive and neglectful of its business, and had conducted it in a way very unsatisfactory and unprofitable to defendant company, and had been guilty of fraudulent conduct as such agents; and, further, in said McLennan county at various times, and in Austin at various times in the fall of 1898 and 1899 and in the spring of 1900, made other statements, to the effect that the plaintiffs were financially insolvent and irresponsible, and that they would make them bankrupt when they liked, and that the plaintiffs were going out of the business, and that plaintiffs had been guilty of fraudulent conduct as agents." There are numerous charges of like character against the defendants in the petition, which enters minutely and elaborately into a statement of the various acts and statements of the several defendants, done and made for the accomplishment of the purpose charged, of breaking them up and driving them out of business. It cannot be said that it is fair competition to deal with a competitor in the manner shown by the facts alleged in this petition; for if the facts be true, and we must take them as such in this investigation, they manifest wicked persecution of the appellants by the defendant company, through its agents and officers, with the purpose of destroying appellants' business and of securing the benefits to defendant company which legitimately belonged to Brown Brothers. It can hardly be said that the purpose of breaking a man down in business and driving him out of business is a lawful purpose, even when accomplished by lawful means. The best that can be said of such transaction is that the law affords no remedy for such wrong.

In *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111, this court quoted from *Walker v. Cronin*, 107 Mass. 555, 562, as follows: "Everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from a malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right, by contract or otherwise, is in-

terfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing." If the allegations of the petition in this case be true, it was not a matter of competition on part of the defendant company and its agents, but a malicious pursuit of appellants by means wholly without justification in law or morals; therefore, having produced the wrong as charged in the petition, the defendants may be justly held liable for the damage occasioned by the destruction of the business which the plaintiffs by their energy and care had built up for themselves. *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111.

The cause of action alleged by the plaintiffs and upon which they sought recovery is the destruction of their business as loan agents by the unlawful and malicious acts of the defendants. The various acts which are charged in the petition—for instance, the representation that plaintiffs were dishonest and unreliable, and that they were bankrupt and insolvent—were simply allegations showing the methods by which the defendants accomplished the purpose of destroying their business. It was not sought to recover upon the allegations constituting libel or slander, but the facts stated were the evidence by which the cause of action would be established. The statute of limitations of one year does not apply to the cause of action set up in this case.

WISCONSIN SUPREME COURT.

R. G. KINGSLEY, *Appt.*,

v.

City of MERRILL, *Rcpt.*

(.....Wis.....)

1. Mortgages, and notes of solvent debtors are property at the residence of their owner, within the meaning of a constitutional provision permitting the legislature to levy taxes upon such property as it shall prescribe.
2. For the purpose of determining whether or not the maker of notes is solvent within the meaning of a statute taxing solvent credits, he must be considered solvent if, although indebted to others, he has business or income and pays his debts, or has property out of which collection can be made.
3. The constitutional requirement of uniformity in taxation is not violated with respect to a tax upon credits by imposing it upon those which are solvent only, leaving debts due by insolvent persons untaxed.
4. A taxation of solvent credits does not present a case of double taxation, forbidden by the constitutional requirements of uniformity, although a tax may also be levied on the debtor.
5. The taxation by a state of debts due by solvent debtors is not forbidden by the clause of the amendment to the Federal Constitution forbidding any state to deny to any person the equal protection of the laws, although no tax is laid on debts due by insolvents.

(*Dodge, J., dissents in part.*)

(June 9, 1904.)

NOTE.—As to situs, for purpose of taxation, of debts evidenced by notes and mortgages, see also, in this series, *Boyd v. Selma*, 16 L. R. A. 729, and the later case of *Holland v. Silver Bow County*, 27 L. R. A. 797.

As to taxation of mortgages, including ques-

APPEAL by plaintiff from a judgment of the Circuit Court for Lincoln County in favor of defendant in an action brought to recover money paid as taxes under protest. *Affirmed.*

Statement by **Cassoday**, Ch. J.:

This is an appeal from an order sustaining a demurrer to the complaint in an action to recover back \$374.32 paid under protest; the same being for \$363.42 taxes levied on account of notes and mortgages, and \$10.90 fees of the officer in making such collection. The complaint alleges, in effect, that the defendant is a municipal corporation, organized as such; that upon the general assessment roll of the city for 1902 there was carried out by the treasurer against the plaintiff an assessment of \$10,430 on account of notes and mortgages owned by the plaintiff, in addition to an assessment of all other personal property of the plaintiff then liable to taxation in that city; that the city clerk made out the tax roll for that year on that basis, and, in doing so, levied and charged on said tax roll against the plaintiff, on account of such notes and mortgages, a tax for that year of \$363.42; that such tax was illegal and void, because contrary to the provisions of the Constitution of this state; that such tax roll, with a warrant in due form for the collection of the same, was delivered to the city treasurer in December, 1902; that such

tion of double taxation, see *Detroit v. Rents*, 16 L. R. A. 59, and *note*.

For tax on obligations of loan association held against borrower, as double taxation, see *People's Loan & Homestead Assn. v. Keith*, 28 L. R. A. 65.

treasurer demanded payment of all taxes levied against the plaintiff on such tax roll; that the plaintiff paid all of such taxes, except the \$363.42 so levied on account of notes and mortgages, which the plaintiff refused to pay, for the reasons stated; that March 4, 1903, said treasurer, pursuant to the command of said warrant, again demanded payment of the \$363.42, with the collector's fee of \$10.00 added; that, upon the plaintiff's refusal to pay the same, the treasurer seized and levied upon certain personal property of the plaintiff for the purpose of selling the same and collecting such amounts; that thereupon, and in order solely to save his property from being removed and sold, and thereby sacrificed, and solely by reason of such duress, the plaintiff paid to the said treasurer the \$374.32 so demanded by him, under protest, however, that such levy and collection was wrongful and unlawful, and that the plaintiff would bring action to recover back the money so paid; that the treasurer paid said sum into the defendant's treasury; that May 15, 1903, the plaintiff presented to the common council of the city, for audit and allowance, his duly verified claim for said \$374.32 so illegally and wrongfully collected of the plaintiff; that July 16, 1903, the common council wholly disallowed such claim, and the city clerk thereupon notified the plaintiff, in writing, of such disallowance; that thereupon the plaintiff duly appealed to the circuit court from the decision of the common council disallowing such claim, and prays judgment for the amount so paid, with interest from March 4, 1903, and costs.

Messrs. Curtis & Reid, for appellant:

For the purposes of taxation choses in action are not property, are incapable of being taxed as property, and the tax in question is void for that reason.

Cooley, Const. Lim. 5th ed. p. 479; Cooley, Taxn. 1st ed. p. 3; *Hart v. Smith*, 159 Ind. 182, 58 L. R. A. 949, 95 Am. St. Rep. 280, 64 N. E. 662.

The power to tax is not an unlimited, despotic power to make exactions, but it is restrained by fundamental constitutional principles, so as to make it a power for public good, and not for public harm, and so as to maintain the liberty and rights of the people, and not oppress them.

Cooley, Const. Lim. 5th ed. 603; *State ex rel. New Richmond v. Davidson*, 114 Wis. 563, 58 L. R. A. 739, 88 N. W. 596, 90 N. W. 1067; *Curtis v. Whipple*, 24 Wis. 354, 1 Am. Rep. 187.

Choses in action constitute no part of the aggregate wealth of the community. Their creation adds nothing to that wealth, and their destruction deducts nothing from it; 67 L. R. A.

and they are not "property" according to the constitutional principles of taxation.

People v. Hibernia Sav. & L. Soc. 51 Cal. 243, 21 Am. Rep. 704.

Not everything that is recognized as property is subject to taxation.

Black v. State, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522; *Hart v. Smith*, 159 Ind. 182, 58 L. R. A. 949, 95 Am. St. Rep. 280, 64 N. E. 662.

In order to constitute property subject to a property tax the thing must have intrinsic value, be capable of certain and definite valuation by the process provided for laying property taxes, and constitute a portion of the aggregate wealth of the community.

Black v. State, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522; *Pippin v. Ellison*, 34 N. C. (12 Ired. L.) 61, 55 Am. Dec. 403; *Pullen v. Raleigh*, 68 N. C. 451; *Re Jameson*, 1 Mich. 99; *White v. Robbins*, 21 Minn. 370; *Johnson v. Lexington*, 14 B. Mon. 648; *Covington v. Powell*, 2 Met. (Ky.) 226; *Chicago v. Hulbert*, 118 Ill. 632, 59 Am. Rep. 400, 8 N. E. 812; *People v. Hibernia Sav. & L. Soc.* 51 Cal. 243, 21 Am. Rep. 704.

At common law choses in action could not be seized or sold on execution because not regarded as property.

Freeman, Executions, § 112; *Ingalls v. Lord*, 1 Cow. 240; *Denton v. Livingston*, 9 Johns. 96, 6 Am. Dec. 264; *Dart v. Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544; *People ex rel. Martin v. Wayne County*, 5 Mich. 223; *Williams v. Reynolds*, 7 Ind. 622; *Stephens v. Cady*, 14 How. 528, 14 L. ed. 528.

It is property in possession and enjoyment, and not merely in right, which must ultimately pay every tax.

People v. Hibernia Sav. & L. Soc. 51 Cal. 243, 21 Am. Rep. 704.

It is the duty of the court to so construe the term "property" as to exclude credits therefrom if such construction would be at all reasonable.

Cooley, Taxn. 1st ed. p. 165.

A purpose to impose double taxation upon property is not to be presumed, but, to sustain a tax which would have that effect, the intent must be clear and unmistakable.

Wright v. Louisville & N. R. Co. 54 C. C. A. 672, 117 Fed. 1007; *Salem Iron Factory Co. v. Danvers*, 10 Mass. 514; *Nashua Sav. Bank v. Nashua*, 46 N. H. 389; *Amesbury Woollen & Cotton Mfg. Co. v. Amesbury*, 17 Mass. 461; *Bank of Georgia v. Savannah*, Dudley (Ga.) 132; *Iron City Bank v. Pittsburgh*, 37 Pa. 340; *Gordon v. Baltimore*, 5 Gill, 231.

A debt due from an insolvent debtor is

as much liquidated as a debt due from a solvent debtor.

Choses in action are either all property, or they are not. If, in considering them in connection with the fundamental principles involved in levying a property tax, they cannot all be treated as property, then they must be logically all excluded from the meaning of that term.

Black v. State, 113 Wis. 219, 90 Am. St. Rep. 853, 89 N. W. 522; *Knowlton v. Rock County*, 9 Wis. 410.

The taxation of choses in action as property violates the 14th Amendment to the Federal Constitution, and it should be held that it also violates § 1, art. 8, of the state Constitution.

Second Ward Sav. Bank v. Milwaukee, 94 Wis. 587, 69 N. W. 359; *Railroad Tax Case*, 8 Sawy. 238, 13 Fed. 722; *Santa Clara County v. Southern P. R. Co.* 18 Fed. 385; *Stroh v. Detroit*, 131 Mich. 109, 90 N. W. 1030.

Mr. E. M. Smart, with **Mr. John Van Hecke**, for respondent:

The legislature has the power, not only to prescribe what property shall be taxed, but also the rule by which it must be taxed; and the only limitation of that power is that the rule shall be uniform.

Wisconsin C. R. Co. v. Taylor County, 52 Wis. 37, 8 N. W. 833; Cooley, Taxn. 2d ed. pp. 5, 6.

A mortgagee may be taxed on his mortgage, although the land is also taxed for its full value to the mortgagor.

Detroit v. Detroit (Detroit v. Rents) 91 Mich. 78, 16 L. R. A. 60, 51 N. W. 787.

Credits are property. and are therefore proper subjects of taxation.

People v. Worthington, 21 Ill. 171, 74 Am. Dec. 86.

This does not amount to a double assessment.

Second Ward Sav. Bank v. Milwaukee, 94 Wis. 587, 69 N. W. 359, Cooley, Taxn. 2d ed. 225; *Griffin v. La Salle County*, 184 Ill. 276, 56 N. E. 397; *Judge v. Spencer*, 15 Utah, 242, 48 Pac. 1097; *Illinois Nat. Bank v. Kinsella*, 201 Ill. 31, 66 N. E. 338; *International Bldg. & L. Asso. v. Marion County*, 30 Ind. App. 12, 65 N. E. 297.

Taxation is not invalid because of unequal results.

Cooley, Taxn. 2d ed. 221; *Green Bay & M. Canal Co. v. Outagamie County*, 76 Wis. 587, 45 N. W. 536.

A mortgage is a "credit," and is "property," and the assessment of the mortgage and of the mortgaged property in full is not "double taxation."

McGregor v. Vangel, 24 Iowa, 436; *Taggart v. Sanilac County*, 71 Mich. 16, 38 N. W. 639; *People v. Worthington*, 21 Ill. 171, 67 L. R. A.

74 Am. Dec. 86; *Redmond v. Tarboro*, 106 N. C. 122, 7 L. R. A. 539, 10 S. E. 845; *Perrine v. Jacobs*, 64 Iowa, 79, 19 N. W. 861; *Jones v. Seward County*, 10 Neb. 154, 4 N. W. 946.

Cassoday, Ch. J., delivered the opinion of the court:

Counsel for the plaintiff contend with much ability that the notes and mortgages in question are not property, capable of being taxed as such in this state. Certainly the statutes have treated such debts as property and subject to taxation ever since the state has existed. This is obvious from the wording of different sections of the statutes. Thus the statute declares that "taxes shall be levied upon all property in this state, except such as is exempted therefrom." § 1034, Rev. Stat. 1878; § 1034, Rev. Stat. 1898. The same, in substance, was contained in § 1, chap. 15, Rev. Stat. 1849. Then, after defining the term "real property," "real estate," and "land," the statute provides that "the term 'personal property' as used in this title shall be construed to mean and include . . . all debts due from solvent debtors, whether on account, note, contract, bond, mortgage, or other security, or whether such debts are due or to become due." § 1036, Rev. Stat. 1878; § 1036, Rev. Stat. 1898. Those provisions were taken almost literally from § 19, chap. 130, p. 138, Laws 1868, and are substantially the same as § 3, chap. 15, Rev. Stat. 1849. Among the rules for construing the statutes, as prescribed therein, during the last forty-six years, we find that "the words 'personal property' include money, goods, chattels, things in action, and evidences of debt." And again that "the word 'property' includes property, real and personal." Subdivs. 14, 15, § 1, chap. 5, Rev. Stat. 1858; subdivs. 3, 4, § 4972, Rev. Stat. 1878; § 4972, Rev. Stat. 1898. The statute only exempts the taxpayer from "so much of the debts due or to become due to any person, as shall equal the amount of bona fide and unconditional debts by him owing." Subdiv. 10, § 1038, Rev. Stat. 1878; subdiv. 10, § 1038, Rev. Stat. 1898; subdiv. 10, § 2, chap. 130, p. 132, Laws 1868. Other sections of the statutes clearly require such notes and mortgages to be assessed as personal property. §§ 1055, 1056, Rev. Stat. 1878; §§ 1055, 1056, Rev. Stat. 1898. If such statutes are constitutional, then there can be no doubt but what the tax in question is valid.

The Constitution declares that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." Wis. Const. art. 8, § 1. If it is true that notes and

mortgages are not property subject to taxation under this clause of the Constitution, then it is very singular that the fact was not discovered by the able lawyers who have revised the statutes from time to time,—first in 1849, and then in 1858,—and especially those who revised the statutes of 1878, because that revision took place several years after the lengthy controversy and numerous conflicting decisions and opinions as to the validity of certain provisions of the statutes under the clause of the Constitution above quoted. The subject related to revenue, and was of vital importance to the state and its citizens; and, in revising the statutes on the subject, the revisers, from time to time, must have scrupulously sought to keep within the bounds of legislative power. The same may be said of the legislature, from time to time, amending the statutes in respect to taxation.

Such long and uniform sanction by law revisers and lawmakers of the right to tax notes and mortgages would, of course, be entitled to great weight in construing an ambiguous or doubtful provision of the Constitution, yet it is entitled to no weight if the statutes in question are in conflict with the plain meaning of the Constitutional provision quoted. *State ex rel. Hudd v. Timme*, 54 Wis. 318, 336–341, 11 N. W. 785; *State ex rel. Weiss v. District Board*, 76 Wis. 177, 195–199, 7 L. R. A. 330, 20 Am. St. Rep. 41, 44 N. W. 967; *State ex rel. Lamb v. Cunningham*, 83 Wis. 90, 141–143, 17 L. R. A. 145, 35 Am. St. Rep. 27, 53 N. W. 35, and cases there cited; *Travelers' Ins. Co. v. Fricke*, 94 Wis. 258, 266, 68 N. W. 958. The question of such validity is here squarely presented, and must be squarely met, and disposed of on the merits.

Undoubtedly, as stated by the tax commission and urged by counsel, that which gives a credit "value, and which the present assessment laws recognize and treat as property, consists, not in the written instruments or other evidences of the creditor's right or security, but in the right itself,—the creditor's right to receive and enforce payment of his demand. This right of the creditor is admittedly a thing of value, assuming always that the debtor is solvent. In many of its forms, with its evidences, it may be freely transferred from one person to another, and often performs the office of a medium of exchange more efficiently than money." Wis. Tax Com. 1903. p. 116. But that does not indicate that notes and mortgages are not property. On the contrary, it pretty clearly indicates that they are property. One definition of property in the Century Dictionary is: "The right to the use or enjoyment or the beneficial right of dis-

posal of anything that can be the subject of ownership; ownership; estate; especially ownership of tangible things. In the broader sense, a right of action is property." "A vested right of action is property in the same sense in which tangible things are property." Bouvier, Law Dict. That is a quotation from the opinion of the Supreme Court of the United States in *Pritchard v. Norton*, 106 U. S. 124, 132, 27 L. ed. 104, 107, 1 Sup. Ct. Rep. 102. Mr. Black says, "Personal property is further divided into property in possession and property or choses in action." [Law Dict.] In the latest Encyclopædia of Law, it is stated that, "in general the word 'property,' standing alone, will include choses in action. Thus the word without the qualifying term 'personal' has been held to include solvent credits. So it has been held to include bank notes, promissory notes, bills of exchange, bonds, insurance policies, judgments, and stock." 23 Am. & Eng. Enc. Law, 2d ed. pp. 264, 265. In support of the text numerous adjudications are cited. In one of them, Cooley, Ch. J., makes this statement: "A right of action is as much property as is a corporeal possession." *Power v. Harlow*, 57 Mich. 107, 111, 23 N. W. 606. This court has held, in effect, that notes and mortgages in favor of a nonresident and against a resident of this state are "property within this state," and subject to be reached by creditors' bill. *Bragg v. Gaynor*, 85 Wis. 468, 481–488, 21 L. R. A. 161, 55 N. W. 919. So this court has held that notes secured by mortgages on land in another state, and in the hands of an agent in such state, but belonging to a resident of this state, are "property in this state," within the meaning of the Constitution and the statutes of this state, and hence are taxable here. Const. art. 8, § 1; Rev. Stat. 1898, §§ 1034, 1036, 1038, 1040, 1056; *State ex rel. Dwinell v. Gaylord*, 73 Wis. 316, 323–325, 41 N. W. 521. It is there said that "such notes and mortgages, however, are mere evidences of indebtedness. The destruction of such evidences does not necessarily extinguish the debts. They are merely choses or things in action. . . . In the case of such intangible species of property, the thing that is valuable is 'the right of the creditor to receive property or money,' and to enforce such right by action in court." That case has since been sanctioned in this and other states. *Perrigo v. Milwaukee*, 92 Wis. 241, 65 N. W. 1025; *Howell v. Gordon*, 127 Mich. 517, 86 N. W. 1042. So it was held in Vermont that debts due from solvent debtors, residing in that state, to a nonresident creditor, upon promissory notes, were personal property, within the meaning of the statutes of that state,

and that the legislature of that state had power to enact a law subjecting such property in the hands of an agent there to taxation. *Cutlin v. Hull*, 21 Vt. 152. So it has been held in Alabama that solvent credits, evidenced by negotiable promissory notes, were taxable at the place of the owner's residence in that state, although secured by mortgage on lands in another state, where they were payable and held by an agent. *Boyd v. Selma*, 96 Ala. 144, 16 L. R. A. 729, 11 So. 393. There seems to be no escape from the conclusion that the notes and mortgages in question were property, within the meaning of the statutes cited, and the constitutional provision quoted.

2. The more important question is whether "the rule of taxation" prescribed by those statutes is "uniform," within the meaning of such constitutional provision. One of the grounds for claiming that such rule is not uniform is that the statutes mentioned only required taxes to be levied on "all debts due from solvent debtors," after deducting therefrom "the amount of bona fide and unconditional debts" owing by such taxpayer. In other words, the statutes omit from taxation debts due from insolvent debtors. It is claimed that, if "debts due from solvent debtors" are property, then debts due from insolvent debtors are also property, and that the statute requiring taxes to be levied upon the former without being levied upon the latter is in violation of the rule of uniformity required by the Constitution. If the statute is void upon the ground thus suggested, then we have never had a valid statute on the subject in this state. We have already shown that the statute under which the tax in question was levied has existed in substantially the same form ever since the revision of 1849. Before that, and several years prior to the adoption of our Constitution, the territorial legislature enacted that "the term personal property . . . shall be construed to include . . . debts due from solvent debtors, over and above the amount of debts owned by the owner thereof, whether due on account, contract, notes, bond, or mortgage." Wis. Terr. Laws 1841, No. 4, pp. 20, 21. That provision was taken almost literally from the Revised Statutes of New York, where the same has remained in force in substantially the same form ever since. N. Y. Rev. Stat. 1829, chap. 13, pt. 1, § 3, title 1, p. 388; 3 Birdseye's Rev. Stat. art. 1, § 2, sub. div. 4; N. Y. Codes & Gen. Laws, 2d ed. p. 3091. The question recurs, What is meant by the words "solvent debtors," as thus used in the statutes? Of course, "solvent debtors" include all who are not insolvent. Undoubtedly the meaning of the words depends very largely upon the subject to which they are

applied, and the circumstances under which they are used. In bankruptcy and insolvency laws and proceedings they have a different meaning than in common discourse. Thus it is said in a recent work that, "as used in the insolvency and bankruptcy laws, especially when applied to traders or persons engaged in commercial pursuits, the term 'insolvency' generally means the condition of a person who is unable to pay his debts as they become due in the ordinary course of business. According to this definition, a person may be insolvent, though he has assets exceeding in value the amount of all his liabilities." 16 Am. & Eng. Enc. Law, 2d ed. pp. 636, 637. But the same authority states in the same connection that, "in its popular and general sense, the term 'insolvency' denotes the insufficiency of the entire property and assets of an individual to pay his debts." Undoubtedly the general understanding is that an insolvent debtor is one whose property is insufficient to pay all his debts, or out of which his debts may be collected. Century Dict. The statute in question was made for the guidance of assessors and people generally. It is to have a practical construction. It was never intended that the assessor should engage in a judicial investigation to ascertain the exact balance between the assets and liabilities of such debtors. Where a person although indebted to others, has business or income, and pays his debts, or has property out of which collection can be made, then he may fairly be regarded as a solvent debtor.

Under the constitutional provision quoted, was it competent for the legislature to require taxes to be levied upon "debts due from solvent debtors," without requiring taxes also to be levied upon debts due from insolvent debtors? In other words, was the rule of uniformity broken by such discrimination between good and bad debts? This court held many years ago that "the legislature has power to prescribe, not only the property to be taxed, but the rule by which it must be taxed, and the only limitation of that power is that the rule shall be uniform. The power to prescribe what property shall be taxed necessarily implies the power to prescribe what property shall be exempt." *Wisconsin C. R. Co. v. Taylor County*, 52 Wis. 37, 89 *et seq.*, 8 N. W. 833. It was there said, in effect, that such rule of taxation had never been regarded as requiring "uniformity as to the subjects of taxation;" and numerous provisions of the statutes were there referred to as illustrating the truth of the statement. While recognizing that "arbitrary classification of inclusion and exclusion," based upon "no rational grounds for distinction in the character, use,

productiveness, or circumstances of the property or subjects taxed," could not be indulged, yet this court, in a later case, reaffirmed the authority of the legislature to make legitimate classification of property for the purposes of taxation. *State ex rel. Sanderson v. Mann*, 76 Wis. 469, 476, 477, 45 N. W. 526, 46 N. W. 51. It was there said that, since the *Taylor County Case*, "numerous decisions have been made by courts of high authority sanctioning the reasonable classifications of property for the purposes of taxation, and holding that the same were not in violation of the rule of uniformity;" citing a number of cases in support of the proposition. See *Black v. State*, 113 Wis. 216, 217, 90 Am. St. Rep. 853, 89 N. W. 522. The new Constitution of Pennsylvania of 1873 provides that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." Pa. Const. art. 9, § 1. See 52 Wis. 87, 8 N. W. 833. Under that provision it was held in that state that "the power to impose taxes for the support of the government, with the power of classification, still belonging to the legislature under the new Constitution, the selection of the subjects thereof, their classification, and the methods of collection to be provided, are matters purely legislative. The power to classify being given, all that is then required by the Constitution is that the taxes shall be uniform upon the members of a class; and it is the uniformity of taxation according to the classification made which is a question to be determined by the courts. Absolute equality is unattainable, and a mere diversity in the methods of assessment and collection violates no rule of constitutional right, if, when they are applied, there is substantial uniformity in the results." *Com. v. Delaware Div. Canal Co.* 123 Pa. 594, 615, 2 L. R. A. 798, 16 Atl. 584; *Com. v. Lehigh Valley R. Co.* 129 Pa. 455, 18 Atl. 406, 410. The Constitution of Missouri of 1875 requires that taxes "shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." Mo. Const. art. 10, § 3. In a case arising in that state under that provision of the Constitution, it was held by the Supreme Court of the United States that "diversity of taxation, both with respect to the amount imposed and the various species of property selected, either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality in taxation, and of a just adaptation of property to its burdens. A system of taxation which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the" 67 L. R. A.

principle of uniformity and equality in taxation, and of a just adaptation of property to its burdens." *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250. If, for the purposes of taxation, any classification of debts is permissible, under the constitutional provision in question, then certainly the difference between "debts due from solvent debtors" and debts due from insolvent debtors is sufficient to furnish a basis for such classification. We must hold that the statute in question is not void by reason of such classification.

3. It is further contended that, if "debts due from solvent debtors" are property, within the sense mentioned, yet that to tax the same necessarily results in double taxation, and hence is repugnant to the rule of uniformity required by our Constitution. Our attention is called to the report of the Wisconsin State Tax Commission on the subject. Pp. 116-118. Undoubtedly it is true, as there said, that "for every credit there exists an indebtedness of equal amount;" that "the sum of all credits in the world is exactly equal to the sum of all indebtedness;" that if, by some method of exchange or transfers, all debts were paid, then the corresponding credits would thereby become wholly extinguished; that "the result would be a great shifting of property or changing of financial resources among individuals," but that, there would be no less actual property in the world; "that to treat credits as property," as well as all lands and tangible things, "is, in substance and effect, a duplication of values;" that "such duplication results in double taxation, in economic consideration, and from the standpoint of substantial justice and equity." There may be great force in such statement when addressed to the legislature engaged in the framing of taxation laws, but they are only entitled to consideration here as bearing upon the constitutionality of the statutes mentioned. The report assumes the constitutionality of such statutes, and does "not contend that such duplication results in double taxation, in technical and legal contemplation, according to the general current of judicial decisions." We are not called upon to consider the wisdom of the statutes, but the power of the legislature to enact the statutes. The case seemingly most relied upon by counsel is *People v. Hibernia Sav. & L. Soc.* 51 Cal. 243, 21 Am. Rep. 704, where it was held that "credits are not property in the sense in which the word 'property' is used in § 13 of article 11 of the Constitution, and cannot be assessed for taxes or taxed as property, even if secured by mortgage." The section of the Constitution of that state therein re-

ferred to declares that "taxation shall be equal and uniform throughout the state. All property in this state shall be taxed in proportion to its value, to be ascertained as directed by law." P. 244, 51 Cal., p. 705, 21 Am. Rep. It will be observed that this provision contains restrictions upon legislative power not found in our Constitution. The equality of taxation and the proportionate value of property are requirements not mentioned in our Constitution. The decision in that case was in obedience to such requirements. It seems to be placed upon the grounds that credits were incapable of proportionate valuation as there required, and that to tax property purchased on credit, and also to tax the credit, was unequal taxation, and hence forbidden by the Constitution. The provision of the Constitution of that state is quite similar to some of those referred to from other states in the *Taylor County Case*, where it was said that "the provisions quoted from the several state Constitutions have each contained one or more elements of restriction upon legislative power not present in our Constitution." 52 Wis. 88, 8 N. W. 833. See pp. 60-63 and 78-88, 52 Wis., 8 N. W. 833. The decision in that case is certainly not an authority in a case under our Constitution, containing no such restrictions. In Pennsylvania, where, as we have shown, the constitutional restriction is very much like our own, it is held that "the legislature has the power to impose double taxation, provided it is done in such manner as to secure the uniformity which the Constitution requires." *Com. v. Fall Brook Coal Co.* 156 Pa. 488, 26 Atl. 1071; *Com. v. Lehigh Coal & Nat. Co.* 162 Pa. 603, 29 Atl. 664. Of course, there is a presumption against the existence of an intention to impose such double taxation, until overcome by the express language of the statute. *Ibid.* See also *Stroh v. Detroit*, 131 Mich. 109, 90 N. W. 1029. In this state it has been held that, "in order to render taxation double, one person or known subject of taxation must be required to contribute twice directly to the same burden, while other subjects of taxation are required to contribute but once." *Second Ward Sav. Bank v. Milwaukee*, 94 Wis. 587, 69 N. W. 359. In that case the shares of stock in the bank were taxed as the property of the shareholder, while the real estate forming a part of the capital stock was taxed as the property of the bank. And in a recent case it was held by this court "that the fact that the capital of such an unincorporated association engaged in banking consists of real property, and was taxed as such to the association, does not affect the question of its being taxable in its intangible form to the members 67 L. R. A.

of such association." *State ex rel. Batz v. Lewis*, 118 Wis. 432, 95 N. W. 388. The correctness of these decisions has not been questioned, and we perceive no good reason why they are not based upon solid ground. The case at bar does not present a case of double taxation, as defined by this court in the cases cited. We must hold that the statutes in question are not repugnant to the constitutional requirement that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." Const. art. 8. § 1.

4. Counsel also contend that the taxation of "debts due from solvent debtors" is prohibited by that clause of the Federal Constitution which declares that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. Amend. art. 14, § 1. The question was determined by the Supreme Court of the United States against such contention of counsel many years ago, in a case wherein it was held that "this court can afford the citizen of a state no relief from the enforcement of her laws prescribing the mode and subjects of taxation if they neither trench upon Federal authority, nor violate any right recognized or secured by the Constitution of the United States. The Constitution does not prohibit a state from taxing her resident citizens for debts held by them against a nonresident, evidenced by his bonds, payment whereof is secured by his deeds of trust or mortgages upon real estate situate in another state. *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558, Affirming the same case in 42 Conn. 426, 19 Am. Rep. 546. See also *Kentucky Railroad Tax Cases (Cincinnati, N. O. & T. P. R. Co. v. Kentucky)* 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Gibbons v. District of Columbia*, 116 U. S. 404, 29 L. ed. 680, 6 Sup. Ct. Rep. 427; *Davenport Nat. Bank v. Davenport Bd. of Equalization*, 123 U. S. 83, 31 L. ed. 94, 8 Sup. Ct. Rep. 73; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; *Western U. Teleg. Co. v. Indiana*, 165 U. S. 304, 41 L. ed. 725, 17 Sup. Ct. Rep. 345; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *Kidd v. Alabama*, 188 U. S. 730, 47 L. ed. 669, 23 Sup. Ct. Rep. 401. Several of these cases sanction the classification of property in the states for the purposes of taxation. We must hold that the statutes in question are valid enactments, and that the notes and mortgages belonging to the plaintiff were subject to taxation.

The order of the Circuit Court is affirmed.

Dodge, J., dissenting:

I concur in the holding of my brethren *that*, in the light of constitutional and legislative history, the framers of our Constitution must be deemed to have used the word "property," in § 1, art. 8, in a sense broad enough to include credits, however unphilosophical may be the treatment of such assets as property for purpose of taxation. I also yield to the authority of the heretofore decided cases in this court declaring that taxation both of the credits and of all the property of the debtors does not constitute such double taxation as to breach the uniformity rule of the Constitution, however clear may be the fact that thereby the debtor is *pro tanto* taxed twice. *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481; *San Mateo County v. Southern P. R. Co.* 8 Sawy. 238, 13 Fed. 722, 732. Also I agree that inclusion of debts of solvent debtors, and exclusion of others, is legitimate classification, upon distinctions germane to the subject of taxation. So that, as to most of the subjects discussed in the opinion in this case, I am in general accord with that document, but to the conclusion reached I think there is a still further obstacle urged in argument, but passed without comment in the opinion. That I shall attempt to state.

If we concede that, for purposes of taxation, credits are property, the lawmakers must accept with that concession the burdens and limitations imposed on them in exercising their power to tax property. The limitation imposed by our Constitution is that the rule of taxation must be uniform. This is re-enforced by the 14th Amendment to the Federal Constitution, which prohibits the state from denying to any person the equal protection of the law. The state Constitution prohibits discrimination in rules of taxation between different kinds of that property which the legislature prescribes to be taxed, while the Federal Constitution protects the owners of property against discrimination in tax laws, as in all others. *Black v. State*, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522; *State v. Whitcom* (Wis.) 99 N. W. 468. I have found myself unable to escape the conviction that both of these prohibitions have been defied in that provision of our legislative scheme of taxation which permits the deduction of debts from the value of the credits owned by any person, in ascertaining their taxable value, without permitting such deduction from the values of other property. The statutory rule of taxation of all prescribed property is that the true cash value is to be ascertained, and that all general taxes are to be levied proportionately to such values. Assenting, as I do with some hesitation, to the 67 L. R. A.

view of my brethren that the statutes direct the ascertainment of the cash value of credits, as distinguished from their nominal or face value, I still cannot think that uniformity of rule is maintained when deductions are permitted from the value of one kind of the property prescribed to be taxed, and not from that of other kinds. I think that my brethren would hardly hold that uniformity was maintained in a statute which permitted deduction of the owner's debts from the value of his cattle, but not of his horses; of his wheat, but not of his corn; but I can see no difference between such cases and that now before us, in the principle involved. If a good \$1,000 bond and \$1,000 worth of lumber are both alike property, in the constitutional sense, why should one be valued for taxation at \$500, and the other at \$1,000, as they would be if the owner of each owed \$500? Such discrimination signifies a perhaps unconscious recognition of a philosophical absurdity in attempting to class credits with tangible assets as taxable property, but only upon such classification does the power to tax credits as property exist at all under our Constitution. Some have suggested that one whose wealth consists of credits has wealth only to the excess of his credits over his debts. This may be conceded without advancing the argument. Equally the wealth of him who has tangible assets is not correctly measured unless his debts be deducted. In neither case, however, is that material to the question of taxation, for it is not the wealth of the individual on which the Constitution authorizes taxes to be laid, but the property within this state. Others have urged that credits constitute a fund from which men ordinarily expect to discharge their debts, and that somehow this justifies taxation of only the balance. The premise, however, is unfounded in fact. The farmer, the merchant, the manufacturer, ordinarily relies on the proceeds of his crops or stock in trade to pay his current debts, rather than the securities in which he may have invested. Usually only he who has not surplus for investment relies on his credits to meet debts. He whose wealth is mainly invested in bonds and mortgage does not. No other ground worthy even of mention has, to my knowledge, ever been advanced to justify such a classification. I find myself unable to conceive any. While, of course, I must concede that not only may the legislature exempt certain classes of property, by implication, from the power to prescribe that which shall be taxed, and may even classify that which they do prescribe for taxation, so that some may be treated differently from other classes, without disobedience of the behest that the rule

be uniform, still such classification must be legitimate,—must be based upon distinctions having real relation to the differences in the rule of taxation applied to each. *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 530, 58 L. R. A. 748, 91 Am. St. Rep. 934, 90 N. W. 1098; *Black v. State*, 113 Wis. 205, 90 Am. St. Rep. 853, 89 N. W. 522; *State v. Whitcom* (Wis.) 99 N. W. 468. Finding, as I do, no differences between credits and tangible property in any wise germane to the valuing one with a deduction for debts, and the other without, I cannot escape the conclusion that the rule of uniformity is infringed by this statute.

The still further classification attempted by the legislation of 1903 (Laws 1903, chap. 378, p. 601, whereby the most solvent class of credits—those secured by mortgage on real estate—is exempted entirely, while others are taxed, will present curious and interesting questions when, if ever, it comes up for judicial consideration.

The further question whether certain persons are denied “equal protection of the laws” by the provision now under discussion, as that phrase is used in the 14th Amendment to the Federal Constitution, is one upon which this court cannot speak finally unless it speak affirmatively. The final construction and enforcement of this prohibition lie with the courts of the United States. The ultimate court of that jurisdiction has not as yet had occasion to declare upon the validity of such a tax scheme as ours, but the circuit court has, and that, too, in no uncertain terms, by the pen of one of the ablest of the then members of the Supreme Court,—Mr. Justice Field. In *San Mateo County v. Southern P. R. Co.* 8 Sawy. 238, 13 Fed. 722, 732, and *Santa Clara County v. Southern P. R. Co.* 18 Fed. 385, was considered a law which authorized deduction of mortgage debts from the value of other property in ascertaining its valuation for taxation, but denied such deduction from the value of property belonging to railroad

companies. It was held that since the law designated property as the subject of taxation, and its value as the basis of apportionment, the allowance of deduction of mortgage debts from true value of some, and the denial of similar deduction from that of other, property in the taxable class, denied to the owners of the latter equal protection of law. The former of these cases was taken to the Supreme Court, but was affirmed on other grounds; that court recognizing the very grave importance of the question whether the state law was in defiance of the Federal Constitution, but restraining itself from expressing any opinion thereon, because such question belonged “to a class which that court should not decide unless their determination is essential to the disposal of the case.” 118 U. S. 394, 410, 30 L. ed. 118, 123, 6 Sup. Ct. Rep. 1182, 1140. These two cases have, I believe, never since been seriously questioned in the Federal courts, but have often been referred to approvingly and as authority. *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 168. They seem in accord with the principle decided in *New York v. Weaver*, 100 U. S. 539, 25 L. ed. 705, which held that a law permitting deduction of debts from the total of other personal property, but denying such deduction from value of stock in national banks, was discriminatory against the latter, and therefore forbidden by § 5219, U. S. Rev. Stat. (U. S. Comp. Stat. 1901, p. 3502). I shall not feel justified in occupying space to quote, as I should like to do, from the very clear and vigorous arguments of Field, J. Suffice it to say that they convince me that equal protection of the laws is denied when a creditor class is created of those whose credits equal or exceed their debts, and an immunity from taxation granted them which is withheld from the debtor class, composed of those whose debts exceed their credits. Of the policy of such a law, I might properly express opinion only as a citizen.

NORTH CAROLINA SUPREME COURT.

G. O. GOODWIN

v.

A. B. CLAYTOR *et al.*, *Appts.*

(.....N. C.....)

1. The right to exemption from execution is subject to the law of the forum.
2. A debtor cannot claim the benefit of the exemption law of the state of his domicile, even against his creditor residing there, with respect to a debt due him by a corporation, located and doing business in another state, which is also the situs of the debt, and which debt has been attached by the creditor at the domicile of the corporation.
3. Taking personal judgment against the principal debtor and the gar-

nishee does not waive the lien of the attachment, where the statute contemplates personal judgment against the garnishee, and the judgment against the principal debtor is void for lack of jurisdiction.

4. The debt owing by the garnishee to the principal debtor at the time of his appearance and answer, and not that due at the time of service of summons, may be applied in satisfaction of the claim of the attaching creditor, under a statute providing that judgment shall be entered for all sums of money due to the principal debtor from him.
5. A foreign corporation which has its principal place of business and the bulk of its property in a state with whose laws it has complied for the purpose of obtaining the privilege of doing business there, which subject it to the service of process there, is subject to the jurisdiction of the

NOTE.—Where debt garnishable.

- I. Domicil of garnishing creditor, 209.
- II. Domicil of debtor, 209.
- III. State, other than his domicile, where debt- or temporarily present, 218.
- IV. State where foreign corporation engaged in business, 214.
- V. Conflict of jurisdiction, 220.
- VI. Exemptions, 222.

Scope.

The earlier cases on this subject are collected in the note to *Illinois C. R. Co. v. Smith*, 19 L. R. A. 577. The present note covers only the cases upon the point decided since that note, and includes only those cases in which the question is discussed upon general principles of constitutional law and private international law. Cases which turn upon the construction of the language of local statutes are not included.

As to attachment of shares of stock in foreign corporation, see note to *Simpson v. Jersey City Contracting Co.* 55 L. R. A. 796.

I. Domicil of garnishing creditor.

It is apparent, from the cases cited in the following subdivisions, that the domicile of the principal defendant (*i. e.*, the person to whom the debt sought to be garnished is due), and of the garnishee (*i. e.*, the person owing the debt sought to be garnished), has an important bearing upon the question whether a debt has a situs in a particular state so as to make it competent for that state to subject it to garnishment. The residence of the garnishing creditor, however, has no bearing upon this question, though it may, of course, affect the question whether a particular debt falls within the local garnishment laws, conceding that it may constitutionally be embraced by them.

II. Domicil of debtor.

Since the publication of the note in 19 L. R. A. 577, it has been authoritatively determined by the United States Supreme Court, in *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, and *King v. Cross*, 175 U. S. 398, 44 L. ed. 211, 20 67 L. R. A.

Sup. Ct. Rep. 181, that a court of the state in which the debtor is domiciled may, without service on the nonresident creditor except by publication, acquire jurisdiction to render a judgment in garnishment, condemning a debt, payable generally, to the satisfaction of a claim against the nonresident creditor, which judgment shall be entitled to full faith and credit in other states, under the Federal Constitution. To this extent these decisions are, of course, binding upon the state courts, and are conclusive as to the duty of a court of one state to recognize a judgment in garnishment proceedings rendered in another under the circumstances mentioned. They rest upon the fundamental proposition, which is expressly declared in the latter case, that such a proceeding, though the nonresident creditor be served constructively only, does not deny due process of law. But, while they lend strong support to that general proposition, they are not necessarily conclusive upon the state courts with respect to it, so far as it affects the question whether a state court will take jurisdiction in a domestic proceeding under such circumstances, since a decision by a state court in a domestic proceeding that a particular course of procedure does not constitute due process of law, is not reviewable by the Federal Supreme Court. As a state court, however, is bound to concede that such a proceeding, when conducted in another state under these circumstances, constitutes due process of law, it is not likely to decline jurisdiction of a domestic proceeding under the same circumstances upon the ground that it does not constitute due process of law, even if, prior to the decisions of the Supreme Court, it had adopted the other view.

The position of the Supreme Court does not rest upon any abstract reasoning with respect to the situs of a debt, but upon the broad ground suggested by the following quotation from the opinion in the first case: "The essential service of foreign-attachment laws is to reach and arrest the payment of what is due and might be paid to a nonresident to the defeat of his creditors. To do it, you must go to the domicile of his debtor, and can only do it under the laws and procedure in force there." The idea that jurisdiction in such case does

courts of that state in actions to collect debts due from it either to foreign or domestic creditors, so far as foreign creditors are permitted to maintain actions in the state.

6. **Wages due by a corporation, which, although having its domicil of origin in one state, has acquired a domicil for business purposes by adoption in another one where its property is located, to a salesman whose services are rendered in still another state, where he resides, are subject to attachment for the debt of the salesman in favor of a creditor residing in the state of the latter's domicil at the adopted domicil of the corporation, under a statute providing that an action may be brought against a foreign corporation by a plaintiff not a resident of the state when the cause of action shall have arisen, or the subject of the action shall be situated, within the state.**
7. **A statute exempting wages from the reach of creditors in supplementary proceedings will operate in favor of non-**

residents, and will be construed to include property sought to be reached by mesne process, such as writs of attachment and garnishment issued to place the property in the custody of the court to preserve it for application to plaintiff's claim.

(December 13, 1904.)

A PPEAL by defendants from a judgment of the Superior Court for Forsyth County in favor of plaintiff in a garnishment proceeding to reach a debt owing by the defendant corporation to its employee. *Reversed.*

Statement by **Walker, J.:**

This action was heard in the superior court of Forsyth county at spring term, 1904, by McNeill, J., upon a case agreed as follows:

The action was commenced before a jus-

not depend upon the situs of the debt, but upon the control which is obtained over the debtor, is still further emphasized in *Mooney v. Buford & G. Mfg. Co.* 18 C. C. A. 421, 34 U. S. App. 581, 72 Fed. 32. In *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 36 L. R. A. 640, 56 Am. St. Rep. 275, 46 N. E. 631, the court says: "To hold that the situs of the debt determines the question of jurisdiction is practically to hold that a debt cannot be garnished at all in foreign attachments, for the very ground of a foreign attachment is the nonresidence of the principal defendant, who, in cases of garnishment, is the creditor of the garnishee; and, if the debt which the garnishee owes to his creditor can be reached only by proceedings had where such creditor resides,—that is, where the debt has its situs,—it cannot be reached in foreign attachment at all."

While the debt involved in the *Sturm Case* was for wages earned by the nonresident creditor in the state of his domicil, and would, undoubtedly, in the ordinary course, have been paid there, the decision is nevertheless upon the assumption that the debt was payable generally, and that there was no "special limitation or provision in respect to payment." This assumption introduces a qualification into the doctrine as actually established by the case, though, in view of the broad ground upon which the decision rests, it is difficult to perceive how the question whether the debt is payable generally, or is expressly made payable at some particular place, can have any legitimate effect upon the question. The qualification, nevertheless, must be accepted as attaching to the actual decision made. It is difficult to align the cases with reference to the distinction thus suggested, since it is not always clear, when the court states that the debt was payable in a certain state, whether it means that it was expressly payable there, or was by legal implication payable there. For instance, in the opinion in *Missouri P. R. Co. v. Sharitt*, 43 Kan. 375, 8 L. R. A. 385, 19 Am. St. Rep. 143, 23 Pac. 430 (referred to in the *Sturm Case*), the court said that the debt was payable in Kansas, the creditor's domicil; whereas, in the *Sturm Case*, upon substantially the same state of facts, the court assumed that the debt was payable generally. The distinction has, how-

ever, been recognized in other cases. Thus, it will be observed that the case next cited, which upholds the jurisdiction of the court of the debtor's domicil, makes the same qualification as the *Sturm Case*.

A debt having no special provision in regard to payment is payable at any place, and, hence, may be attached at the domicil of the debtor, although the creditor's domicil may be elsewhere. *Barbour v. Boyce*, 7 Ohio, N. P. 504. The court said that the question whether a debt due a nonresident is garnishable at the domicil of the debtor when made payable at a particular place outside that domicil was left open in the *Sturm Case*.

And the distinction is recognized in the cases next cited, which deny the jurisdiction of the court of the debtor's domicil if the debt is payable elsewhere.

A debt due from a domestic corporation to a nonresident, which is payable at the latter's domicil, is not subject to garnishment. *Central R. Co. v. Brinson*, 109 Ga. 354, 77 Am. St. Rep. 382, 34 S. E. 597. The decision in this case was followed in *Johnson v. Southern R. Co.* 110 Ga. 303, 34 S. E. 1002.

A debt due a nonresident and payable at the latter's domicil is not subject to garnishment in Georgia. *Beasley v. Lennox-Haldeman Co.* 116 Ga. 13, 42 S. E. 385. It does not expressly appear in this case that the garnishee was domiciled in Georgia, but that was probably the fact; and the decision is upon the ground that the situs of a debt is at the place where a creditor is domiciled. And this position was adhered to in the subsequent cases of *Hugh v. Padrova*, 119 Ga. 648, 46 S. E. 859, and *Glower v. Glidden Varnish Co.* 120 Ga. 983, 48 S. E. 355.

A debtor can be garnished only in the state where the debt is payable if that be the place of the residence of his creditor. *Bullard v. Chaffee*, 61 Neb. 83, 51 L. R. A. 715, 84 N. W. 604.

It is difficult to determine whether the decisions in the cases last cited are upon the assumption that the debt was expressly payable in a state other than that in which the debtor was domiciled, or upon the assumption that it was, by legal implication, payable in such other state. Upon the former assumption,

tice of the peace by Goodwin, a resident of the state of Virginia, against Claytor, also a resident of the state of Virginia, for the recovery of \$109.67, with interest on \$96.01 from January 14, 1903, due by judgment. The indebtedness of Claytor to Goodwin is admitted. Service of summons was duly had by publication, and by garnishment of a debt due from the R. J. Reynolds Tobacco Company to Claytor. Claytor is an employee of the R. J. Reynolds Tobacco Company in the capacity of traveling salesman, and the money which was attached in the hands of the R. J. Reynolds Tobacco Company was the earnings of Claytor for his personal services; and said earnings accrued within sixty days next preceding the institution of this action, service of garnishment, filing of answer, and the order of the justice. These earnings were used for the

support of a family dependent upon him. It is admitted that the R. J. Reynolds Tobacco Company is a corporation duly chartered and created under and by virtue of the laws of the state of New Jersey, and is engaged in the manufacture of tobacco, with its principal place of business and bulk of its property in Winston, North Carolina, it having no property in New Jersey, save that such office as is required by the laws of New Jersey is located there. The said company has complied with the laws of North Carolina in reference to foreign corporations of the nature and character of this company. The contract between Claytor and the company was signed by Claytor in Virginia, and returned to Winston by mail. The preliminary arrangements, however, and the principle involved in the contract were agreed upon at the office of the company in

these decisions would not be inconsistent with the decisions of the United States Supreme Court already referred to, but upon the latter assumption they would be.

Louisville & N. R. Co. v. Nash, 118 Ala. 477, 41 L. R. A. 331, 72 Am. St. Rep. 181, 23 So. 825, upon substantially the same state of facts involved in the *Sturm* Case, denied the jurisdiction of a court of the domicile of the debtor to garnish an indebtedness due to a nonresident creditor, who was served within the state and did not appear. The decision which was rendered prior to the decision in the *Sturm* Case is upon the broad ground that the situs of a debt for the purpose of garnishment is at the domicile of the creditor, and not at the domicile of the debtor, and does not rest upon any distinction with respect to the place of payment.

McBee v. Purcell Nat. Bank, 1 Ind. Terr. 288, 37 S. W. 55—holding that, where money deposited in a bank by a nonresident is payable over the counter, the situs of the debt for the purpose of garnishment is the place of deposit,—seems to assume that, in order to confer jurisdiction upon a court of the debtor's domicile, it is not sufficient that the debt be payable generally, but that it must, either by contract or by implication of law, be payable at the debtor's domicile.

Some of the cases, however, have expressly applied the doctrine that a debt due a nonresident is subject to garnishment at the domicile of the debtor, in cases in which the debt was expressly payable in another state. Thus, *Tootle v. Coleman*, 57 L. R. A. 120, 46 C. C. A. 132, 107 Fed. 41, held that debts due from parties domiciled in Kansas, payable in Missouri, for goods purchased in the latter state, were subject to garnishment in Kansas, notwithstanding that the creditors were nonresidents, and were served by publication only. The implication in this case is that the contract expressly made Missouri the place of payment. At all events, it is clear that the court recognizes no distinction based upon the fact whether the debt is payable generally, or is expressly made payable at a certain place.

Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co. 127 Mo. 242, 27 L. R. A. 631, 48 Am. St. Rep. 626, 29 S. W. 1010, also holds that the situs of a debt due a nonresident for the pur-

poses of garnishment is at the domicile of the debtor, even though payable elsewhere; and expressly overrules the exception to the rule made by previous decisions of the appellate court, when the debt, by the terms of the contract, is made payable elsewhere.

So, a debt due from a resident to a nonresident is subject to garnishment, although the debt was payable, and the contract out of which it arose was performed, outside the state. *Dinkins v. Crunden-Martin Woodenware Co.* 99 Mo. App. 310, 73 S. W. 246.

Under the Illinois statute, a creditor may have an attachment against his debtor, who is a nonresident, and have garnishee process against all residents indebted to such debtor, notwithstanding that the indebtedness garnished is due in the state where the principal defendant resides. *Pomeroy v. Rand, McN. & Co.* 157 Ill. 176, 41 N. E. 636.

So, *Hawley v. Hurd*, 72 Vt. 122, 52 L. R. A. 195, 82 Am. St. Rep. 922, 47 Atl. 401, declared that the rule was established in Vermont that a resident trustee is chargeable with respect to a debt payable to a nonresident in the state of his domicile; and applied the rule to notes made by a person domiciled in Vermont which were expressly payable in New York to a person domiciled in the latter state.

Rothschild v. Knight, 176 Mass. 48, 57 N. E. 337, without qualifying the doctrine by any reference to the place of payment of the debt, declares generally that, so far as the attachability of a debt depends upon its situs, it must be held that the situs with reference to collection is the place where the proceedings may be had against the debtor. It does not appear, as a matter of fact, whether the debt involved was payable generally, or at some particular place.

Bragg v. Gaynor, 85 Wis. 468, 21 L. R. A. 164, 55 N. W. 919, declaring that debts owing to nonresidents, although represented by notes and mortgages, have their situs within the state for the purpose of garnishment or creditors' bills in favor of those to whom the creditor is indebted, suggests no distinction based upon the fact whether or not the notes expressly designate a place of payment.

Reimers v. Seacot Mfg. Co. 30 L. R. A. 365, 17 C. C. A. 228, 37 U. S. App. 426, 70 Fed. 573, declares generally, without any reference to

Winston. The salary of Claytor is usually paid him by check upon a bank in New York, which is sent to him by mail in Virginia, but occasionally a check is drawn on a bank in Winston and mailed to him in Virginia. These checks are sent from the office of the company in Winston. The contract between the company and Claytor does not fix where or how his salary shall be paid. All services performed and done under and by virtue of this contract are performed and done in the states of Virginia and West Virginia, and no part of said work is done in North Carolina. At the date of the service of the writ of garnishment on the company, it was indebted to Claytor by reason of the contract in the sum of \$16.55 for salary and \$17.58 expense money, and likewise, since the service of the writ of garnishment, has become indebted to Claytor up

to the date of filing the answer in the sum of \$86 for salary, and \$—— for expense money; the expense money being advanced by Claytor, and the company reimbursing him for the same upon receiving statement thereof.

The laws of Virginia upon the question of exemptions are as follows:

Section 3630 of the Code of 1887 [Code 1904, p. 1935]: "Every householder or head of a family residing in this state shall be entitled . . . to hold exempt from levy, seizure, garnishment, or sale under any execution, order, or process issued on any demand for a debt or liability on contract, hereafter contracted, his real and personal property, or either, to be selected by him, including money and debts due him, to the value of not exceeding \$2,000."

Section 3652 [Code 1904, p. 1949]:

the place of payment, that it is within the competence of the sovereign of the residence of the debtor, by reason of its control over its own residents, to pass laws subjecting the debt to seizure within its territorial sovereignty. The case, however, was *obiter* on this point.

In the two cases next cited it does not appear whether the debt was payable generally, or at a place expressly named.

The situs of a debt due from a New York insurance company to a resident of North Carolina, upon account of a loss which occurred in the latter state, is in New York, so far as to authorize process of attachment or garnishment to be taken out in that state. *Sexton v. Phoenix Ins. Co.* 132 N. C. 1, 43 S. E. 479.

A debt due from a resident to a nonresident is subject to attachment. *Olcott v. Guerinck*, 19 Ohio (C. C.) 32.

Rice v. Sharpleigh Hardware Co. 85 Fed. 559, is not opposed to the doctrine that a resident debtor of a nonresident may be garnished on account of the debt, as in this case a person claiming to be a creditor of the nonresident principal defendant undertook to garnish himself upon account of an indebtedness admitted by him to be due to the nonresident, and the decision was merely that the garnishment statute did not contemplate or permit the same person to be both garnishing creditor and garnishee.

The cases above reviewed seem to indicate a tendency to disregard the qualification introduced into the decision in the *Sturm* Case, by the assumption of the court in that case that the debt was payable generally, and had "no special limitation or provision in respect to payment." It is not probable that the Supreme Court will adhere to that qualification. No mention is made of it in *Kling v. Cross*, 175 U. S. 396, 44 L. ed. 211, 20 Sup. Ct. Rep. 131. So far as appears, however, the debt in the latter case was not expressly payable in a state other than that in which the debtor was domiciled, and the decision is not necessarily inconsistent with the qualification. As before suggested, it is difficult to see how the fact that the debt is expressly made payable in a certain state can affect the question, since, even in that case, it is suable wherever the debtor may be found and served with process.

67 L. R. A.

The general question, whether a judgment rendered in one state is subject to garnishment in another, is not within the scope of this *note*, since it does not turn upon the domicile of any of the parties to the proceedings. It may be said here, however, that the weight of authority holds that a judgment is not subject to garnishment in a state other than that in which it was rendered; and therefore a judgment is not within the rule declared in the *Sturm* Case, that an indebtedness, not expressly payable elsewhere, is subject to garnishment at the domicile of the debtor; and it has been expressly held by the United States Supreme Court in *Wabash R. Co. v. Tourville*, 179 U. S. 322, 45 L. ed. 210, 21 Sup. Ct. Rep. 113,—a case substantially like the *Sturm* Case except that the indebtedness had been reduced to judgment,—that a judgment rendered against a corporation in Missouri was not subject to garnishment in Illinois, in which state the corporation was separately organized. The decision of the Missouri supreme court in *Tourville v. Wabash R. Co.* 148 Mo. 614, 71 Am. St. Rep. 650, 50 S. W. 300, to the same effect, was affirmed.

So, it was held in *Boyle v. Musser-Sauntry Land, Logging, & Mfg. Co.* 88 Minn. 456, 97 Am. St. Rep. 538, 93 N. W. 520, that a judgment obtained in, and by a citizen of, Minnesota against a corporation organized in Iowa, but doing business and having an agent and an office in Minnesota, cannot be impounded or condemned in either attachment or garnishment proceedings in Iowa in an action brought by a corporation of that state against the judgment creditor, who was served constructively only. The decision is upon the ground that the judgment had no situs in Iowa,—whether because the judgment creditor was not domiciled there, or because the judgment was to be regarded as payable elsewhere, it is difficult to determine.

Ward v. Boyce, 152 N. Y. 191, 36 L. R. A. 549, 46 N. E. 180, held that a wife, a resident of New York, to whom a note made by a resident of Vermont was payable, was not concluded by a judgment rendered in a trustee process instituted in Vermont by a creditor of the husband, whereby the note was adjudged to belong to the husband rather than to the wife, and the maker was directed to pay the same to the husband's creditor, it appearing

"Wages owing to a laboring man being a householder, not exceeding \$50 per month, shall also be exempt from distress, levy, or garnishment."

Section 3656 [Code 1904, p. 1952]: "An injunction may be awarded to enjoin the sale of any property exempt under the provisions of this chapter, and to prevent the wages exempted by § 3652 from being garnisheed or otherwise collected by an execution creditor."

It is admitted that Claytor is a householder, or head of a family, within the meaning of the exemption law of the state of Virginia, and it is likewise admitted that he has never had allotted to him any exemption under and by virtue of the laws of that state.

This agreed statement of facts is made and signed without prejudice to any rights

of either of the interested parties to make any motion or enter any special appearance as, in its or his judgment, may be deemed advisable.

The court, upon the case agreed, rendered judgment in favor of the plaintiff and against both defendant and garnishee for the full amount of his debt and the costs. Defendant and the garnishee excepted and appealed.

Messrs. Glenn, Manly, & Hendren, for appellants:

The court below was without jurisdiction.

Haughton v. Allen, 1 N. C. pt. 2, p. 277 (Conference, 157); 6 Thomp. Corp. p. 6427.

In so far as the proceeding by garnishment is a proceeding for the attachment of a debt, considered as property, due by the

that there was no personal service upon either husband or wife within Vermont, and that the wife was not made a party to the proceeding until after the rendition of the judgment by which the indebtedness of the husband to the creditor instituting the proceeding was established.

III. State, other than his domicile, where debtor temporarily present.

The court, in *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, *supra*, I., limited its decision to a case in which the debtor is domiciled in the state in which the garnishment proceedings are instituted, and expressly refrained from passing upon the question whether a debtor temporarily in a state may be garnished there in respect of an indebtedness due a nonresident, not personally served within the jurisdiction.

In *King v. Cross*, 175 U. S. 396, 44 L. ed. 211, 20 Sup. Ct. Rep. 131, also, the garnishee was domiciled in the state in which the garnishment proceedings were instituted. The broad ground upon which the decisions rest, however,—namely, that the jurisdiction to garnish the debt rests upon the power of the court over the debtor,—would seem to cover the case of a debtor temporarily within the jurisdiction of the court and subject to its process, as well as the case of a debtor domiciled within the jurisdiction. Many of the cases, however, expressly distinguish the two cases. Some of them, while not denying altogether the jurisdiction when the debtor is temporarily within the state but is not domiciled there, hold that, in order to support the jurisdiction, the debt due from the nonresident debtor must be expressly payable within the state where the proceedings are instituted, whereas, even in the most restricted view of the decision in the *Sturm* Case, it is sufficient, in case of a domiciled debtor, that the debt be payable generally; in other words, that it be not expressly payable out of the state.

Thus, *Balk v. Harris*, 124 N. C. 467, 45 L. R. A. 258, 70 Am. St. Rep. 606, 32 S. E. 799, which concedes that the situs of a debt for the purpose of attachment is where the debtor re-

sides, although the creditor is a nonresident, holds that jurisdiction to attach a debt cannot rest upon service of process upon a nonresident debtor when passing through or transiently in the state, unless he has contracted to pay the debt to defendant within the jurisdiction where the attachment is laid.

So, a nonresident, temporarily in the state, may be summoned and compelled to answer as garnishee, but if, upon his answer, it be established that he is a nonresident, he cannot be subjected to further proceedings in the cause, for want of jurisdiction; unless, when garnished, he has in the state property of the defendant in his possession, or be bound to pay the defendant money or deliver to him property within the state. *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 62 L. R. A. 178, 44 S. E. 300.

National Broadway Bank v. Sampson (N. Y.) 66 L. R. A. 606, 71 N. E. 766, while not denying that a debt due from a resident debtor to a nonresident creditor may be attached, held that the liability of a nonresident debtor to a nonresident corporation is not subject to attachment while the debtor is temporarily within the jurisdiction. It was further held in this case that service of attachment upon a resident member of a firm indebted to a nonresident corporation confers upon the court jurisdiction only of the debt or liability owed or incurred by him as a partner, and confers no jurisdiction over the debt so as to hold a nonresident member of the firm liable therefor.

A debt in ordinary form, or in the form of wages due from one nonresident of the state to another nonresident of the state, is payable, as a matter of law, or by legal implication, in the state of their common residence, in the absence of a place fixed by the contract; and in such case there is no property in the former state subject to levy or seizure. *Central Trust Co. v. Chattanooga, R. & C. R. Co.* 68 Fed. 685.

A nonresident creditor cannot have his property in the debt seized in a state to which the debtor may resort, not for the purpose of residence, but merely for the purpose of doing business through agents, if the claim arose on a contract not to be performed within the state, and the debtor does not reside therein. *Reimers v. Seateo Mfg. Co.* 30 L. R. A. 365,

garnishee to the principal debtor, it is a proceeding *in rem*, and, unless the principal debtor has property in the state,—that is, that the debt due from the garnishee has its situs, is located, in the state of suit,—the court acquires no jurisdiction to proceed to the condemnation of such property.

Patton v. Smith, 29 N. C. (7 Ired. L.) 438; *Balk v. Harris*, 122 N. C. 64, 45 L. R. A. 257, 30 S. E. 318.

In garnishment the plaintiff is subrogated to the position of the principal debtor.

Balk v. Harris, 124 N. C. 471, 45 L. R. A. 260, 70 Am. St. Rep. 606, 32 S. E. 799; *Patton v. Smith*, 29 N. C. (7 Ired. L.) 438; *Fairfax Forrest Min. & Mfg. Co. v. Chambers*, 75 Md. 604, 23 Atl. 1024; *Myer v.*

Liverpool, L. & G. Ins. Co. 40 Md. 595; *Louisville & N. R. Co. v. Nash*, 118 Ala. 477, 41 L. R. A. 331, 72 Am. St. Rep. 187, 23 So. 825.

It would be an anomaly in judicial procedure if the garnishee could be made liable upon a cause of action by suit in attachment, when it would not be liable in the same court, upon the same cause of action, by suit commenced by summons and complaint upon personal service, because of the want of jurisdiction in the court.

Pullman Palace Car Co. v. Harrison, 122 Ala. 149, 82 Am. St. Rep. 68, 25 So. 697.

A nonresident can sue a foreign corporation in our courts only "when the cause of action shall have arisen, or the subject of the action be situated, in this state."

17 C. C. A. 228, 37 U. S. App. 426, 70 Fed. 573.

And, conversely: Even if a debtor is not a resident of the sovereignty under which garnishment is attempted, such sovereignty still may subject him to its process and constructive seizure, if he is personally within the service of its process, and the debt is payable within its territory. *Ibid.*

A debt due a nonresident by a foreign corporation, arising out of a contract made and payable in New York, is subject to attachment in the latter state. *Lancaster v. Spotswood*, 41 Misc. 19, 83 N. Y. Supp. 572. The court said that *Douglass v. Phenix Ins. Co.* 138 N. Y. 209, 20 L. R. A. 118, 34 Am. St. Rep. 448, 33 N. E. 938, merely laid down general rules, apparently in the absence of proof as to the actual situs of the debt.

In *Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co.* 127 Mo. 242, 27 L. R. A. 651, 48 Am. St. Rep. 626, 29 S. W. 1010, the court said that a debt may be garnished at any place where suit thereon may be brought by the creditor if the laws of that place authorize it. In this case, however, the garnishee was domiciled in the state in which the garnishment proceedings were instituted; and the court probably did not mean to extend the rule to garnishees transiently in the state, as distinguished from those domiciled therein.

In *Harvey v. Great Northern R. Co.* 50 Minn. 405, 17 L. R. A. 84, 52 N. W. 905, the court said that, for the purposes of attachment, a debt has a situs wherever the debtor may be found; that wherever the creditor might sue for its recovery, there it may be attached as his property, provided the laws of the forum authorize it; and it is not material that the debt is not made payable in the state where the attachment proceedings are instituted. This statement, however, was characterized as a *dictum* in *McKinney v. Mills*, 80 Minn. 478, 81 Am. St. Rep. 278, 83 N. W. 452, and *Boyle v. Musser-Saunrey Land, Logging & Mfg. Co.* 88 Minn. 456, 97 Am. St. Rep. 538, 93 N. W. 520; and these cases restrict the doctrine of the *Harvey* case to the actual facts in that case, which were that the garnishee was a railroad corporation doing business in Montana, where the garnishee proceedings were commenced; that the debt garnished grew out of a Montana transaction, and was incurred in that state while the main debtor was domiciled there, although, at the time of the garnishment proceedings, he was not a resident of that state. As a matter of fact, the garnishee in the *Harvey* case was a Minnesota corporation, but, for the purposes of an action in Montana, was deemed a resident of that state.

When all the parties to an action brought in Minnesota—the plaintiff, the defendant, and the garnishee—are nonresidents, none of them being within the state except the garnishee, who is served with a summons while temporarily within the state upon business, the garnishee process must be discharged, as the court has no jurisdiction. *McKinney v. Mills*, 80 Minn. 478, 81 Am. St. Rep. 278, 83 N. W. 452. It is also stated in the opinion that the debt arose and was payable in another state.

The court, in *Kansas City, P. & G. R. Co. v. Parker*, 69 Ark. 401, 86 Am. St. Rep. 205, 63 S. W. 996, favored the broad position taken in *Minors' Conflict of Laws*, § 125, *et seq.*, that, regardless of the place of payment, the situs of a debt, for the purpose of garnishment, is not only at the domicile of the debtor, but in any state in which the garnishee may be found, provided the municipal law of that state permits the debtor to be garnished, and provided the court acquires jurisdiction over the garnishee through his voluntary appearance or actual service of process upon him within the state. This, however, was going much further than the facts of the case required. The debtor was a foreign corporation doing business in the state, and the court said that, it having presumably complied with the law, it was to all intents and purposes a domestic corporation. Besides, the indebtedness in this case arose out of the business of the corporation within the state, and was presumably payable therein; and this fact would bring the case within the narrower rule applied by the other cases cited in this subdivision.

This question, as affecting the garnishment of foreign corporations doing business within the state, is further discussed in the next subdivision.

IV. State where foreign corporation engaged in business.

When the debtor of a nonresident creditor is a foreign corporation which has complied with the requirements of the local statute prescribing the conditions of the right of foreign

Clark's Code, § 194, subsec. 2; *Broghill v. Wellborn*, 15 N. C. (4 Dev. L.) 511.

Since all the services of the defendant to the garnishee were rendered in the state of Virginia, the debt would be contracted there, and, as a cause of action on debt arises where the debt was contracted or originated, the cause of action would not arise in this state.

Steele v. Rutherford, 70 N. C. 137; *Burckle v. Eckhart*, 3 N. Y. 132; *Connecticut Mut. L. Assur. Co. v. Cleveland, O. & O. R. Co.* 23 How. Pr. 180; *Hiller v. Burlington & M. River R. Co.* 70 N. Y. 223; *Chambers v. Feron & B. Co.* 56 N. Y. Supp. 338; *Bryun v. Western U. Teleg. Co.* 133 N. C. 603, 45 S. E. 938.

The contract was signed in Virginia and

corporations to do business within the state, it is apparent that the question as to jurisdiction is somewhat different than when the debtor is a natural person temporarily within the state, but domiciled elsewhere. None of the cases that concede the jurisdiction of a court of the state in which the debtor is domiciled deny altogether and under all circumstances the jurisdiction when the debtor is a foreign corporation, but has complied with the conditions of doing business within the state.

Although the garnishee in the case of *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, was a corporation of the state in which the debt was garnished, there is probably no doubt, since the establishment in that case of the general principle that a debt may have a situs for the purposes of garnishment apart from the domicile of the creditor, that a debt due from a foreign corporation to a nonresident may constitutionally be subjected to garnishment, if it arose out of business done within the state,—at least if it is not expressly payable out of the state. This is tacitly assumed by the cases subsequently cited in this subdivision upon the question whether the debt is thus subject to garnishment when it arises out of business transacted out of the state; and is expressly declared in *Kansas City, P. & G. R. Co. v. Parker*, 69 Ark. 401, 86 Am. St. Rep. 205, 63 S. W. 998, holding that a citizen of Arkansas may garnish a foreign railroad corporation operating a line in that state for a debt due one of its employees for labor there, notwithstanding that the employee is a citizen of another state. As a matter of fact, the court in this case had personal jurisdiction of the nonresident creditor; but it was clearly assumed that the court would have had jurisdiction under the circumstances to proceed *in rem* and without personal jurisdiction of the creditor.

A railroad company incorporated in another state, which operates its line in Vermont, and has a superintendent resident in that state, may be held upon trustee process as to debts arising out of the business conducted by such authorized agent, and payable in Vermont, under Vt. Stat. § 1310, which makes debts due from a nonresident attachable by trustee process served on his duly authorized agent. *Holt v. Ladd*, 71 Vt. 204, 44 Atl. 69. The court said that the debt sought to be attached must

returned to Winston by mail. This makes it a case where a proposal or solicitation to enter into a contract is made in one state and the contract completed in another. In such a case it is a contract of the place where it is accepted.

Armstrong v. Best, 112 N. C. 60, 25 L. R. A. 188, 34 Am. St. Rep. 473, 17 S. E. 14; *Hunter v. Randolph*, 128 N. C. 91, 32 S. E. 238; 22 Am. & Eng. Enc. Law, 2d ed. p. 1324; *Perry v. Mt. Hope Iron Co.* 15 R. I. 380, 2 Am. St. Rep. 902, 5 Atl. 632; *Clark*, Contr. p. 43.

The situs of the debt sought to be condemned is not in this state.

Balk v. Harris, 124 N. C. 467, 45 L. R. A. 260, 70 Am. St. Rep. 606, 32 S. E. 799, 122 N. C. 64, 45 L. R. A. 257, 30 S. E.

be one arising in the business conducted by the authorized agent (citing *Towle v. Wilder*, 57 Vt. 622), but that, when it so arises, and the nonresident debtor has an authorized agent resident within the state, either to conduct the business within the state, or appointed especially to receive service for the nonresident debtor in regard to the business done within the state, the debt may be attached by service, according to the statute, upon such agent (citing *Weed Sewing Machine Co. v. Bouteille*, 56 Vt. 570, 48 Am. Rep. 821; *Chaffee v. Rutland R. Co.* 55 Vt. 110, 140).

It was held in *Craig v. Gunn*, 67 Vt. 92, 27 L. R. A. 511, 30 Atl. 880, that a railroad company incorporated in New York was not subject to garnishment in Vermont in respect of an indebtedness due a nonresident for services rendered in New York under a New York contract. The case upon its facts comes within the exception implied in *Holt v. Ladd*, supra, since the indebtedness did not arise out of business transacted within the state, and was not payable therein. The decision, however, is put upon the ground that a foreign corporation, under such circumstances, is not a resident of the state within Vt. Rev. Laws, § 1073, providing that no person shall be summoned as a trustee, unless, at the time of the service of the writ, he resides within the state. No mention is made of the statutory provision under which the decision in *Holt v. Ladd* was rendered.

The question of practical difficulty, is whether a debt due from a foreign corporation to a nonresident, not personally within the jurisdiction, may be thus garnished when it arises out of business transacted out of the state. There is a conflict among decisions upon this point which may be partially explained by differences in the local statutes as to the circumstances under which an action may be maintained against a foreign corporation. There seems to be a tendency to make the ability or disability of the principal defendant (the nonresident creditor), under the local statute, to maintain an action against the garnishee (the debtor) in the state, for the recovery of the debt sought to be garnished, the criterion of the jurisdiction to garnish the debt. According to this criterion, the question whether a debt due a nonresident, not personally within the jurisdiction, from a foreign corporation, arising out of business not transacted within the state, is the subject of garnishment, de-

318; *Strause Bros. v. Aetna F. Ins. Co.* 126 N. C. 223, 48 L. R. A. 452, 35 S. E. 471; *Seaton v. Phoenix Ins. Co.* 132 N. C. 1, 43 S. E. 479; *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 716, 43 L. ed. 1144, 1146, 19 Sup. Ct. Rep. 797; *Reimers v. Seasco Mfg. Co.* 30 L. R. A. 367, 17 C. C. A. 228, 37 U. S. App. 426, 70 Fed. 573; *Hammond Beef & Provision Co. v. Best*, 91 Me. 431, 42 L. R. A. 531, 40 Atl. 338.

The question of domicile or residence of a corporation must be determined, not by the residence of any particular officer, nor of its stockholders or directors, but by the state of its creation where the corporate, as distinguished from its general, business is done, even though it may transact its most important business in another place.

depends upon the question whether the local statute would permit the principal defendant (the creditor) to maintain an action in the state against the foreign corporation to recover the indebtedness in question. This criterion seems to be applied, not merely to the construction of the local garnishment statute as applied to indebtedness due from a foreign corporation, but also to the question of the constitutional right to subject such indebtedness to garnishment. In other words, the ability of the principal defendant, under the local statute, to have maintained an action in the state in respect of the indebtedness sought to be garnished seems to be regarded as necessary to give the debt a local situs in the state.

Thus, a foreign insurance company which has become subject to the service of process in a state where it is doing business with like effect, as if it had been incorporated therein, is subject to garnishment upon account of an indebtedness due to a nonresident principal defendant, notwithstanding that such indebtedness arose out of business transacted in the state of the principal defendant's domicile. *Mooney v. Buford & G. Mfg. Co.* 18 C. C. A. 421, 34 U. S. App. 581, 72 Fed. 32. The court in this case plainly rests its decision, that the debt, though arising out of business transacted out of the state, was subject to garnishment, upon the fact, to which it expressly calls attention, that, under the broad terms of the local statute, the principal defendant (the creditor) could have maintained an action within the state to recover the debt.

In *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 36 L. R. A. 640, 56 Am. St. Rep. 275, 46 N. E. 631, the court said that a foreign corporation was subject to garnishment proceedings in any state in which, in compliance with the local law, it has established itself for business purposes,—not for the reason that the debt has a situs in each and all of such states at one and the same time, but because it is liable to suit by its creditors for the collection of a debt in each and all of the states where it has so established itself for business purposes.

So, in the cases next cited, the jurisdiction is upheld, notwithstanding that the indebtedness arose out of business transacted outside the state. While some of these decisions are not expressly put upon the ground that, under the local statute relating to foreign corpora-

Cline v. Bryson City Mfg. Co. 116 N. C. 837, 21 S. E. 791; *Shaw v. Quinoy Min. Co.* (*Ex parte Shaw*) 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 610, 37 L. ed. 302, 13 Sup. Ct. Rep. 444; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83, 6 Sup. Ct. Rep. 1094; *Boyer v. Northern P. R. Co.* 8 Idaho, 74, 66 Pac. 826; *Moise v. Mutual Reserve Fund Life Assn.* 45 La. Ann. 736, 13 So. 170; *Voss v. Evans Marble Co.* 101 Ill. App. 373.

And this rule is the same, though the corporation was organized to do its chief business in another state.

Filli v. Delaware, L. & W. R. Co. 37 Fed. 65; *Savage v. People's Bldg. L. & Sav.*

tions, the nonresident creditor might have maintained an action in respect of the indebtedness sought to be garnished, that was probably the fact.

An insurance company incorporated in Connecticut, but having a general agent and office in California for its Pacific coast business, and a fund in that state for the payment of losses on account of that business, may be garnished in that state in respect of an indebtedness due to a resident of Arizona for a loss occurring in that territory. *National F. Ins. Co. v. Ming (Ariz.)* 60 Pac. 720. This case clearly makes the ability of the principal defendant to sue the garnishee the criterion of jurisdiction to garnish the debt. The court said that, whether or not, under the laws of California, the principal defendant could have maintained a purely personal action against the insurance company by service upon its agent there, it could have attached the fund in that state.

A corporation whose domicile of origin is in Great Britain, but which, having complied with the laws of Illinois and Wisconsin relating to foreign corporations, transacts business and keeps agents and property in those states, is subject to garnishment in either state for an indebtedness due to a resident of Wisconsin for a loss occurring in Wisconsin. *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 36 L. R. A. 640, 56 Am. St. Rep. 275, 46 N. E. 631.

A nonresident creditor may proceed by attachment against a nonresident debtor and garnish a foreign corporation doing business in the state, and a court of equity is without jurisdiction to enjoin the collection upon the ground that the proceeding was brought in Illinois in order to evade the exemption laws of the state where the parties were domiciled. *Missouri P. R. Co. v. Flannigan*, 47 Ill. App. 322. The indebtedness was for wages earned and payable in Missouri, where all the parties resided.

The courts of a state have jurisdiction to garnish a debt due to a resident of another state from a foreign corporation having an agent in the state upon whom process may be served, at the suit of a resident of the state. *German Bank v. American F. Ins. Co.* 83 Iowa, 491, 32 Am. St. Rep. 316, 50 N. W. 53. The debt did not arise out of business transacted in the state where the debt was garnished.

A state court has jurisdiction to garnish a

Asso. 45 W. Va. 275, 31 S. E. 991; *Quesenberry v. People's Bldg. L. & Sav. Asso.* 44 W. Va. 512, 30 S. E. 73; *Overman Wheel Co. v. Pope Mfg. Co.* 46 Fed. 578; *Baughman v. National Waterworks Co.* 46 Fed. 6.

The amount of property that the corporation has, or volume of business it does, in the state of suit is immaterial.

Hammond Beef & Provision Co. v. Best, 91 Me. 431, 42 L. R. A. 531, 40 Atl. 338; *Bergner & E. Brewing Co. v. Dreyfus*, 172 Mass. 154, 70 Am. St. Rep. 252, 51 N. E. 531; *Strause Bros. v. Aetna F. Ins. Co.* 126 N. C. 223, 48 L. R. A. 452, 35 S. E. 471; *Balk v. Harris*, 124 N. C. 467, 45 L. R. A. 260, 70 Am. St. Rep. 606, 32 S. E. 799; *Seaton v. Phoenix Ins. Co.* 132 N. C. 1, 43 S. E. 479.

debt due to a nonresident defendant by a nonresident corporation doing business in the state. *Pittsburg, C. C. & St. L. R. Co. v. Bartels*, 108 Ky. 216, 56 S. W. 152. The debt due from the garnishee to the principal defendant was payable in Indiana. The court said that there was no question but that the principal defendant could have come into Kentucky and sued the garnishee.

A railroad company incorporated in Iowa is subject to garnishment in that state by a resident of Missouri upon account of an indebtedness for wages due to another resident of Missouri for work done in the latter state. *Howland v. Chicago, R. I. & P. R. Co.* 134 Mo. 474, 36 S. W. 29.

In *National F. Ins. Co. v. Chambers*, 53 N. J. Eq. 468, 32 Atl. 663, it was held that an indebtedness due from a Connecticut insurance company to a resident of New Jersey upon a loss by fire occurring in the latter state was subject to garnishment in Pennsylvania, where the corporation had a permanent business residence. The court takes the view that the liability of such a debt to attachment is not dependent upon the *res* being within the jurisdiction of the attaching court, and that the real and only ground of jurisdiction in case of attachment over choses in action is the service within the jurisdiction of warning order upon the debtor. It said, however, that it was not necessary to determine whether or not such service upon a debtor casually, and for a temporary purpose within the jurisdiction, is sufficient.

Foreign attachment will lie against a Connecticut insurance company doing business in Pennsylvania for a debt due a citizen of New Jersey. *Datz v. Chambers*, 3 Pa. Dist. R. 353. The indebtedness did not arise out of business transacted in Pennsylvania, and it was payable at the home office of the company in Connecticut.

A foreign corporation may be charged as garnishee in all cases where an original action might be maintained against it for the recovery of the property or credit in respect to which the garnishment is served. *Neufelder v. German American Ins. Co.* 6 Wash. 336, 22 L. R. A. 287, 36 Am. St. Rep. 166, 33 Pac. 870. Applying this principle, the court held that a New York insurance company, which kept a fund in California for the payment of losses on the Pacific coast, was subject to garnishment 67 L. R. A.

The debt is not here in the sense that its situs is at the domicile of the garnishee, because the garnishee is not a resident of this state. It is not here in the sense that its situs is that of the domicile of the defendant, because he is a resident of Virginia.

A foreign corporation cannot give a situs to its debts in every state in which it qualifies and does business.

Shaw v. Quincy Min. Co. (Ex parte Shaw) 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44; *Southern R. Co. v. Allison*, 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713; *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 610, 37 L. ed. 302, 13 Sup. Ct. Rep. 444; *Boyer v. Northern P. R. Co.*

in that state for an indebtedness due to a resident of Washington on account of a loss in the latter state, although the principal defendant was served by publication only.

The decision in *Stewart v. Northern Assur. Co.* 45 W. Va. 734, 44 L. R. A. 101, 32 S. E. 218, that an insurance company, whose domicile of origin was in England, but which had its principal office for the United States in Ohio, could not avail itself of a judgment rendered against it as garnishee by a court of Ohio, as a bar to an action by a resident of West Virginia on account of a loss occurring in the latter state, was not upon the ground that the Ohio court had no jurisdiction to render the judgment, but upon the ground that the contract on which the Ohio action was brought was wholly void as against the principal defendant, and that the insurance company wholly failed to notify, or attempt to notify in any way, the principal defendant of the proceeding against her.

A foreign corporation, which exercises no corporate powers or franchises within Ohio is not subject to garnishment in that state in respect of an indebtedness due a nonresident; but, if such foreign corporation has complied with the Ohio statute, and is prosecuting its business within the state, and is capable of suing and being sued there, it is subject to garnishee process in any action against its creditors in which an attachment may rightfully issue. *Ritter-Conley Mfg. Co. v. Mzik*, 23 Ohio C. C. 164.

In the four cases next cited, it will be observed that the debtor corporation was incorporated in two or more states, including the state in which the garnishment proceedings were instituted and so was domiciled in that state. That was also the case in *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797. These cases are, therefore, only authority for the proposition that a debt may be garnished at the domicile of the debtor.

A railroad company incorporated originally in Georgia, but subsequently in Alabama, is subject to garnishment in the latter state upon account of an indebtedness due to a nonresident, although such indebtedness was created and was payable in another state. *Georgia & A. R. Co. v. Stollenwerck*, 122 Ala. 539, 25 So. 258. The court, after so holding, states, what seems to be a *non sequitur*, that the situs of a debt, in the absence of a stipulation to the contrary, is the domicile of the creditor.

8 Idaho, 74, 66 Pac. 826; *Rathbun v. Northern C. R. Co.* 50 N. Y. 656; *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 157; *Alpha Mills v. Watertown Steam Engine Co.* 116 N. C. 804, 21 S. E. 917; *Larson v. Aultman & T. Co.* 86 Wis. 281, 39 Am. St. Rep. 894, 56 N. W. 915; Clark's Code, 349 (2); 3 Am. & Eng. Enc. Law, 2d ed. p. 200; *Voss v. Evans Marble Co.* 101 Ill. App. 373; *Hammond Beef & Provision Co. v. Best*, 91 Me. 431, 42 L. R. A. 531, 40 Atl. 338; *Bergner & E. Brewing Co. v. Dreyfus*, 172 Mass. 154, 70 Am. St. Rep. 252, 51 N. E. 531.

Statutes providing for service of process against such corporations simply appoint a method of bringing corporations invested with a foreign character into the courts of

the state where such courts have jurisdiction over them, and do not extend such jurisdiction.

Camden Rolling Mill Co. v. Swede Iron Co. 32 N. J. L. 15; *Cumberland Coal Co. v. Sherman*, 8 Abb. Pr. 243; *Sawyer v. North American L. Ins. Co.* 46 Vt. 697; 14 Am. & Eng. Enc. Law, 2d ed. p. 816.

It is impossible to find a location within North Carolina of the debts of a New Jersey corporation belonging to a resident of Virginia,—especially when the contract out of which the debt arose was made in Virginia, and the work was done in that state, and the debt is payable in Virginia,—in accordance with the rule that, in the absence of a place fixed in the contract, a debt is payable at the domicile of the creditor.

A consolidated railroad company organized under the laws of Illinois and Missouri, and having lines of railway and business offices in each of those states, may be garnished in Illinois by a resident of Missouri in respect of a debt owed by it to another resident of Missouri for wages earned in the latter state; and the jurisdiction is not affected by the fact that the garnishing creditor's motive was to evade the exemption law of Missouri. *Wabash R. Co. v. Dougan*, 142 Ill. 248, 34 Am. St. Rep. 74, 31 N. E. 594.

A railroad company chartered both in Alabama and Tennessee may be garnished in the latter state for wages due by it to an employee residing and employed in Alabama. *Holland v. Mobile & O. R. Co.* 16 Lea. 414.

A railroad company originally chartered in Alabama, but subsequently chartered in Tennessee, is subject to garnishment in the latter state in respect of wages due to a citizen of another state for labor performed wholly within that state. *Mobile & O. R. Co. v. Barnhill*, 91 Tenn. 395, 30 Am. St. Rep. 889, 19 S. W. 21.

It has been frequently held, even by those courts that concede the jurisdiction of the court of debtor's domicile to garnish an indebtedness due to a nonresident, that the jurisdiction of the courts of a state in which a foreign corporation is doing business to garnish debts due from the corporation to a nonresident is limited to debts which arise out of business transacted within the state, or which are payable within the state.

Thus, *Douglass v. Phenix Ins. Co.* 138 N. Y. 209, 20 L. R. A. 118, 34 Am. St. Rep. 448, 33 N. E. 938, while conceding that the laws of a state may, for the purposes of attachment proceedings, fix the situs of a debt at the domicile of the debtor, held that a New York insurance company which had appointed an agent in Massachusetts under the laws of that state, upon whom process could be served, could not be garnished in the latter state in respect of an indebtedness due to a resident of New York upon account of a loss occurring in New York. The decision is upon the ground that a corporation has its exclusive residence and domicile in the jurisdiction of origin, and does not acquire a new domicile or residence in another state by complying with the laws of the latter state as a condition of doing business therein. *Blanc v. Tennessee Coal, I. & R. Co.* 2 App. Div. 248, 37 N. Y. Supp. 906, is to the same effect. 67 L. R. A.

Wages due by a railroad company incorporated in Georgia to a citizen of that state, for services there performed, are not subject to attachment or garnishment in Tennessee, notwithstanding that the railroad company, without being incorporated in the latter state, extends its road into that state, and is subject to suit by process on its local agents. *Central Trust Co. v. Chattanooga, R. & C. R. Co.* 68 Fed. 685.

A court of Michigan cannot acquire jurisdiction *in rem* to pronounce judgment against a nonresident to the extent of a debt owed to the latter, and payable at his domicile, by an Illinois corporation, notwithstanding that the corporation does business in Michigan, and is liable by the laws thereof to service of process in garnishment in that state. *Reimers v. Seasco Mfg. Co.* 30 L. R. A. 365, 17 C. C. A. 228, 37 U. S. App. 426, 70 Fed. 573. This case distinguished *Newland v. Rellly*, 85 Mich. 151, 48 N. W. 544, upon the ground that, though the principal defendant in that case was a nonresident, and the indebtedness was not to be performed in Michigan, the garnishees were residents of the latter state. *Cofrode v. Gartner*, 79 Mich. 332, 7 L. R. A. 511, 44 N. W. 623, is distinguished upon the same ground.

Louisville & N. R. Co. v. Nash, 118 Ala. 477, 41 L. R. A. 331, 72 Am. St. Rep. 181, 23 So. 825, held that a Kentucky corporation doing business in Tennessee was not subject to garnishment in the latter state in respect of an indebtedness due to a resident of Alabama, and payable in the latter state. This decision, however, was rendered upon the broad doctrine—which, so far as it affects proceedings in other states, has been overruled by the United States Supreme Court (see *supra*, II.)—that the situs of a debt for the purposes of garnishment is exclusively at the creditor's domicile; and the court expressly said that it was immaterial whether the corporation garnished is one created by the laws of the state where the debt is sought to be condemned, or is a foreign corporation doing business therein by permission of the state.

Everett v. Connecticut Mut. L. Ins. Co. 4 Colo. App. 509, 36 Pac. 616, while apparently conceding that a debt to a nonresident may be garnished if the debtor is a resident, held that an indebtedness due from a foreign life insurance company to a nonresident was not subject to garnishment in Colorado, although the company had, as a condition of doing business in

Central Trust Co. v. Chattanooga, R. & C. R. Co. 68 Fed. 685; *National Bank v. Furtick*, 2 Marv. (Del.) 35, 44 L. R. A. 115, 69 Am. St. Rep. 108, 42 Atl. 479; *Fielder v. Jessup*, 24 Mo. App. 91; *Reimers v. Seatco Mfg. Co.* 30 L. R. A. 366, 17 C. C. A. 228, 37 U. S. App. 426, 70 Fed. 573.

A corporation does not, by appointing an agent or doing business in another state, become subject to garnishment there on account of debts owing by it to residents of the states other than that in which the process of garnishment is served.

Abbeville Electric Light & P. Co. v. Western Electrical Supply Co. 61 S. C. 361, 55 L. R. A. 146, 85 Am. St. Rep. 925, 39 S. E. 559.

Colorado, designated the superintendent of insurance as its agent to receive service of process.

So, wages due from a railroad company incorporated in Kansas, to a resident of that state for services performed there, are not subject to garnishment in Colorado, although the company operates a part of its line in the latter state. *Atchison, T. & S. F. R. Co. v. Maggard*, 6 Colo. App. 85, 39 Pac. 985.

A debt due from a railroad company incorporated in Wisconsin for services performed in North Dakota is not subject to garnishment in Minnesota, although the railroad extends through that state, where neither the plaintiff nor principal defendant is a resident of Minnesota. *Northwestern Life & Sav. Co. v. Gippe* (Minn.) 99 N. W. 364.

A demand against a foreign insurance company has no situs, for the purpose of garnishment, in a state where it has an agency, when the demand is due to a nonresident for a loss of property insured in another state in which the loss is payable. *National Bank v. Furtick*, 2 Marv. (Del.) 35, 44 L. R. A. 115, 69 Am. St. Rep. 99, 42 Atl. 479.

In *Drake v. Lake Shore & M. S. R. Co.* 69 Mich. 168, 13 Am. St. Rep. 382, 37 N. W. 70, it was held that a corporation organized under the laws of Indiana and Michigan, and doing business in both states, was not subject to garnishment in Michigan in respect of an indebtedness contracted and payable in Indiana, of which state the principal defendant was a citizen. This decision, even upon the assumption that the debtor was domiciled in Michigan, is not inconsistent with the actual decision in the *Sturm Case*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797 (*supra*, II.), since the debt in this case was expressly payable in another state, which fact brings the case within the qualification of the rule as declared in the *Sturm Case*.

An indebtedness, due from an insurance company, organized in England, to a resident of North Dakota, upon a loss occurring in that state, is not subject to garnishment in Minnesota, notwithstanding that the insurance company, in compliance with the law of Minnesota and as a condition of doing business in that state, has authorized the insurance commissioner to accept service for it, and has established local agencies and insured property in the state. *Swedish-American Nat. Bank v. Blecker*, 72 Minn. 383, 42 L. R. A. 283, 71 Am. 67 L. R. A.

Here the situs of the debt within the state is essential to jurisdiction in the absence of summons.

Balk v. Harris, 122 N. C. 64, 45 L. R. A. 257, 30 S. E. 318, 124 N. C. 467, 45 L. R. A. 260, 70 Am. St. Rep. 606, 32 S. E. 799; *Strause Bros. v. Etna F. Ins. Co.* 126 N. C. 223, 48 L. R. A. 452, 35 S. E. 471; *National Bank v. Furtick*, 2 Marv. (Del.) 35, 44 L. R. A. 115, 69 Am. St. Rep. 106, 42 Atl. 479; *Louisville & N. R. Co. v. Nash*, 118 Ala. 477, 41 L. R. A. 331, 72 Am. St. Rep. 184, 23 So. 825.

If for any reason a court is without jurisdiction over the defendant or the cause of action, though it may have jurisdiction over the garnishee, yet it cannot enter judgment.

St. Rep. 492, 75 N. W. 740. The court held that such acts did not give the garnishee a domicile in Minnesota for all purposes, or bring into that state the situs of a debt which it owed elsewhere, by reason of business transacted elsewhere. The court, continuing, said: "Neither the creditor nor the debtor resided in this state; none of the transactions out of which the indebtedness arose took place in this state; and the indebtedness was not payable in this state. Under these circumstances the debt has not a situs in this state."

An insurance company incorporated in Missouri, having sustained a loss in Nebraska, payable in the latter state, cannot be garnished in Illinois if it has neither property nor money of the debtor subject to process in that state, although it has a general agency there, and has complied with the conditions to enable it to do business there. *American Cent. Ins. Co. v. Hettler*, 37 Neb. 849, 40 Am. St. Rep. 522, 56 N. W. 711.

A foreign insurance company which does business in New York is not subject to attachment in the latter state in respect of a debt due to a resident of South Carolina for a loss which occurred in the latter state. *Wood v. Furtick*, 17 Misc. 561, 40 N. Y. Supp. 687.

A creditor of a foreign firm cannot attach a debt due from a foreign corporation to such firm in New York. *Allen v. United Cigar Stores Co.* 39 Misc. 500, 80 N. Y. Supp. 401. It does not appear where the debt was contracted, or where it was payable. The court said that, whether the situs of the debt be fixed at the residence of the debtor or the creditor (the residence of a foreign corporation being confined to the sovereignty which created it), the property attached was never within the state of New York.

A debt due from an insurance company of one state for loss in another state has no situs in a third state so as to sustain a garnishment there by a creditor of the insured, merely because the insurance company, as a condition of the right to do business therein, has, in pursuance of local statutes, appointed an agent in the state on whom services of process may be served. *Strause Bros. v. Etna F. Ins. Co.* 126 N. C. 223, 48 L. R. A. 452, 35 S. E. 471. In this case it was held that garnishment proceedings, instituted in Pennsylvania against a Connecticut insurance company upon an indebtedness due to a resident of North Carolina for a loss

ment against the garnishee or the defendant.

Southern R. Co. v. Newton, 106 Ga. 566, 71 Am. St. Rep. 279, 32 S. E. 658; 14 Am. & Eng. Enc. Law, 2d ed. p. 852; *Plimpton v. Bigelow*, 93 N. Y. 592; *Douglass v. Phenix Ins. Co.* 138 N. Y. 209, 20 L. R. A. 118, 34 Am. St. Rep. 448, 33 N. E. 938.

The debt sought to be attached is exempt under the laws of Virginia.

Suit was instituted in this state for the purpose of evading the exemption laws of that state.

Where all the parties are residents of the same foreign state the law of comity will not permit a creditor residing in one state to avail himself of the process of another state for the purpose of evading the ex-

emption laws of his own state, thus depriving the debtor of his right of exemption.

Rood, Garnishment, §§ 100, 101; *Drake v. Lake Shore & M. S. R. Co.* 69 Mich. 168, 13 Am. St. Rep. 382, 37 N. W. 70; *Mason v. Beebe*, 44 Fed. 556.

Statutory exemption of wages from legal process is not merely a personal privilege, but a declaration of the public policy of the state for the protection of the debtor's family.

Mills v. Colyer (1904; Ga.) Atlanta Super. Ct.; *Griffin v. Sutherland*, 14 Barb. 456.

Such exemptions cannot be waived.

Mills v. Bennett, 94 Tenn. 651, 45 Am. St. Rep. 763, 30 S. W. 748; *Burke v. Finley*, 50 Kan. 424, 34 Am. St. Rep. 132, 31 Pac.

in the latter state, were not a defense to an action upon the policy in North Carolina.

A debt, which arose and is payable outside of Ohio, due from one nonresident corporation to another, is not subject to attachment and garnishment in Ohio, notwithstanding that the garnishee corporation has its principal office in Ohio, and has complied with the provisions of the statute of that state by appointing an agent upon whom service of process may be made. *R. A. Kelley Co. v. Garvin Mach. Co.* 4 Ohio S. & C. P. Dec. 374.

A foreign insurance company doing business in Wisconsin may not be garnished in that state by a resident thereof on account of its indebtedness to a nonresident principal defendant, arising from a loss occurring in another state. *Morawetz v. Sun Ins. Office*, 96 Wis. 175, 65 Am. St. Rep. 43, 71 N. W. 109. See *infra* as to this case.

An insurance company which has no office in the province of Manitoba is not subject to attachment therein in respect of a loss which is payable at Montreal. *Braun v. Davis*, 9 Manitoba L. Rep. 534.

Moneys payable in a foreign country by a foreign corporation for services performed in that country under a contract made there are not seizable under a writ of *saque-arret* issued out of a court of Quebec, although the foreign corporation may have a branch office, and be served with process, in the province. *Goodhue v. O'Leary*, Rap. Jud. Quebec, 17 C. S. 201.

The decisions in some of the foregoing cases denying the jurisdiction to garnish an indebtedness due from a foreign corporation to a nonresident, not arising out of business transacted within the state, are attributable to the fact that, under the local statute, the nonresident creditor could not have maintained an action against the corporation within the state in respect of the indebtedness sought to be garnished. Thus, the decision in *Morawetz v. Sun Ins. Office*, 96 Wis. 175, 65 Am. St. Rep. 43, 71 N. W. 109, *supra*, is expressly put upon the ground that, under the Wisconsin statute, a foreign corporation can be sued only when it has property within the state, or the cause of action arises therein, or exists in favor of a resident of the state. The court pointed out that, while the garnishing creditor was a resident of Wisconsin, he must, for the purpose in hand, stand in the position of the principal defendant, who was a nonresident. It is difficult to trace this 67 L. R. A.

distinction through the cases, and it disappears entirely in some of them; but it is obvious that it may have an important bearing upon the question whether the jurisdiction extends to indebtedness arising out of business not transacted within the state.

So, the decision in *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 62 L. R. A. 178, 44 S. E. 300, that an indebtedness due from a foreign railroad corporation to a nonresident, and payable out of the state, was not subject to garnishment within the state, where the railroad company operated no road in the state, and did no business therein other than maintaining, jointly with other railroads, an agency relating to through freight service, and for the soliciting of freight to be handled on its lines without the state,—seems to have turned upon the point that the corporation was not doing business within the state so as to make it liable to garnishment there, rather than upon the point that the particular debt in question did not pertain to business transacted within the state; and the court seems to concede that a foreign corporation which does business within the state may, the same as a domestic corporation, be garnished in respect of an indebtedness arising out of business not transacted within the state; for it says that foreign corporations and nonresident individuals stand upon the same footing in respect of garnishment, "except that the former are subject to garnishment when doing business within the state in which the garnishment issues in such sense and to such extent as to have become domiciled therein."

The objections, based upon the possibility that the debtor may be compelled to pay the debt twice, to the doctrine which holds that a debt due from a corporation is subject to garnishment in any state in which the corporation does business and in which it may be served with process, without reference to the place of its domicile or to the place where the business out of which the debt in question arose, or where the debt is payable, are considered in *infra*, V.

V. Conflict of jurisdiction.

It was said by the court in *Douglass v. Phenix Ins. Co.* 138 N. Y. 209, 20 L. R. A. 118, 34 Am. St. Rep. 448, 33 N. E. 938,—and the same objection has been urged by other courts,—that the admission of the principle that a foreign corporation is subject, in respect of a

1065; *Firmstone v. Mack*, 49 Pa. 393, 88 Am. Dec. 507.

The law has set such property apart for a specific purpose. As to it there is neither creditor nor debtor.

Ducall v. Rollins, 71 N. C. 221; *Winchester v. Gaddy*, 72 N. C. 117; *Montgomery County v. Riley*, 75 N. C. 146.

It is not an asset, and to it the creditor has no right to look.

O'Conner v. Ward, 60 Miss. 1037; 14 Am. & Eng. Enc. Law, 2d ed. p. 221; *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41.

The debt is exempt under the laws of North Carolina by virtue of Code, § 493.

Traudi v. Hagerman, 27 Ind. App. 150, 60 N. E. 1012; *Northwestern Mut. L. Ins.*

Co. v. Gridley, 100 U. S. 616, 25 L. ed. 747; 12 Am. & Eng. Enc. Law, 2d ed. p. 75; *Rustad v. Bishop*, 80 Minn. 497, 50 L. R. A. 168, 81 Am. St. Rep. 282, 83 N. W. 449; *Spencer v. Myers*, 150 N. Y. 269, 34 L. R. A. 175, 55 Am. St. Rep. 677, 44 N. E. 942; *Leavitt v. Metcalf*, 2 Vt. 342, 19 Am. Dec. 718; *Roberts v. Parker*, 117 Iowa, 389, 57 L. R. A. 764, 94 Am. St. Rep. 316, 90 N. W. 744; *Rutledge v. Crawford*, 91 Cal. 526, 13 L. R. A. 761, 25 Am. St. Rep. 212, 27 Pac. 779; *Riggs v. Palmer*, 115 N. Y. 506, 5 L. R. A. 340, 12 Am. St. Rep. 819, 22 N. E. 188; *State ex rel. Gamble v. Rhyne*, 80 N. C. 183; *Furners' Mfg. Co. v. Steinmetz*, 133 N. C. 192, 45 S. E. 552; *Jones v. Alsbrook*, 115 N. C. 46, 20 S. E. 170; *Montgomery County v. Riley*, 75 N. C. 146.

particular debt, to garnishment in any state in which it may do business, gives rise to embarrassing conflicts of jurisdiction, and subjects the creditors of such corporations to great prejudice. The court, in *Mooney v. Buford & G. Mfg. Co.* 18 C. C. A. 421, 34 U. S. App. 581, 72 Fed. 32, 39, says, in reply to this objection: "The proceedings and judgments of the courts of the United States are entitled to equal respect, and it follows that a proceeding in garnishment, begun in any court of competent jurisdiction, against a corporation doing business and subject to process in two or more states, would be entitled to precedence of any suit for the same cause commenced later in another district or state, and that the supposed inconvenience of different suits in different jurisdictions, and danger of debtors being compelled to discharge their obligations more than once, is more imaginary than real. No court can rightfully disregard the lien upon the debt which is established by the service of process in garnishment upon the debtor."

It is not the intention here to discuss the question as to the proper practice or procedure when two or more actions or proceedings to reach the same indebtedness are pending in different states. It may be said in this connection, however, that there is some difference of opinion whether the pendency of the first suit or proceeding should be pleaded in abatement of a suit or proceeding subsequently commenced in another state, or whether both proceedings should be allowed to proceed until a judgment has been recovered in one of them, and the judgment then interposed as a bar to the further prosecution of the other. However this may be, it is, of course, a fundamental principle of justice that the debtor ought not, by reason of the concurrent jurisdiction of the courts of two or more states, to be compelled to pay the debt more than once. The danger that he may be compelled to do so arises, not from the universal adoption of the principle making a corporation liable to garnishment in respect of an indebtedness in any state in which it may do business, and in which it may have an agent upon whom service of process may be made, but from a conflict of views among the courts of the different states upon this question; and this danger may therefore be removed by a decision of the United States Supreme Court upon the question, just as the decisions of that court have averted further danger of a double liability.

ity arising from the different views of the state courts, upon the question whether a debt payable generally has a situs for the purpose of garnishment at the domicile of the debtor.

The case of *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 36 L. R. A. 640, 56 Am. St. Rep. 275, 46 N. E. 631, indicates how the debtor may be protected against a double liability, notwithstanding that garnishment proceedings are instituted against him in respect of the same indebtedness in two states. In that case an insurance company, domiciled in Great Britain but doing business in Illinois and Wisconsin, was garnished originally in Illinois by a resident of that state in respect of an indebtedness due to a resident of Wisconsin upon account of a loss occurring in the latter state; while the Illinois garnishment proceeding was pending, the corporation was also garnished in Wisconsin in respect of the same indebtedness by another creditor of the principal defendant. The corporation pleaded the pendency of the Illinois proceedings in abatement of the Wisconsin proceedings, but the Wisconsin court held that the Illinois court was without jurisdiction in the premises, and that its proceedings were no defense to the Wisconsin proceedings, and therefore rendered judgment against the corporation, which it paid under compulsion. The judgment and its payment were subsequently set up by the corporation as a bar to further proceedings under the Illinois garnishment; and this defense was allowed. The Illinois court held that the Wisconsin court was in error in denying the jurisdiction of the Illinois court; but held that the courts of the two states had concurrent jurisdiction, and that the judgment first rendered could properly be pleaded in bar to the further maintenance of the other proceeding, notwithstanding that the proceedings were instituted by different parties. It must be conceded that, if the judgment had been rendered first in the Illinois proceeding, and the corporation had been compelled to pay the same, it would probably have been subjected to a double liability, since the Wisconsin court would doubtless have held that that judgment, having been rendered without jurisdiction, was not conclusive or binding upon the principal defendant, or upon the latter's creditor who instituted the Wisconsin proceeding. It is apparent, however, that the injustice to the corporation upon this assumption would not be legitimately attributable to the Illinois doctrine

This statute is, in effect, a general statute of exemption, and, under the liberal construction accorded such statutes, will be construed to be an exemption from all process.

Collier v. Murphy, 90 Tenn. 300, 25 Am. St. Rep. 698, 16 S. W. 465; *Millington v. Laurer*, 89 Iowa, 322, 48 Am. St. Rep. 385, 56 N. W. 533; *Seymour v. Cooper*, 26 Kan. 539; *Harding v. Hendrix*, 28 Kan. 584; *Curlee v. Thomas*, 74 N. C. 51; *Burgwyn v. Hall*, 108 N. C. 489, 13 S. E. 222.

A nonresident who sued here can claim the benefit of this statute.

12 Am. & Eng. Enc. Law, 2d ed. p. 78; *Mineral Point R. Co. v. Barron*, 83 Ill. 365; *Missouri P. R. Co. v. Maltby*, 34 Kan. 125, 8 Pac. 235; *Rood, Garnishment*, § 92; *Drake, Attachm.* §§ 480, 667; *Waples, Attachment & Garnishment*, p. 164; *Montgomery County v. Riley*, 75 N. C. 144; *State ex rel. Gamble v. Rhyne*, 80 N. C. 183; *Davis v. Garrett*, 25 N. C. (3 Ired. L.) 466; 12 Am. & Eng. Enc. Law, 2d ed. pp. 184, 185.

Entry of a personal judgment without an order of sale or condemnation of attached property will effect a dissolution of the at-

tachment, and release the property attached.

Farmers' Mfg. Co. v. Steinmetz, 133 N. C. 194, 45 S. E. 552; 4 Cyc. Law & Proc. pp. 825, 826; *Amyett v. Backhouse*, 7 N. C. (3 Murph.) 63.

The garnishee is liable only for the amount due at the time of the service of the writ.

Drake, Attachm. §§ 451 (a), 667; *Rood, Garnishment*, §§ 8, 13, 49; 14 Am. & Eng. Enc. Law, 2d ed. p. 835; *Arrington v. Screws*, 31 N. C. (9 Ired. L.) 42, 49 Am. Dec. 408; *Devries v. Summit*, 86 N. C. 126; *State Bank v. Hinton*, 12 N. C. (1 Dev. L.) 397; *Skinner v. Moore*, 19 N. C. (2 Dev. & B. L.) 145, 30 Am. Dec. 155; *Leak v. Moorman*, 61 N. C. (Phill. L.) 168.

Mr. A. H. Eller, for appellee:

The court has jurisdiction of the *R. J. Reynolds Tobacco Company*.

Code, § 194; *Balk v. Harris*, 124 N. C. 467, 45 L. R. A. 260, 70 Am. St. Rep. 606, 32 S. E. 799.

The court has jurisdiction over the property of the defendant, Claytor, because that property is in the state, in the hands of the Reynolds company.

with respect to jurisdiction, but rather to the conflict between the views of the courts of Illinois and of Wisconsin upon that question. It seems altogether probable, in view of the attitude taken by the Supreme Court in the *Sturm Case*, that it will adopt the position of the Illinois court, rather than that of the Wisconsin court, when a case involving such a state of facts comes before it.

One garnished for a debt due a nonresident creditor may prevent judgment against him in the garnishment proceeding by showing that, without his collusion, and notwithstanding his plea of the pendency of the garnishment proceeding, a court at the creditor's domicile having jurisdiction rendered a judgment against him on the debt in favor of the creditor, which, having property in that jurisdiction, he was compelled to pay. *Virginia F. & M. Ins. Co. v. New York Causual Mfg. Co.* 95 Va. 515, 40 L. R. A. 237, 28 S. E. 888.

A judgment against a garnishee, rendered without fraud or collusion, after full disclosure of a prior garnishment in a court of another state having concurrent jurisdiction, must, after it has been satisfied, be held a complete bar to the proceedings in the other state. *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 36 L. R. A. 640, 56 Am. St. Rep. 275, 46 N. E. 631.

An employer duly garnished and held liable in one state, and who has paid as garnishee a debt due a resident in another state, may interpose such garnishment proceedings and payment in bar of the prosecution in the latter state of another action for the same debt by the employee to whom it is due, although, by the laws of such latter state, such debt is exempt from garnishment. *Unlon P. R. Co. v. Baker*, 5 Kan. App. 253, 47 Pac. 563.

But payment by a garnishee of a judgment which was void for want of jurisdiction over the nonresident creditor will not be a defense to 67 L. R. A.

an action by the latter. *Louisville & N. R. Co. v. Nash*, 118 Ala. 477, 41 L. R. A. 381, 72 Am. St. Rep. 181, 23 So. 825.

VI. Exemptions.

For earlier cases see note to *Illinois C. R. Co. v. Smith*, 19 L. R. A. 577.

The United States Supreme Court, in *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, not only held that a debt, not expressly payable elsewhere, is subject to garnishment at the debtor's domicile though the creditor is a nonresident and is served constructively only; but also held that exemption laws are not a part of the contract, but are a part of the remedy and subject to the law of the forum; and therefore held that the court of Iowa, where the garnishment proceedings were instituted, was not in error in refusing to admit the exemption allowed by the law of Kansas, the domicile of the creditor (*i. e.*, the principal defendant). The decision upon this point is, perhaps, strictly speaking, *obiter*, since the Iowa court, having jurisdiction of the proceeding, it would seem that its decision upon this point would be conclusive, whether right or wrong.

Sexton v. Phoenix Ins. Co. 132 N. C. 1, 43 S. E. 470, and *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 62 L. R. A. 178, 44 S. E. 300, take the same position; and so does *Wabash R. Co. v. Dougan*, 142 Ill. 248, 34 Am. St. Rep. 74, 31 N. E. 594, with reference to a case not governed by the Illinois statute which expressly declares that a nonresident principal defendant shall be allowed the same exemption in respect of wages as is, at the time, allowed him by the law of the state where he resides. See also *Atchison, T. & S. F. R. Co. v. Maggard*, 6 Colo. App. 85, 39 Pac. 985, *infra*.

Howland v. Chicago, R. I. & P. R. Co. 134 Mo. 474, 36 S. W. 29, did not pass upon the

Balk v. Harris, 124 N. C. 467, 45 L. R. A. 260, 70 Am. St. Rep. 606, 32 S. E. 799; *Cooper v. Adel Security Co.* 122 N. C. 463, 30 S. E. 348; *Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 198.

A debt not due, wages to be earned, salary arising under the same continuing contract, have such an existence as to be easily ascertained, and are attachable.

Rood, Garnishment, §§ 65, 73, 74; 8 Am. & Eng. Enc. Law, pp. 1150, 1151.

Walker, J., delivered the opinion of the court:

The counsel of the defendant and of the garnishee, in their able and exhaustive brief, rely on several grounds to defeat the plaintiff's recovery. For convenience, we will change somewhat the order in which they are stated in the brief. It is contended: (1) That the debt garnished is exempt by the laws of Virginia from garnishment. (2) That, if the debt was subject to garnishment at all, any lien acquired by the service of the writ was waived and the garnishee released by taking a general and personal judgment against the defendant and the garnishee, instead of taking an order

condemning the debt to the payment of the plaintiff's claim. (3) That the judgment is erroneous, as it condemned a debt due after the service of the writ. (4) That the court was without jurisdiction to proceed against the garnishee for the purpose of condemning the debt due by him, because it is necessary to the possession and rightful exercise of such jurisdiction that three things should occur: (a) The corporation who is the garnishee in this case must have such a residence and agency within the state as renders it amenable to the process of the court; (b) the principal defendant, who is the plaintiff's debtor, must himself have the right to sue the garnishee, his debtor, in this state, for the recovery of the debt; (c) it must appear that the situs of the debt is in this state. (5) And lastly, he insists that the earnings of a debtor are exempted from condemnation by the laws of this state. We will consider these contentions in the order thus presented.

The right of exemption under the laws of Virginia cannot be enforced here. It is well settled that exemption laws have no extra-territorial effect. They are not, in respect

question whether exemption pertains to the remedy or to the substantive contract; but merely held that the decision of the court of another state on that point was conclusive, whether right or wrong, since that court had jurisdiction of the garnishment proceeding in which the decision was made.

By the converse of the principle that denies the application of the exemption law of the state of the creditor's domicile, upon the ground that such law pertains to the remedy rather than the substantive contract, it might seem that the law of the state in which the garnishment proceeding is instituted should be applied, notwithstanding the nonresidence of the principal defendant (*i. e.*, the creditor to whom the debt sought to be garnished is due). It is clear, however, that this result cannot follow if the local exemption law is, in terms, confined to residents of the state. Even when the statute is not in terms so confined, it is a serious question whether it ought not to be regarded as intended for the protection of residents only. *Wabash R. Co. v. Dougan*, 142 Ill. 248, 34 Am. St. Rep. 74, 31 N. E. 594, however (a case not governed by the Illinois statute above alluded to), held that the Illinois exemption law was not confined to residents, and was therefore to be applied in a proceeding in that state to garnish an indebtedness due to a resident of another state.

So, *Kansas City, Ft. S. & M. R. Co. v. Cunningham*, 7 Kan. App. 47, 51 Pac. 972, held that the courts of Kansas would, as a matter of comity, in garnishment proceedings in which the principal defendant was a resident of Missouri, give effect to the exemption law of that state, it being in substantial harmony with the exemption law of Kansas.

A similar result was reached by the Kansas supreme court in *Missouri P. R. Co. v. Maltby*, 34 Kan. 125, 8 Pac. 235. But, while the actual decision in this case was merely that the debt

was exempt from garnishment process in Kansas, and was not expressly referred to the law of Kansas as distinguished from the law of the principal defendant's domicile (the law of the two states being substantially the same), the court intimated that, in its opinion, the exemption law of Kansas applied, notwithstanding the nonresidence of the principal defendant.

In *Atchison, T. & S. F. R. Co. v. Maggard*, 6 Colo. App. 85, 39 Pac. 985, however, the court held that, assuming the jurisdiction of a court of Colorado to garnish an indebtedness due to a resident of Kansas for services performed in the latter state, neither the exemption law of Kansas nor that of Colorado could be applied, even though the exemption statute of the latter state is not expressly, and in terms, confined to residents of that state.

It is obvious that the principle that a debt is subject to garnishment at the domicile of the debtor, in conjunction with the principle that the exemption laws pertain to the remedy, and not to the substantive right, may, as it did in the *Sturm Case*, operate to deprive the principal defendant of an exemption to which he is entitled under the law of his domicile. Some of the states have undertaken to avoid such result by the enactment of statutes forbidding the sending of claims out of the state for collection in order to evade the exemption laws of the state. The questions relating to the constitutionality and construction of such acts do not come within the scope of the note; but it may be remarked here that the constitutional question has been passed upon in *Singer Mfg. Co. v. Fleming*, 39 Neb. 679, 23 L. R. A. 210, 42 Am. St. Rep. 613, 58 N. W. 226, and *Re Flukes*, 157 Mo. 125, 51 L. R. A. 176, 80 Am. St. Rep. 619, 57 S. W. 545. See also, as to liability for evasion of exemption laws by action in other state, *note to Stewart v. Thomson*, 36 L. R. A. 582.

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to the question now under discussion, a part of the contract, but relate only to the remedy and the right to an exemption is therefore subject to the law of the forum. *Rood, Garnishment*, § 100; *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; *Sexton v. Phoenix Ins. Co.* 132 N. C. 3, 43 S. E. 479. But there is another decisive answer to this claim of exemption. We have concluded, as will appear hereafter, that the domicile of the corporation, the Reynolds Tobacco Company, is, for the purposes of this case, in this state, and it nowhere appears that it has any domicile, or even an agency, in the state of Virginia. Indeed, the case shows that, while it was created a corporation in the state of New Jersey, it has no property in that state, but the bulk of its property and its principal place of business are here. For this reason, it could not be sued by the defendant Claytor in the state of Virginia for the debt garnished in this action, and Claytor therefore could not avail himself of the exemption laws of that state. It is argued that, as the plaintiff and the defendant Claytor are residents of Virginia, if Claytor is not allowed his exemption under the laws of that state the plaintiff will be enabled thereby to evade or "shove by" the law of the domicile of both of them, and set it at defiance. How can this be, if the plaintiff cannot, by the process of the courts of that state, reach and lay hold of the *res*, which is the debt due by the tobacco company? An exemption, it would seem, can be allowed only in property actually situated in the state where the claim of exemption is asserted, and where the property in which it is claimed is subject to the jurisdiction and process of its courts. As we will presently show, the tobacco company had no domicile and could not be served with process there; and, besides, as will also appear hereafter, the situs of the debt, if any is required, was here. The argument predicated upon the exemption of the particular debt in Virginia must therefore fail, as no exemption exists.

We do not think that, if the plaintiff acquired any lien on the debt due to the defendant by the tobacco company, he lost it by taking a judgment against the defendant and the garnishee. The judgment against the garnishee seems to be expressly warranted and contemplated by the statute (Code, § 364), and that against the defendant is void as a personal judgment, as the court could acquire no jurisdiction to proceed against him, except in so far as it could by its process levy upon or seize his property; and in this respect the suit is to all intents and purposes in the nature of a proceeding *in rem*, and not of one *in personam*. 67 L. R. A.

am. Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Winfrees v. Bagley*, 102 N. C. 515, 9 S. E. 198; *Fisher v. Traders' Mut. L. Ins. Co.* (at this term) 48 S. E. 667; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308. Nor do we think the judgment was erroneous in that it included a part of the debt which was not earned and due at the time the garnishee was summoned to answer, if it was due when he actually answered and the judgment was rendered. Code, § 364, provides: "When an attachment shall be served on any garnishee in manner aforesaid, it shall be lawful upon his appearance and examination to enter up judgment and award execution for the plaintiff against such garnishee for all sums of money due to the defendant from him, and for all effects and estates of any kind belonging to the defendant, in his possession or custody, for the use of the plaintiff, or so much thereof as shall be sufficient to satisfy the debt and costs and all charges incident to levying the same; and all goods and effects whatsoever in the hands of any garnishee belonging to the defendant shall be liable to satisfy the plaintiff's judgment, and shall be delivered to the sheriff or other officer serving the attachment." The language thus employed clearly indicates the intention that any money due by the garnishee, or goods in his hands belonging to the debtor, at the time of appearance and answer, shall be applied in satisfaction of the debt. 1 Am. & Eng. Enc. Law, pp. 1150, 1151, 1165. It does not appear in this case how or when the salary was to be paid. It is admitted, however, that an amount more than sufficient to pay the plaintiff's claim was due at the time of filing the answer, and judgment was rendered only for the amount of the defendant's indebtedness to the plaintiff.

We come now to the consideration of the defendant's fourth exception, which involves important questions not at all free from difficulty. For the purpose of determining whether any one of the defendant's contentions under the fourth exception is well founded, we may admit the general rule that a garnishment is, in effect, a suit by the principal debtor, the defendant in the action, in the name of the plaintiff, and for his use and benefit, against the garnishee, to recover the debt due to the plaintiff's debtor, and apply it to the satisfaction of the plaintiff's demand. It would appear to be a necessary corollary from the proposition thus stated that the plaintiff in the garnishment is, in his relation to the garnishee, substituted merely to the rights of his own debtor, and can enforce no claim

against the garnishee which the debtor himself, if suing, would not be entitled to recover. *Shinn, Attachm.* § 487; *Myer v. Liverpool, L. & G. Ins. Co.* 40 Md. 595; *Brauser v. New England F. Ins. Co.* 21 Wis. 509. The garnishee can be placed in no worse position by reason of the garnishment than he occupied as a debtor to the defendant, nor subjected to any greater liability. This is a just and reasonable doctrine, but it does not by any means sustain the objections of the defendant. It seems to be conceded that, if the creditor of the garnishee can sue the latter in this state, then the plaintiff can proceed here against the garnishee. That the garnishee, the tobacco company, although a corporation having its domicile of origin in New Jersey, was amenable to process such as issued in this case, is too well settled to be now an open question. We are speaking now of the service of process, and not of jurisdiction. It is found as a fact that the company has complied with the laws of this state concerning foreign corporations, which means either that it had an agent in this state upon whom process could be served under the general law in all actions against it, or that it had complied with the provisions of chapter 5, p. 66, Acts 1901. As the tobacco company transacted business here by the favor or comity of this state, it was subject to the state's laws, and to all of its reasonable rules and regulations regarding the service of process; and any judgment of a state court, having jurisdiction of the cause or of the subject of the action, is binding upon the company,—at least in this state,—the same as if it were a domestic corporation or an individual. The subject is fully discussed in *Fisher v. Traders' Mut. L. Ins. Co.* (decided at this term) 48 S. E. 667. See also *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; *Shields v. Union Cent. L. Ins. Co.* 119 N. C. 380, 25 S. E. 951. While the company cannot be treated as a domestic corporation or as a distinct entity in this state, for the purpose of determining the jurisdiction of the Federal courts, it may be so regarded in respect to its liability to be sued here; and the jurisdiction of our courts over it, which extends to suits not only by residents of this state, but to those by residents of other states, who are equally entitled to be admitted to our courts to prosecute actions for the protection of their rights and the recovery of their property, in the absence of any law forbidding them to sue in our courts. The state may, it is true, exclude nonresidents from our courts, if it sees fit to do so, with-

out infringing the Constitution of the United States, which protects only citizens of a state against such discrimination by another state; but we do not think the principal defendant, who is the debtor of the plaintiff, has been denied the right to sue his debtor, the garnishee, in our courts, by § 194 of the Code. It having been settled that a foreign corporation exercising its franchises in this state may be subjected to the process of garnishment when it holds property or credits of the debtor for which the latter can sue in our courts, and that the plaintiff in attachment, as against the garnishee, is subrogated to the rights in that respect of the debtor, and can recover only by the same right and to the same extent as the debtor could recover if he were suing the garnishee, his debtor (*Myer v. Liverpool, L. & G. Ins. Co.* 40 Md. 595), it must follow that the plaintiff may maintain his action, and the garnishment proceedings as ancillary to it, unless he is precluded from doing so by § 194. That section provides that an action may be brought against a foreign corporation by a plaintiff not a resident of this state when the cause of action shall have arisen or the subject of the action shall be situated within this state.

It appears in this case that the terms of the contract between Claytor and the tobacco company were agreed upon in this state, and, while the services were performed by Claytor in Virginia, all checks for his salary or wages were drawn at and sent from Winston, in this state; and it further appears that the tobacco company has no property in New Jersey, which by courtesy may be called its domicile of origin, and that the bulk of its property is in this state, which is actually its domicile by adoption. What a curious result would follow if we should hold that Claytor cannot sue the company in this state! We will force him to seek his debtor in New Jersey, but he will find no property there to satisfy his debt; and there is no good reason why he should be required to resort to the courts of any other state than New Jersey, where there may happen to be some of the property of his debtor, but where the debtor has no domicile of any kind, and where the same law may exist as we have here; nor should he be required to first obtain judgment in New Jersey, and then come here to sue upon it. A construction of our statute, with reference to the special facts of this case, which would produce such an anomaly, by requiring him to pursue any one of the courses indicated, should not be accepted as the true one unless no other is admissible. The transactions out of which the cause of action of Claytor against the company arose occurred in this state, and

the debt due to him was as much payable here as it was in Virginia. For some purposes it may be important to determine precisely where a debt is payable or a contract is to be performed, but it is a well-established general rule that "all debts are payable everywhere, unless there is some special limitation or provision in respect to the payment; the rule being that debts, as such, have no *locus* or *situs*, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere." 2 Parsons, Contr. 8th ed. 702. The contract between Claytor and the tobacco company contained no "special limitation or provision in respect to payment," and the debt growing out of it, if not, by reason of the special circumstances of its creation, payable here (*Perry v. Erie Transfer Co.* 28 Abb. N. C. 430, 19 N. Y. Supp. 239), was payable generally, and could have been sued on by Claytor in this state, and therefore was attachable here. "This is the principle and effect of the best-considered cases,—the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws, if we would enforce that purpose." *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; Beale, Foreign Corp. § 284. Considering the special facts of this case, we find that the tobacco company obtained a charter in New Jersey for the avowed purpose of establishing its principal office and transacting its business in this state. It was born, it is true, in New Jersey, but it lives, moves, and has its being in this state. It is nominally a corporation of the other state, where it was originally created, but in reality has its home, its domicile, here. There is no valid or practical reason why this case should not be held to come substantially within the principle of *Seaton v. Phoenix Ins. Co.* 132 N. C. 3, 43 S. E. 479, *supra*, and *Boyd v. Royal Ins. Co.* 111 N. C. 372, 16 S. E. 389; and, if that is the correct view, the tobacco company cannot certainly be prejudiced in the least when it is required to pay its debts where it conducts its business and has all or the larger part of its assets. On the contrary, it will be to its advantage if it is required to pay where it has its assets, rather than at the domicile of its origin, where it has none, and where it performs none of its corporate functions. This case is clearly distinguishable from *Balk v. Harris*, 124 N. C. 468, 45 L. R. A. 257, 70 Am. St. Rep. 606, 32 S. E. 799 and *Strause Bros. v. Aetna F. Ins. Co.* 126 N. C. 223, 48 L. R. A. 452, 35 S. E. 471. The facts of this case and of those two cases are wholly different. It has been said that a corporation must dwell in the place of its creation, and cannot migrate

to another sovereignty (*Bank of Augusta v. Earle*, 13 Pet. 588, 10 L. ed. 307); but this dictum has been said to be nothing but a rhetorical statement of the perfectly obvious principle that a corporation, wherever it goes, is subject to the law of the state where it was created, and cannot rid itself of the control of that state, nor can it disregard the restrictions of its charter, which embodies the limitations of its legal existence and its corporate powers. It may, though, acquire a domicile or a residence in another state, and be subject to its laws to the same extent as if it had been fully domesticated there. *Murfree, Foreign Corp.* §§ 8, 9.

Our conclusion on this branch of the case is that the tobacco company was amenable to the process of our courts, both *mesne* and final; that the cause of action against it and in favor of Clayton arose in this state (*Steele v. Rutherford*, 70 N. C. 137); and that the subject of the action is situated here; that is, the debt due from the tobacco company to the defendant,—the *res*, as it is called (*Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 198),—which has been brought within the jurisdiction of the court by service of the garnishment.

It was necessary to decide the questions we have discussed before considering the defendant's last ground of objection, because a decision for him on any one of those questions would have settled the case in his favor.

The defendant further insists that his earnings for personal services at any time within sixty days next preceding the garnishment were exempt under § 493 of the Code. He admits that this exemption is allowed by that section in supplementary proceedings, but his counsel argue that it is intended by the law that such earnings shall in no way be condemned or applied to the payment of debts. The humane and beneficent provisions of the law in regard to exemptions, being remedial in their nature and founded upon a sound public policy, should always receive a liberal construction, so as to embrace all persons coming fairly within their scope. Black, Interpretation of Laws, 311. This court has uniformly held that, where property is exempted from seizure under final process, it is similarly exempt from levy or seizure under any *mesne* process issued for the purpose of placing it in the custody of the court, and thus to preserve it until it can finally be applied to the satisfaction of the plaintiff's debt. *Virginia-Carolina Chemical Co. v. Sloan* (at this term) 48 S. E. 577. Supplementary proceedings are in the nature of final process, when viewed either as a substitute for a creditor's bill to en-

force the payment of a judgment at law, or as a proceeding having the essential qualities of an equitable *fi. fa.*; and, if the defendant comes within the general description of the persons designated in the act, there is no good reason for denying him the exemption under the garnishment. The homestead and personal property exemptions can be claimed only by residents of this state. But this is so by reason of the express words of our Constitution and laws. There is no such limitation in § 493, and we are unable to see why we should restrict its meaning so as to exclude the defendant from the benefit of its wise provisions, and thereby defeat the evident policy and benevolent purpose of the legislature. We prefer to give the section a liberal construction, which will be apt to do justice, and at the same time carry out the legislative intent, and which, too, will not be contrary to the letter of the law.

The defendant should be allowed his exemption out of his earnings in accordance with the provisions of § 493, and to this extent there was error in the judgment upon the case agreed.

We have discussed the case somewhat at length, as it involves questions of great and increasing importance, and, it may be, of far-reaching consequences. It was unusually well presented on both sides by counsel in their briefs.

Error.

W. H. McNEILL

v.

DURHAM & CHARLOTTE RAILROAD COMPANY, *Appt.*

(135 N. C. 682.)

1. The giving of passes in consideration of the publication of railroad time-tables in a newspaper is within the prohibition of a statute making it unjust discrimination for a common carrier to receive from any person a greater or less compensation for transportation than is demanded or received from any other person by means of any special rate, rebate, drawback, or other device.

On Rehearing.

2. Conditions on the back of a void pass are without effect upon the rights of the person who is attempting to use it for transportation.
3. A railroad company renders itself liable to the penalty, provided by a stat-

ute for making unjust discrimination in rates for transportation over its road, not by making a contract for free transportation, but by actually transporting a person without charge or for an inadequate consideration.

4. One accepting free transportation which a railroad company is forbidden, under penalty, to grant is not precluded, on the ground that he is *in part delicto*, from holding the carrier liable to him for injuries due to its negligence, since he is not *in part delicto* with a railroad company, and, if he is so with respect to the carriage contract, it does not extend to the negligence causing the injury.
5. The acceptance of free transportation, which a railroad company is prohibited, under penalty, from granting, does not deprive one of the character of a bona fide passenger, or the protection to which he is entitled as such.
6. A person riding on the cars of a railroad company with its consent without any contract between him and the company may hold it liable for injuries inflicted upon him by the negligence of the company or its servants.

(Clark, Ch. J., and Montgomery, J., dissent.)

(April 28, 1903.)

APPEAL by defendant from a judgment of the Superior Court for Moore County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinions.

Messrs. Guthrie & Guthrie and H. F. Seawell, for appellant:

The general drift and weight of authority have unquestionably been towards holding the conditions on free passes, which are pure gratuities, valid and binding on the holders.

Payne v. Terre Haute & I. R. Co. 157 Ind. 616, 56 L. R. A. 472, 62 N. E. 472; *Muldoon v. Seattle City R. Co.* 7 Wash. 528, 22 L. R. A. 794, 38 Am. St. Rep. 901, 35 Pac. 422.

The old maxim of the law, *In pari delicto melior est conditio defendantis*, ought to apply to a case like the one at bar.

Turner v. North Carolina R. Co. 63 N. C. 522.

The contract was one of private carriage without hire,—a purely gratuitous bailment,—and lacked the essentials of a contract of common carriage, *viz.*, a duty to carry and reward or hire therefor.

A common carrier may enter into a pri-

NOTE.—For other cases in this series as to rights of person riding on pass, and as to validity of condition exempting carriers from liability for injury, see *Muldoon v. Seattle City R. Co.* 22 L. R. A. 794, and *note*; *Rogers v. Kennebec S. B. Co.* 25 L. R. A. 491; *Texas & P. R. Co. v. Smith*, 31 L. R. A. 321; *Meuer* 67 L. R. A.

v. Chicago, M. & St. P. R. Co. 25 L. R. A. 81; *Davis v. Chicago, M. & St. P. R. Co.* 33 L. R. A. 654; *Doyle v. Fitchburg R. Co.* 33 L. R. A. 844; *Whitney v. New York, N. H. & H. R. Co.* 50 L. R. A. 615; *Peterson v. Seattle Traction Co.* 53 L. R. A. 586; and *Payne v. Terre Haute & I. R. Co.* 56 L. R. A. 472.

vate contract of carriage or bailment under special circumstances.

Citizens' Bank v. Nantucket S. B. Co. 2 Story, 32, Fed. Cas. No. 2,730.

Consequently when a common carrier undertakes to do that which he is under no duty whatever to do,—to carry a person gratuitously for charity,—and makes it one of the terms of such gratuitous carriage that in so doing he is not a common carrier, and that the person so carried shall assume all risks, such a contract is not contrary to public policy, and is valid and binding.

Coup v. Wabash, St. L. & P. R. Co. 50 Mich. 111, 56 Am. Rep. 374, 22 N. W. 215; *Chicago, M. & St. P. R. Co. v. Wallace*, 30 L. R. A. 101, 14 C. C. A. 257, 24 U. S. App. 589, 66 Fed. 509; *Robertson v. Old Colony R. Co.* 156 Mass. 525, 32 Am. St. Rep. 482, 31 N. E. 650; *Blank v. Illinois C. R. Co.* 182 Ill. 332, 55 N. E. 332; *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385; *Norfolk & W. R. Co. v. Shott*, 92 Va. 34, 22 S. E. 811; *Kuney v. Central R. Co.* 32 N. J. L. 407, 90 Am. Dec. 675, 34 N. J. L. 513, 3 Am. Rep. 265; *Griswold v. New York & N. E. R. Co.* 53 Conn. 371, 55 Am. Rep. 115, 4 Atl. 261; *Quimby v. Boston & M. R. Co.* 150 Mass. 365, 5 L. R. A. 846, 23 N. E. 205; *Rogers v. Kennebec S. B. Co.* 86 Me. 261, 25 L. R. A. 491, 29 Atl. 1069; *Higgins v. New Orleans, M. & C. R. Co.* 28 La. Ann. 133; *Annas v. Milwaukee & N. R. Co.* 67 Wis. 46, 57 Am. Rep. 388, 30 N. W. 282; *Ulrich v. New York C. & H. R. R. Co.* 108 N. Y. 80, 2 Am. St. Rep. 369, 15 N. E. 60; *Hosmer v. Old Colony R. Co.* 156 Mass. 506, 31 N. E. 652; *Muldoon v. Seattle City R. Co.* 7 Wash. 528, 22 L. R. A. 794, 38 Am. St. Rep. 901, 35 Pac. 422; *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Illinois C. R. Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260.

Messrs. Murchison & Johnson also for appellant.

Messrs. U. L. Spence, W. J. Adams, J. D. McIver, Shepherd & Shepherd, and Douglass & Simms for appellee.

Clark, Ch. J., delivered the opinion of the court:

This is an action of tort arising out of contract for personal injuries alleged to have been received by the plaintiff April 6, 1900, by negligence of the defendant, while traveling on its road. The complaint avers that the plaintiff was a passenger on said railroad under a contract by it to carry the plaintiff for a valuable consideration. The defendant, in its answer, among other things, avers that the plaintiff was a "trespasser on its train, having tendered to defendant no ticket, money, or compensation 67 L. R. A.

whatever for its fare,—only a free pass, which had expired 1st January previously by its own limitation," and which further had on its back a stipulation exempting the company from liability under all circumstances for injury to his person, or loss or damage to his baggage. The plaintiff testified that he was "editor of the Carthage Blade, a newspaper published at Carthage. In 1899 I made a contract with the defendant to publish its time-table in my paper, as the consideration for the pass. I did publish the time-table, and the defendant agreed to continue the contract and renew the pass for 1900." It is true, he said he told the conductor he would pay the fare; but, upon his making the above statement, the conductor accepted him as a free passenger.

Upon this evidence the motion for judgment as of nonsuit should have been granted. There is no lawful contract of passage, and the only right the plaintiff could claim against the defendant is that the defendant should not wilfully and wantonly injure him. *Cook v. Southern R. Co.* 128 N. C. 333, 38 S. E. 925. The general assembly (Laws 1891, chap. 320, p. 277, § 4) provided that "if any common carrier subject to the provisions of this act shall directly or indirectly by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of this act than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantial similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination." Section 25 of said chapter (p. 286) contains the exceptions which permit handling free and at reduced rates property of the United States, state, or municipal governments, or for charitable purposes, or to or from fairs, and at exhibits thereat, and permits "the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation [or the free transportation of persons traveling in the interest of orphan asylums or any department thereof], or the issuance of mileage, excursion, or commutation passenger tickets. Nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the national homes or state homes for

disabled volunteer soldiers and of soldiers' and sailors' orphan homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees." These exceptions are very liberal, but they do not embrace newspaper editors. Subject to the liberal exceptions just recited, the general assembly deemed that free transportation or any other discrimination was so much against public policy that a violation of the statute was made punishable with a fine not less than \$1,000 and "not exceeding \$5,000" for each offense. Nothing could be more clearly a discrimination than the ground upon which the plaintiff asked for and received free passage on this occasion, to wit, that for the year previous he had advertised the schedule of the defendant company in his paper, and had received therefore a free pass over its line for the previous year, and that this contract had been renewed for the year then current. It does not appear what was the value of the advertising done, charging for the space at the same rates as would be charged others; but, let it be what it may, it could not amount exactly—"neither more nor less"—to the value of a free pass to travel *ad libitum* an unstipulated number of miles over the defendant's road. Besides, it was an illegal discrimination to sell the plaintiff transportation on credit, and not payable in money.

This statute was before this court, and the clear meaning of the statute, and the duty of the court to enforce the public policy indicated by its unequivocal terms were stated in an exhaustive and able opinion by Mr. Justice Montgomery. *State v. Southern R. Co.* 122 N. C. 1052, 41 L. R. A. 246, 30 S. E. 133. In the concurring opinion of Mr. Justice Douglas in that case it was stated that the number of free passes issued in this state per year was understood to be over 100,000, and, after deducting the free passes issued in the cases allowed by the act, over \$250,000 of transportation was given away each year, mostly to the classes best able to pay, and that this quarter of a million dollars was perforce added to the fares of those who paid their way. This was to show the public policy which required that such discriminations should be forbidden. Sections 4 and 25 of the act of 1891, above quoted, were copied from the act of Congress forbidding such discriminations, and the rulings of the Interstate Commerce 67 L. R. A.

Commission and of the Federal courts thereon have been to the same effect as our own; many of those decisions being cited by Justice Montgomery in *State v. Southern R. Co.* 122 N. C. 1063-1067, 41 L. R. A. 246, 30 S. E. 133. At page 1060, 122 N. C., page 249, 41 L. R. A., and page 135, 30 S. E., it is well said: "The thing which was denounced by the statute, and for which the defendant is indicted, is not the act of giving the free pass,—the mere handing to the passenger the piece of paper on which was written the privilege of riding free,—but the act of transporting the favored passenger without charge or the payment of fare. The law would be violated if no pass was actually issued, if the passenger was carried free. The favored passenger might be known personally to the conductor, or be known to him by preconceived signs, or mileage books distributed gratis or sold at reduced rates, and in other ways."

The plaintiff knew that the defendant had no right to make a contract with him to transport him free an unlimited number of miles for an advertisement which in any aspect would not be the exact rate charged all other passengers. He knew that the statute denounced such attempted contract as unlawful and punishable with a fine "not less than \$1,000 nor more than \$5,000." While the plaintiff was not himself made indictable, as in some states, he knew that the contract was unlawful, and he cannot now come into a court of justice and ask that the court shall give him compensation for damages sustained by the negligent breach of the contract of safe carriage. That presupposes a lawful contract, and he knew that this was an unlawful contract. He and the defendant are *in pari delicto*, and the court will leave the parties to settle their own controversy over damages for breach of a contract forbidden by law. In *Cook v. Southern R. Co.* 128 N. C. 333, 38 S. E. 925, a tramp was stealing a ride. He was on the train unlawfully. In *Pierce v. North Carolina R. Co.* 124 N. C. 83, 44 L. R. A. 316, 32 S. E. 399, a boy had jumped on a switching train, and was riding thereon, contrary to the town ordinance. The court held that the company was liable in such cases only for any wilful or wanton injury inflicted by the employees of the company. Here the plaintiff was on the train illegally, and against a prohibition more severe than the violation of a town ordinance against the boy, or the stealing of a ride by a tramp. To same purport, *Richmond & D. R. Co. v. Burnsed*, 35 Am. St. Rep. 656, and notes (70 Miss. 437, 12 So. 958); *Hendryx v. Kansas City, Ft. S. & G. R. Co.* 45 Kan. 379, 25 Pac. 893, and cases cited. The plaintiff is an educated,

reputable gentleman,—a member of an honored profession; but, being on the cars illegally, seeking free transportation, or at least discrimination in rates, contrary to the prohibition of the statute, his rights as against the company are the same as those others who were also riding contrary to law. He neither shows nor avers wilful, wanton, or malicious injury, and cannot recover. In *State v. Southern R. Co.* 122 N. C. 1052, 41 L. R. A. 246, 30 S. E. 133, the defendant set up the plea of ignorance of the law, but the court said everyone was fixed with knowledge of the law. The plaintiff has had the additional advantage of the notice given by the construction of the statute in that case. In a subsequent case (*State v. Southern R. Co.* 125 N. C. 670, 34 S. E. 527) the court repeated that free transportation, or reduced rates, except in cases allowed by the statute, "would be an undue preference, forbidden by the statute, equally whether it was given upon a free pass from an official, or by a verbal order, or upon a ticket or mileage book not in truth paid for, but donated by the company. It is the fact of discrimination, and not the method by which it is done, which constitutes the offense." Subsequent to these decisions, the general assembly re-enacted these sections as §§ 13 and 22, chap. 164, pp. 301, 304, Laws 1899, with no substantial change, though some other sections were repealed. The Constitutions of 11 states—Alabama, Arkansas, California, Florida, Kentucky, Mississippi, Missouri, New York, Pennsylvania, Washington, and Virginia—prohibit the issuing of free passes or giving reduced rates to any member of the legislature or other officeholder whatever; and some of these Constitutions, like the Federal statute and our statute and the statutes of yet other states, as Colorado, Massachusetts, North Dakota, Wisconsin, and others, forbid the issuing of free passes or reduced rates to anyone, whether officeholder or not, with exceptions similar to those enumerated in our statute above set out. Indeed, the Constitutions of four states—New York, Missouri, California, and the recently adopted Constitution of Virginia—make the acceptance by any officeholder whatever of a free pass from a railroad or telegraph company, or other discrimination in his favor, a forfeiture of office. This recital will serve to show the importance and general acceptance of the public policy of equality in treatment by quasi public corporations, whose infringement our statute punishes with a fine "not exceeding \$5,000," and whose observance it is the duty of all courts to enforce.

The denunciation of the statute is directed against discrimination in the exercise

of a quasi public function, which public policy demands shall be discharged with absolute impartiality and equality,—with equal rights to all, and special privileges to none."

We were cited to many authorities holding ineffectual stipulations upon the back of free passes exempting the common carrier from liability for injuries sustained by the holder thereof. These authorities are conflicting (4 Elliott, Railroads, § 1608), and can be considered only when the pass is issued in one of the cases permitted by our statute. They have no application to a case like this, where the contract of free carriage is illegal, and the parties are *in pari delicto*.

This is a stronger case for the defendant than *Turner v. North Carolina R. Co.* 63 N. C. 522, in which a soldier contracted with a railroad company for transportation to Johnston's Army to serve against the United States, and was injured *en route* by negligence of the company, and it was held that he could not recover damages, Reade, J., saying that, the contract of carriage being illegal, the parties "were *in pari delicto*," and the court "would consult its dignity, and not interfere in their dispute." To same purport, *Martin v. Wallace*, 40 Ga. 52; *Redd v. Muscogee R. Co.* 48 Ga. 102; *Muscogee R. Co. v. Redd*, 54 Ga. 33.

This is the first case in which the illegal discrimination is set up by the common carrier, but it so happens that by the lapse of time it is now protected from indictment by the statute of limitations.

In refusing to grant judgment as of nonsuit, there was error.

Douglas, J., dissenting:

I am inclined to think that the plea *in pari delicto*, applying solely to the contract of carriage, is not a defense to an action for personal injuries caused by the negligence of the defendant.

A petition for rehearing having been filed, **Douglas, J.**, on June 1, 1904, handed down the following response:

This is a rehearing of the case originally decided in 132 N. C. 510, 95 Am. St. Rep. 641, 44 S. E. 34. We fully concur in our former opinion as to the illegality of the contract by which the defendant agreed to give to the plaintiff free personal transportation to an unlimited extent in consideration of certain advertising. The only ground on which we allow the petition is that the plea *in pari delicto*, applying solely to the contract of carriage, is not a defense to an action for personal injuries caused by the negligence of the defendant.

The plaintiff testified as follows: "Marsh-

burn called on me for my ticket. I told him I had a pass for 1899, and showed it to him, and told him I would pay the regular fare if he wanted it. He said it was all right. I was the editor of the Carthage Blade, a newspaper published at Carthage. In 1899 I made a contract with the defendant to publish its time-table in my paper as the consideration for the pass. I did publish the time-table, and the defendant agreed to continue the contract and renew the pass for 1900. The contract was not in writing."

The superintendent of the defendant company testified that there was no such contract, but that the pass was a gratuity. This raised a question of credibility, which in the view we take of the case becomes of no practical importance. In any event it would be a question of fact for the jury. The contract for transportation was rendered absolutely void by the statute, founded upon public policy, whether based upon no consideration or upon the inadequate consideration of printing a time-table. The pass, issued in pursuance of an illegal contract and for the purpose of carrying out its unlawful purpose, inherits its invalidity. The defendant was free at all times to decline to carry the plaintiff except upon the payment of the usual fare, and to eject him from its train upon his refusal to pay. The fact that the pass had expired makes no difference, as, in its character as a contract, it never had any legal existence. Being without legal existence, it was equally devoid of legal effect, and, conferring no rights upon the plaintiff, imposed upon him no obligations which the law will enforce. A void contract is thus defined in Lawson on Contracts, § 350: "A void contract is one destitute of legal effect. It is a mere nullity, and good for no purpose whatever. It is binding upon neither party, and may be attacked as invalid by strangers. It does not require any disaffirmance to avoid it, but may be simply disregarded, and it cannot be ratified and made valid."

The pass itself being worthless, the conditions on the back thereof could have no application. They were not independent contracts, and, if they had been, were totally wanting in a legal consideration. Therefore this case does not come within the principle laid down in *Northern P. R. Co. v. Adams*, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408, where the pass was recognized as a lawful and valid contract for free transportation. By citing and distinguishing that case, decided by a divided court, we do not mean to express our approval of its argument or conclusion. It is not necessary for us to consider it in the case now before us.

We may here repeat that it is not the un-67 L. R. A.

lawful contract for free transportation which renders a railroad company liable to the penalty, but it is the transportation itself. In the view of this statute a free pass is a mere incident, as the same result could be obtained by issuing a thousand-mile ticket or one in ordinary form. The offense consists in the free carriage of a passenger, whether with or without a pass or ticket; and the offense is complete when such passenger is carried any appreciable distance. The railroad company may have issued to him a free pass or ticket from Raleigh to New York with impunity, but would become liable to the full penalties prescribed by the statute as soon as it had transported such passenger to the first station out of Raleigh. In using the term "free transportation," we mean to include all transportation which justly comes within the forbidden principle of discrimination. A mere colorable consideration will neither evade the penalties of the statute upon the one hand, nor confer any rights upon the other.

We must bear in mind that while the statute renders absolutely void any contract for free transportation, so that neither party thereto can acquire any rights thereunder, it imposes the penalty only upon the transportation company. The act of free transportation alone is criminal. The party accepting such transportation is not guilty of a criminal act, whatever moral blame may attach to the reception of unlawful favors. Therefore, in contemplation of law, the parties cannot be considered *in pari delicto*. This difference is well expressed by Pearson, Ch. J., speaking for the court in *Melvin v. Easley*, 52 N. C. (7 Jones, L.) 356. That was an action for deceit and false warranty in the sale of a horse on Sunday by a horse trader, in violation of Rev. Stat. chap. 118, § 1. The court says, on page 358, 52 N. C. (7 Jones, L.): "It is said the plaintiff knew the defendant was a horse trader and concurred in his violation of the statute, and, consequently, was *particeps criminis*. Does this consequence follow? In crimes, there are accessories; in misdemeanors, all who aid or concur are held to be equally guilty, and are subject to like punishment with the party who commits the offense. This plaintiff is not guilty of violating the law, and is not subjected to a penalty, so he cannot be *particeps criminis* in the legal sense of the terms. He is not *in pari delicto*, and it is against the policy of the law, and will defeat its object, so to consider him. The court will not aid any person who violates the law; therefore the defendant could not maintain an action. This rule is adopted on the ground of policy, for the purpose of preventing a violation of the law, and, if

confined in its operation to the actual offender, its application will be salutary; but if it be extended to the party who is not an offender, so far from checking, it will encourage a violation of it, by letting it be known to 'horse traders,' 'shopkeepers,' and 'all whom it may concern,' that they may cheat with impunity, provided always it may be done on the Lord's Day."

The plaintiff was lawfully upon the defendant's train, and testifies that he offered to pay his fare if required by the conductor. The conductor permitted him to ride free, not as a personal favor to him, but in furtherance of a contract between him and the company itself, acting through its superior officers. There is no suggestion that the plaintiff was seeking to defraud the company in any manner, or that there was any collusion between him and the conductor. He was in every respect a bona fide passenger, and entitled to all the protection incident thereto, unless deprived thereof by the acceptance of free transportation.

The cases relied on to sustain the defense of *in pari delicto* are chiefly of two classes, those involving a violation of the Sunday laws, and those growing out of the relation of the plaintiff towards the national government during the Civil War. The latter class, evoked from conditions now happily passed away forever, furnishes no criterion for the determination of the case at bar. It is enough to say that in both classes of cases the plaintiffs were actually engaged in the performance of an act expressly denounced as criminal by the law of the land, as construed by the courts in which the actions were necessarily brought. The following are illustrative cases: *Turner v. North Carolina R. Co.* 63 N. C. 522; *Martin v. Wallace*, 40 Ga. 52; *Wallace v. Cannon*, 38 Ga. 199, 95 Am. Dec. 385; *Muscogee R. Co. v. Rodd*, 54 Ga. 33; *Connolly v. Boston*, 117 Mass. 64, 19 Am. Rep. 396; *Smith v. Boston & M. R. Co.* 120 Mass. 491, 21 Am. Rep. 533; *Lyons v. Desotelle*, 124 Mass. 387; *Holcomb v. Danby*, 51 Vt. 428. While entertaining the highest respect for the Lord's Day, the Sunday of the new law, we have not deemed it our duty to enforce its observance, so as to make it the shield of wrong. *Rodman v. Robinson*, 134 N. C. 503, 65 L. R. A. 682, 101 Am. St. Rep. 877, 47 S. E. 19.

In the case at bar the plaintiff is certainly neither a tramp nor a trespasser, as both of those terms imply an unlawful presence against the will of the owner. Hence it is needless to examine the cases dealing with such relations. If the plaintiff's evidence be true, he was not a gratuitous passenger in the full sense of the term, inasmuch as he printed in his paper the schedule of trains in consideration of his

otherwise free carriage. This was an inadequate consideration which rendered the contract void as an unlawful discrimination, but it was none the less a consideration of some actual value. But while this might, as between the plaintiff and the defendant, bring the case within the principle of *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, we deem it proper to treat the plaintiff as a gratuitous passenger, in view of the unlawful consideration, and will cite the able opinion in that celebrated case only in so far as it relates to this view of the case at bar.

It is often said that one becomes a passenger by virtue of a contract. This is not always so. A contract is a voluntary agreement between two parties, a coming together of two minds to a common intent, and yet a passenger may become such without a contract, and, indeed, against the will of the carrier. A common carrier has no right to refuse a passenger without sufficient reasons, and such reasons so rarely occur, and are so exceptional in their nature, as to vary the general rule too slightly for practical consideration. Suppose the carrier without legal excuse should refuse to sell a ticket to one having the bona fide intention of becoming a passenger, and that the passenger should then enter the carrier's train in an orderly manner, take his seat in the proper car, and tender his fare to the conductor, would the refusal of such fare deprive him of his legal status as a passenger? Assuredly not. He would be a passenger in the fullest meaning of the term, entitled to all the rights, privileges, and protection attaching to that relation, and yet there would be no actual contract between him and the carrier. But it may be said that the law raises an implied contract. Even if we accept that form of expression, it simply means that the law imposes upon a common carrier certain duties and liabilities which adhere to the nature of his calling. We prefer to adopt the more direct expression, and say that those duties and liabilities are imposed by law upon common carriers upon considerations of public policy independent of contract, and arise from the nature of their public employment. Contracts may be made with the carrier, but into all such contracts certain conditions are written by the hand of the law. One such condition is the inherent liability of the carrier for all injuries proximately resulting from its own negligence or that of its servants. But, as we have already said, in the case at bar there was no legally existing contract, which is equivalent to saying there was no contract at all. Viewing the plaintiff as a gratuitous passenger, and it appearing from the verdict that he was in-

jured through the negligence of the defendant, we think that he is entitled to recover.

We have given this case most careful consideration, and have examined a very large number of authorities, but will cite those only which directly bear upon the case in the view we take of it, omitting needless repetitions from the same state. Neither time nor space will permit the discussion of cases having no essential relation to that at bar.

It is significant that the greater weight of authority is to the effect that a passenger may recover for injuries received from the negligence of a common carrier or its servants, even when unlawfully traveling on Sunday, or on a lawful pass with conditions indorsed thereon releasing the carrier from all liability. In both cases the cause of action is attributed to injuries resulting from the breach of a public duty. *A fortiori* the plaintiff can recover for such negligence when the defendant alone is in the commission of an unlawful act, and when there is no release of liability.

We will begin our citations from the supreme court of Pennsylvania, a court which is not addicted to emotional jurisprudence, and has never shown any disposition to burden railroad management with unnecessary conditions or restrictions. In *Pennsylvania R. Co. v. Butler*, 57 Pa. 335, the intestate was killed while riding on a free pass on which a release was indorsed. Sharswood, J., speaking for the court, says on page 337: "The first error assigned has been properly abandoned, as it is too well settled to be now controverted that a stipulation by a common carrier that he shall not be liable for damages does not relieve him from responsibility for actual negligence by himself or servants." This case is cited with approval upon the same point in *Burnett v. Pennsylvania R. Co.* 176 Pa. 45, 34 Atl. 972, the latest case upon the subject.

In *Carroll v. Staten Island R. Co.* 58 N. Y. 126, 17 Am. Rep. 221, where the plaintiff was traveling on Sunday, contrary to the statute, it was held that "the duty imposed by law upon the carrier of passengers to carry them safely, as far as human skill and foresight can go, exists independently of contract. For a negligent injury to a passenger an action lies against the carrier, although there be no contract, and the service he is rendering is gratuitous; and, whether the action is brought upon contract or for failure to perform the duty, the liability is the same. One violating the statute prohibiting travel upon Sunday (1 Rev. Stat. Edmond's ed. p. 628, pt. 1, chap. 20, title 8, § 70) is not without the protection of the law. The carrier owes to him the same duty as if he were lawfully traveling, and is responsible for a failure to perform it, the 67 L. R. A.

same in the one case as in the other." The court says, on pages 133, 134, Am. Rep. pages 224, 225: "But we deem it unnecessary to decide the question, which was argued with great ability by counsel, touching the liability of the defendant in the action, treating it as founded upon the contract between the parties. The gravamen of the action is the breach of the duty imposed by law upon the carrier of passengers to carry safely, so far as human skill and foresight can go, the persons it undertakes to carry. This duty exists independently of contract, and although there is no contract in a legal sense between the parties. Whether there is a contract to carry, or the service undertaken is gratuitous, an action on the case lies against the carrier for a negligent injury to a passenger. The law raises the duty out of regard for human life, and for the purpose of securing the utmost vigilance by carriers in protecting those who have committed themselves to their hands. . . . The liability of the carrier is the same, whether the action is brought upon contract or upon the duty, and the evidence requisite to sustain the action in either form is substantially the same, and when there is an actual contract to carry, it is properly said that the liability in an action founded upon the public duty is coextensive with the liability on the contract. This case, therefore, is not within the principle of many of the cases cited, which forbid a recovery upon a contract made in respect to a matter prohibited by law, or for a cause of action which requires the proof of an illegal contract to support it."

In *Delaware, L. & W. R. Co. v. Trautwein*, 52 N. J. L. 169, 7 L. R. A. 435, 19 Am. St. Rep. 442, 19 Atl. 178, it was held that the plaintiff could recover although unlawfully traveling on Sunday, the court saying, on pages 171, 172, 52 N. J. L. page 437, 7 L. R. A., page 444, 19 Am. St. Rep., and page 179, 19 Atl.: "A contract to carry, made on Sunday, or to be performed on Sunday, is, by force of the statute, illegal and void. No action could be maintained for the breach of such a contract, nor for services performed under it, where the right of action rests exclusively upon a contract, express or implied. . . . It is also clear that a plaintiff will fail where, to make a cause of action, he is compelled to rely upon an illegal contract. But the duty of persons engaged in these public employments to safely and securely carry is independent of contract. It is a duty imposed by law from considerations of public policy, and arises from the fact that persons or property are received in the course of the business of such employments. . . . Nor was the

plaintiff's violation of the Sunday law, in a legal sense, the cause of her injury. It was only the occasion for an injury by the defendant's wrongful act, and hence her wrongdoing did not contribute to the injury in such a sense as to deprive her of her right of action; it was merely a condition, and not a contributory cause of the injury."

In *State, use of Abell v. Western Maryland R. Co.* 63 Md. 433, it was held that "when a carrier undertakes, without any special contract, to carry a passenger gratuitously, the passenger is entitled to the same degree of care as if he had paid his fare." The court says, on page 443: "The principle announced in this decision, that the duty of the carrier to convey safely does not result from the consideration paid, but is imposed by law, has been recognized by this court on the motion to reargue the case of *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 619, 48 Am. Rep. 134, where the court says that a common carrier who accepts a party to be carried owes to that party a duty to be careful, irrespective of contract; and this court illustrates the principle by the example of a child for whom no fare is charged, but who could recover in case of injury, the result of negligence."

In *Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799, a gratuitous passenger injured by the breaking down of a hack was allowed to recover. The court says, on page 357, Am. Rep. page 800: "This, we think, was sufficient to authorize the instruction. The principle announced in it, that, although plaintiff might have been a gratuitous passenger, such fact constituted no defense, is supported by all the authorities which have come under our observation. While in some of them intimations are made that in the case of a gratuitous passenger the carrier may only be liable for gross negligence, it has not been held in any of them that such fact would exempt the carrier from all liability. On the contrary, the weight of authority favors the doctrine of holding the carrier of passengers to the same degree of diligence in all cases where one has been received as a passenger, on the principle that if 'a man undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence.'"

In *Jacobus v. St. Paul & O. R. Co.* 20 Minn. 125, 18 Am. Rep. 360, Gil. 110, it was held that the plaintiff could recover although riding on a pass, as the same degree of care was required of the common carrier as if the plaintiff had been a passenger carried for hire. The court says, on page 129, Am. Rep. page 362: "In the case at 67 L. R. A.

bar, however, the plaintiff was not merely a gratuitous passenger, i. e., a passenger carried without payment of fare or other consideration. He was a passenger upon a free pass expressly conditioned that the defendant should not be liable to him for any injury of his person while he was using or having the benefit of such pass. Does this circumstance distinguish his case from that of a merely gratuitous passenger? . . . There are two distinct considerations upon which the stringent rule as to the duty and liability of carriers of passengers rests. One is a regard for the safety of the passenger on his own account, and the other is a regard for his safety as a citizen of the state. The latter is a consideration of public policy growing out of the interest which the state or government, as *parens patriæ*, has in protecting the lives and limbs of its subjects. . . . So far as the consideration of public policy is concerned, it cannot be overridden by any stipulation of the parties to the contract of passenger carriage, since it is paramount from its very nature. No stipulation of the parties in disregard of it, or involving its sacrifice in any degree, can, then, be permitted to stand. Whether the case be one of a passenger for hire,—a merely gratuitous passenger,—or of a passenger upon a conditioned free pass, as in this instance, the interest of the state in the safety of the citizen is obviously the same. The more stringent the rule as to the duty and liability of the carrier, and the more rigidly it is enforced, the greater will be the care exercised, and the more approximately perfect the safety of the passenger. Any relaxation of the rule as to duty or liability naturally, and it may be said, inevitably, tends to bring about a corresponding relaxation of care and diligence upon the part of the carrier. We can conceive of no reason why these propositions are not equally applicable to passengers of either of the kinds above mentioned."

In *Tibby v. Missouri P. R. Co.* 82 Mo. 292, the intestate was killed while riding on a free pass on top of a cattle car. The plaintiff was allowed to recover, the court saying, on page 300: "The contract of exemption from damages was properly excluded. A common carrier is not permitted to stipulate against its own negligence. [Citing cases.] This rule in its application to the carriage of passengers has never been relaxed."

In *Opsahl v. Judd*, 30 Minn. 126, 14 N. W. 575, the plaintiff, unlawfully traveling on Sunday, was permitted to recover. The court says, on page 128, 30 Minn., page 576, 14 N. W.: "It is further contended that the deceased was, by accepting passage upon the steamboat, engaged in an unlawful act, and was *particeps criminis* with the de-

fendants and their agents in violating the Sunday law. It is a sufficient answer to this objection that the defendants on that day occupied the relation of common carriers of passengers, and their general obligation to use such care and diligence as the law enjoins is not limited by the contract with the passengers, nor with the person who engaged the use of the boat and the services of the crew for that day, but is governed by considerations of public policy. That the undertaking was unlawful does not touch the question. *Carroll v. Staten Island R. Co.* 58 N. Y. 126, 134, 17 Am. Rep. 221; *Jacobus v. St. Paul & C. R. Co.* 20 Minn. 125, 18 Am. Rep. 360, Gil. 116. As remarked by the court in that case, 'any relaxation in the rule as to duty or liability naturally, and, it may be said, inevitably, tends to bring about a corresponding relaxation of care and diligence upon the part of the carrier.' "

In *Rose v. Des Moines Valley R. Co.* 39 Iowa, 246, it was held, quoting the headnote, that "the payment of fare is not necessary to create the relation of common carrier and passenger. A railroad company was held to be liable for causing the death of a passenger by the negligence of its employees, notwithstanding he was at the time riding upon a free pass, upon which was a stipulation, signed by himself, releasing the company from all liability for injury to his person or property while using the same." In its opinion the court adopts the language used in *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 14 L. ed. 502.

In *Russell v. Pittsburgh, C. O. & St. L. R. Co.* 157 Ind. 305, 55 L. R. A. 253, 87 Am. St. Rep. 214, 61 N. E. 678, the release from liability given by a Pullman porter was held valid on the ground that he was not a passenger, but the court uses the following language on page 309, 157 Ind. page 254, 55 L. R. A. page 217, 87 Am. St. Rep. and page 679, 61 N. E.: "The decisions of this state firmly establish that a common carrier of goods or passengers cannot contract with a customer for a release of the carrier from liability resulting from the latter's negligence [Citing cases.] The grounds upon which this prohibition rests are variously stated by the court. It has been said that such exemptions are against public policy, that the public is interested in the exercise of care and diligence on the part of the carrier, that it is unreasonable for any person or corporation to contract for the privilege of being negligent, and that the public is concerned with the life and security of every citizen. The fundamental reason, however, for holding common carriers, such as the appellee, liable for the results of their negligence, notwithstanding contracts ex-

empting them therefrom, is that the state has granted them privileges which they exercise for the benefit of the public; in return for these, the common carrier impliedly undertakes to use due care and diligence in the transportation of both goods and passengers. This being a main inducement for the grant of its special rights, the carrier cannot by any special contract rid itself of the burden of responsibility, which is one of the conditions of its creation. Were it permitted to escape liability by entering into exonerating agreements, its position of advantage over its patrons would in almost every instance enable it to force from them such stipulations as it desired, and the object of the state in creating the carrier would be virtually defeated, the carrier thus being able to abandon the duty imposed upon it by the state. As said in the case of *Louisville, N. A. & C. R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869, at page 130, 126 Ind., page 869, 25 N. E.: 'A stipulation that the carrier shall not be bound to the exercise of care and diligence is in effect an agreement to absolve him from one of the essential duties of his employment, and it would be subversive of the very object of the law to permit the carrier to exempt himself from liability by a stipulation in his contract with a passenger that the latter should take the risk of the negligence of the carrier or of his servants. The law will not allow the carrier thus to abandon his obligation to the public, and hence all stipulations which amount to a denial or repudiation of duties which are of the very essence of his employment will be regarded as unreasonable, contrary to public policy, and therefore void.' In *Cleveland P. & A. R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362, at page 12, 19 Ohio St., page 365, 2 Am. Rep. the court says: 'Carriers, of the class of the plaintiff in error, are creatures of legislation, and derive all their powers and privileges by grant from the public. They are created to effect public purposes, as well as to subserve their own interest. They are intended, by the law of their creation, to afford increased facilities to the public for the carriage of persons and property, and, in performing this office, they assume the character of public agents, and impliedly undertake to employ in their business the necessary degree of skill and care. This obligation arises from the public nature of the employment, and is founded on the policy of the law for the protection of the persons and property of the public, which must of necessity be committed to a very great extent to the care of public carriers. It cannot be denied that pecuniary liability for negligence promotes care, and, if public carriers, in conducting their busi-

ness, can graduate their charges so as to discharge themselves from such liability, the direct effect will be to encourage negligence by diminishing the motives for diligence." In *Davis v. Chicago, M. & St. P. R. Co.* 93 Wis. 470, 33 L. R. A. 654, 57 Am. St. Rep. 935, 67 N. W. 16, it was held: "A stipulation in a contract for the carriage of a passenger, exempting the carrier from liability for injuries caused by its negligence or the negligence of its agents or employees, is void as against public policy;" the court saying, on page 479, 93 Wis., page 657, 33 L. R. A., page 938, 57 Am. St. Rep., and page 18, 67 N. W.: "It is very well established in this state that a contract for such an exemption from liability of a common carrier is void as against public policy. The defendant could not by any agreement, however plain and explicit, wholly relieve itself from liability for injuries caused by its negligence or the negligence of its agents or employees."

In *Gulf, C. & S. F. R. Co. v. McGown*, 65 Tex. 640, it was held, quoting the headnotes, that "a common carrier of passengers cannot by contract relieve itself from responsibility, or even limit its liability, for injuries to a passenger resulting from the negligence of itself or its employees or agents in the scope of their employment; and this is so with reference as well to passengers traveling free of charge as to those paying full fare. The liability of the carrier of passengers does not depend on the fact that compensation for the passenger has been paid to it; but the same degree of care is incumbent on the carrier in the case of a passenger traveling on a free pass as in the case of one paying full fare." The court says, on page 646: "The relation of passenger and carrier is created by contract, express or implied; but it does not follow from this that the extent of liability or responsibility of the carrier is in any respect dependent on a contract. In reference to matters indifferent to the public, parties may contract as they please, but not so in reference to matters in which the public has an interest. For the purpose of regulating such matters, rules have been established, by statute or the common law, whereby certain duties have been attached to given relations and employments. These duties attach as matter of law, and without regard to the will or wish of the party engaged in the employment, or of the person who transacts business with him, in the course thereof; and this is so for the public good. Duties thus imposed are not the subject of contract. They exist without it, and cannot be dispensed with by it. The violation of such a duty is a tort. The law declares that it is the duty of a pub-

lic carrier of passengers to use the highest degree of care to insure their safety. Why was not this left to be settled by the contract of the carrier and passenger? Certainly for no other reason than that the employment itself was of such a nature as to make it a matter of public concern. None could be of greater public concern at the present day than these employments by which men, women, and children are transported by millions, by agencies of a most dangerous character, and with a speed heretofore unknown."

In *Illinois C. R. Co. v. Crudup*, 63 Miss. 291, it was held that a mail agent traveling on a "free ticket" could recover. the court saying, on page 302: "The court properly excluded the evidence proposed by the defendant to show that the deceased had accepted a 'free ticket,' by which he relieved the company from liability for the negligence of its servants. By their contract with the government the company received compensation for transporting both the mail and its custodians, and there would have been no consideration for the obligation entered into by the deceased to waive damages; and in addition to this it may be added that such a contract is against public policy. The duty which common carriers owe to all persons carried by it, viz., not to be guilty of negligent injury, is one against the breach of which they may not protect themselves by private contract."

In *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607, the court says: "We do hold, however, that it makes no difference whether the service is performed gratuitously or not, in regard to the obligation to perform it well, after it is once entered upon; for ever since the decision of the leading case of *Coggs v. Bernard*, 2 Smith, Lead. Cas. 82, it has been regarded as sound law that 'the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.' And we hold, further, that, in undertaking the performance of gratuitous transportation, the common carrier can no more stipulate for exemption from liability for damage occasioned by the negligence, or wilful default, or tort of himself or his servants, than he can when he receives a reward for the service to be performed; both are alike prohibited by a sound public policy, which also forbids a gratuitous bailee, not bound by the considerations of public duty attached to the office of a common carrier, from stipulating that he may be fraudulently negligent or safely dishonest. Railroad companies are incorporated in part, at least, from public considerations, and for the public good. As carriers of persons and property, it has been

held they may be considered as acting in a public capacity, and as a kind of public officers. The exercise of honesty, care, and diligence by them or their agents and employees is a public duty resulting from their position, the obligation to perform which cannot be thrown off by contract. If thus thrown off, the effect would be to relax or modify the performance of the duty, and to promote a relaxation of proper care in the selection of agents and servants for its performance."

In *Waterbury v. New York C. & H. R. R. Co.* 21 Blatchf. 314, 17 Fed. 671, it was held that "the right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being there creates a duty on the part of the company to carry him safely. It suffices to enable him to maintain an action for negligence if he was being carried by the railroad company voluntarily, although gratuitously, and as a mere matter of favor to him." Wallace, Ch. J., says, on page 315, Fed. page 672: "A careful examination of the evidence shows quite satisfactorily that the case did not justify the assumption, in any aspect of it, that the plaintiff was entitled to be carried as a passenger, as an implied condition of the contract to carry his cattle. The most that can be fairly claimed for the plaintiff upon the evidence is that he was riding upon the engine permissively. If he was riding there with the consent of the defendant, express or implied, it is not material, so far as it affects the defendant's liability for negligence, whether he was there as a matter of right or a matter of favor, as a passenger or a mere licensee. It suffices to enable him to maintain an action for negligence if he was being carried by the defendant voluntarily. If the defendant undertook to carry him, although gratuitously, and as a mere matter of favor to himself, it was obligated to exercise due care for his safety in performing the undertaking it had voluntarily assumed. *Philadelphia, & R. R. Co. v. Derby*, 14 How. 468, 14 L. ed. 502; *The New World v. King*, 16 How. 469, 14 L. ed. 1019. The carrier does not, by consenting to carry a person gratuitously, relieve himself of responsibility for negligence. When the assent to his riding free has been legally and properly given, the person carried is entitled to the same degree of care as if he paid his fare. *Todd v. Old Colony & F. River R. Co.* 3 Allen, 18, 80 Am. Dec. 49. As is tersely stated by Blackburn, J., in *Austin v. Great Western R. Co.* L. R. 2 Q. B. 442: 'The right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his 67 L. R. A.

being there creates a duty on the part of the company to carry him safely.'"

In *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 14 L. ed. 502, it was held that a gratuitous passenger could recover, the court saying, on page 484, 14 How., page 508, 14 L. ed.: "The liability of the defendants below for the negligent and injurious act of their servant is not necessarily founded on any contract or privity between the parties, nor affected by any relation, social or otherwise, which they bore to each other. It is true, a traveler by stage-coach or other public conveyance, who is injured by the negligence of the driver, has an action against the owner, founded on his contract to carry him safely. But the maxim of *Respondeat superior*, which, by legal imputation, makes the master liable for the acts of his servant, is wholly irrespective of any contract, express or implied, or any other relation between the injured party and the master. If one be lawfully on the street or highway, and another's servant carelessly drives a stage or carriage against him and injures his property or person, it is no answer, to an action against the master for such injury, either that the plaintiff was riding for pleasure, or that he was a stockholder in the road, or that he had not paid his toll, or that he was the guest of the defendant, or riding in a carriage borrowed from him, or that the defendant was the friend, benefactor, or brother of the plaintiff. These arguments, arising from the social or domestic relations of life, may in some cases successfully appeal to the feelings of the plaintiff, but will usually have little effect where the defendant is a corporation, which is itself incapable of such relations or the reciprocation of such feelings. In this view of the case, if the plaintiff was lawfully on the road at the time of the collision, the court was right in instructing the jury that none of the antecedent circumstances or accidents of his situation could affect his right to recover. . . . This duty does not result alone from the consideration paid for the service. It is imposed by the law, even where the service is gratuitous. 'The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.' See *Coggs v. Bernard*, and cases cited in 1 Smith, Lead Cas. 95. It is true, a distinction has been taken in some cases between simple negligence, and great or gross negligence, and it is said that one who acts gratuitously is liable only for the latter. But this case does not call upon us to define the difference (if it be capable of definition), as the verdict has found this to be a case of gross negligence. When car-

riers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'" The citations of this celebrated case will be found in 5 Rose's Notes (U. S.) 275-284.

In *The New World v. King*, 16 How. 469, 14 L. ed. 1019, Curtis, J., speaking for the court, says, on page 474, 16 How., page 1021, 14 L. ed.: "In the *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 14 L. ed. 502, which was a case of gratuitous carriage of a passenger on a railroad, this court said: 'When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence. And, whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of gross.' We desire to be understood to reaffirm that doctrine, as resting, not only on public policy, but on sound principles of law."

In the celebrated case of *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, than which there are few opinions more able or more widely cited and approved, it was held, quoting the language of the court at the conclusion of its opinion on page 384, 17 Wall. page 641, 21 L. ed.: "First. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter. Fourthly. That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire. These conclusions decide the present case, and require a judgment of affirmance. We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire." The plaintiff was traveling on what was called

a "drover's pass," which expressly stipulated that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The court held that, while the pass was professedly gratuitous on its face, it was in fact given as part of the original contract for shipping the cattle. The case is treated as a carriage for hire, but the reasoning of the opinion clearly applies to all classes of passengers. Justice Bradley, speaking for the court, says, on page 376, 17 Wall., page 639, 21 L. ed.: "It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and therefore may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee; and he is an ordinary bailee because he has made the contract. We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest." Again the court says, on page 377, 17 Wall., page 639, 21 L. ed.: "In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties,—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers, the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms." And again, on page 381, 17 Wall., page 641, 21 L. ed.: "Hence, the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law." The extent to which this case has been cited and

approved will be shown by reference to 8 Rose's Notes (U. S.) 48.

In *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535, the court says, on page 660, 95 U. S., page 536, 24 L. ed.: "Since, therefore, from our view of the case, it is not necessary to determine what would have been the rights of the parties if the plaintiff had been a free or gratuitous passenger, we rest our decision upon *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627. We have no doubt of the correctness of the conclusion reached in that case. We do not mean to imply, however, that we should have come to a different conclusion had the plaintiff been a free passenger instead of a passenger for hire. We are aware that respectable tribunals have asserted the right to stipulate for exemption in such a case, and it is often asked, with apparent confidence, 'May not men make their own contracts, or, in other words, may not a man do what he will with his own?' The question, at first sight, seems a simple one. But there is a question lying behind that: 'Can a man call that absolutely his own, which he holds as a great public trust, by the public grant, and for the public use as well as his own profit?' The business of the common carrier, in this country at least, is emphatically a branch of the public service; and the conditions on which that public service shall be performed by private enterprise are not yet entirely settled."

In *Florida C. & P. R. Co. v. Sullivan*, 61 L. R. A. 410, 57 C. C. A. 167, 120 Fed. 799, it was held that "riding in the coach set apart for colored passengers, contrary to the rules of the carrier and provisions of the statute, is not negligence on the part of a white person which will prevent a recovery for his death through the negligence of the carrier, although he would not have been injured had he not been in that coach."

In the earlier English reports the doctrine was uniformly held that an action to recover damages for negligent injury by a common carrier arose from a breach of duty imposed by the common law, and needed no contract to support it. In course of time, by some unexplained change of judicial sentiment, the courts began to recognize stipulations for release of liability, until, finally, common carriers were practically allowed to absolve themselves, by stipulation, from liability for all negligence, however gross. This led to the passage of the act of 1854, called the "railway and canal traffic act," declaring that railway and canal companies should be liable for the negligence of themselves or their servants, notwithstanding any notice or condition, unless the judge or court trying the cause should adjudge the condition just and reasonable. The practical

effect of this statute was to bring the law back to its original status. However, all the cases seem to hold that there is no implied release in the absence of written stipulations or fraudulent concealment of material facts. This is shown by the following cases, which are typical of others: In *Bretherton v. Wood*, 3 Brod. & B. 54 the court says, on page 57: "This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or, in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that, by their negligence or default, no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it."

In *Marshall v. York, N. & B. R. Co.* 11 C. B. 655, Jervis, Ch. J., says, on page 662: "But upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any contract between him and the company, but by reason of a duty implied by law to carry him safely." In the same case Williams, J., says, on page 663: "I am of the same opinion. . . . It seems to me that the whole current of authorities, beginning with *Govett v. Radnidge*, 3 East, 62, and ending with *Possi v. Shipton*, 8 Ad. & El. 963, establishes that an action of this sort is, in substance, not an action of contract, but an action of tort against the company as carriers. That being so, the question is whether it was necessary to allege any contract at all in the declaration. The earliest instance I find of an action of this sort is in Fitzherbert's *Natura Brevium*, Writ de Trespass sur le Case, where it is said (94D): 'If a smith prick my horse with a nail, etc., I shall have my action upon the case against him, without any warranty by the smith to do it well, for it is the duty of every artificer to exercise his art rightly and truly as he ought.' There is no allusion there to any contract. That being so, it seems to me to follow that the allegation of a contract in a case of this kind is altogether unnecessary."

In *Austin v. Great Western R. Co.* (1867) L. R. 2 Q. B. 442, it was held that a child over the free age prescribed by statute, and having no ticket, and no fare having been asked or paid, could recover for injuries received. Blackburn, J., concurring, says, on page 444: "I am also of opinion there should be no rule. I think that what was said in the case of *Marshall v. York, N. & B. R. Co.* was quite correct. It was there laid down that the right which a passenger by railway has to be carried safely

does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely."

A large number of authorities could be cited in addition to those above, but it is needless to do so. We have already quoted at greater length than we should, but for the fact that we wished to show, not simply the decision of the cases, but especially the essential principles by which those results were reached. We will now close by citations from the leading text-books.

In 5 Am. & Eng. Enc. Law, 2d ed. p. 507, it is said: "The carrier is liable to persons whom it accepts for transportation over its line, and from whom it demands no fare, to the same extent that it is liable to passengers who pay fare. . . . A person riding on a free pass is as much a passenger as if he were paying full fare, and if the pass is given for a valuable consideration he is a passenger for hire. . . . The fact that the carrier is prohibited by law from issuing free passes does not render a person a trespasser who travels upon such a pass unlawfully issued to him. If the pass is unlawful, the conductor should demand the regular fare, and his failure to do so will not make the passenger a trespasser, nor destroy his right as a passenger."

In 6 Cyc. Law & Proc. 544, it is said that, "while it is no doubt true, as indicated in the definition, that public carriers of passengers are those who carry passengers for hire, there is not in the case of carriers of passengers a distinction as to liability between passengers carried for compensation and those carried gratuitously, analogous to that recognized as to carriers of goods between cases where goods are carried for compensation and those where they are carried free. One who is accepted for transportation as a passenger, without any compensation to be rendered, is nevertheless entitled to all the care and protection which the carrier is under obligation to furnish to paying passengers."

In Lawson on Contracts it is said, in § 335: "A carrier of a passenger who has paid a consideration for his passage cannot exempt himself from liability for damages caused by his own negligence, or that of his servants, by any contract which he may have induced his customer to approve. Such a contract is void as against the policy of the law, even though the passenger is a gratuitous one, riding free and paying no fare."

In 2 Beach, Modern Law of Contracts, it is said, in § 1502: "The weight of authority in this country favors the rule that a common carrier cannot lawfully stipulate

for exemption from responsibility when such exemption is not just and reasonable in the eye of the law, and that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants."

In Fetter on Carriers of Passengers, § 220, it is said: "It is now well settled that a carrier, by its acceptance of a passenger as a passenger, comes under an obligation to take due and reasonable care for his safety, which obligation arises by implication of law, and independent of contract, so that it may exist though the contract of carriage is illegal, or though there is no express contract of carriage. Hence the fact that a contract of carriage is entered into on Sunday, and that plaintiff, when injured, was traveling on Sunday, in violation of a statute, does not preclude him from maintaining an action against the carrier for the injuries. In the language of the New York court of appeals: 'It is certainly a startling proposition that the thousands and tens of thousands of persons who travel on business or for pleasure on Sunday, upon railroads and steam and ferry boats in this state, are at the mercy of incompetent or careless engineers and servants, and that there is no remedy for loss of life or limb resulting from this negligence.'"

In Bishop on Noncontract Law, § 1074, it is said: "Such, therefore, is both the policy of the law and the law itself, in the highest sense fundamental and unyielding. The result of which is that, in just legal reason, it will under no circumstances be competent for a railroad or other common carrier, whether of goods or passengers, to cast off this responsibility by any resort to a by-law, to a usage, or even to an express contract with the party. Particularly in the carriage of passengers, if the road could by contract exempt itself from responsibility for its own negligence, its next step would be to refuse all passengers who would not enter into the contract; thereupon the railroad corporations, freed from the only motive to carefulness which they could appreciate, the danger of being mulcted in damages, would conduct their business with a recklessness rendering travel a horror to every person not permitted to remain at home." See also § 1076.

In Cooley on Torts, on page 826, *685, it is said: "Carriers of passengers, it is also held, cannot relieve themselves from the obligation to observe ordinary care by any contract whatsoever, even in the case of 'drovers' passes', which are given without charge to those who accompany consignments of cattle, or in cases where free passage is given as mere matter of courtesy

or favor." The learned author then proceeds to say that, while there are certain exceptions permitted in two states, "the weight of authority is most distinctly the other way, both in this country and in England;" that is, in favor of the rule as above stated.

In Hutchinson on Carriers it is said, in § 566: "It is enough that the person is being lawfully carried as a passenger, to entitle him to all the care which the law requires of the passenger carrier; and the same vigilance and circumspection must be exercised to guard him against injury when he is carried gratuitously, as upon what is known as a free pass, or by the carrier's invitation, as when he pays the usual fare." See also §§ 565 and 567.

In Wharton's Law of Negligence it is said, in § 355: "Is a free passenger to be placed in a different position, so far as concerns his rights to protection from neglect, from a pay passenger? This question, also, was at one time answered in the affirmative, the courts being led astray by the mistaken view of mandates which will be hereafter pointed out. But there is now an almost uniform acquiescence in the true view that a person who undertakes to do a service for another is liable to such other person for want of due care and attention—the *diligentia* of the *bonus et diligens paterfamilias*—in the performance of the service, even though there is no consideration for such undertaking. Or, as the question is elsewhere put, the confidence accepted is an adequate consideration to support the duty. Eminently is this the case with what are called 'free' passengers on the great lines of common carriage. As has been already observed, there is, in such cases, not merely confidence tendered and accepted, but some sort of business consideration, though this be a mere courteous interchange of accommodations. For these and other reasons noticed under the last head, the carrier is bound to exhibit the same diligence and skill towards passengers of this class as he is to passengers who pay money for their tickets." Again, the same author says, in § 354: "But if a trespasser take his seat openly in a carriage, in the place assigned to passengers generally, there is no reason why a different standard of care should be applicable to him than is applicable to other passengers. Waiving for the present the point elsewhere discussed, that even a trespasser, supposing him to continue such, is not withdrawn from the protection of that law which requires that no man shall negligently injure another, the carrier, if he permits such trespasser to continue in the carriage, cannot regard him, after such permission, as a trespasser. The carrier

has a right to expel the trespasser at once from the carriage. If the carrier omits to do this, and if the person in question remains voluntarily with the carrier's assent, then the trespass passes into a *quantum meruit* contract of carriage. On the one side, the person so entering the carriage is bound to the carrier for reasonable pay for the carriage. On the other side, the carrier is bound, from the time he assents thus to carry such person, to exercise towards him the diligence, prudence, and skill of a good carrier in that particular kind of transport; in other words, the particular kind of diligence, prudence, and skill which the carrier is bound to exercise towards all other passengers."

In Watson on Damages for Personal Injuries it is said, in § 230, p. 279: "At the outset it may be stated, as a general rule, that the mere fact that the plaintiff, at the time of the injuries received, is engaged in the commission of an unlawful act, is not sufficient to relieve the author of the wrong of liability in damages therefor. 'The question how far a person can defend an otherwise indefensible act,' it has been said, 'by showing a criminal or unlawful act on the part of the party injured, has of late years been fully discussed in the courts of this country and England. The result, generally reached, is that no man can set up a public or private wrong committed by another as an excuse for a wilful, or unnecessary, or even negligent injury to him or his property. This principle is defended on the grounds of morality and law, and it reaches and determines a great variety of cases.'" The same author further says, in § 238: "The liability of the owners of a steamboat for injuries to a passenger is not affected by the fact that the person injured was, at the time the injuries were received, engaged in an excursion with other passengers upon defendants' steamboat in violation of the Sunday law. One traveling on Sunday in violation of a statute prohibiting is not, by reason thereof, without the protection of the law. The carrier owes him the same duty as if he were lawfully traveling, and is liable in damages for personal injuries resulting from a failure to perform it." In § 231 the author adopts the language of an able and elaborate opinion by Dixon, Ch. J., in *Sutton v. Wauwatosa*, 29 Wis. 27, 9 Am. Rep. 534, as follows: "Himself guilty of a wrong, not dependent on nor caused by that charged against the plaintiff, but arising from his own voluntary act or his neglect, the defendant cannot assume the championship of public rights, nor to prosecute the plaintiff as an offender against the laws of the state, and thus to impose upon him

a penalty many times greater than what those laws prescribed. Neither justice nor sound morals require this, and it seems contrary to the dictates of both that such a defense should be allowed to prevail. It would extend the maxim, *Ex turpi causa non oritur actio*, beyond the scope of its legitimate application, and violate the maxim equally binding and wholesome, and more extensive in its operation, that no man shall be permitted to take advantage of his own wrong. To take advantage of his own wrong, and to visit unmerited and over rigorous punishment upon the plaintiff, constitute the sole motive for such defense on the part of the person making it."

In 3 Thompson's Law of Negligence, § 3326, it is said: "It is thoroughly settled in the American law that a common carrier of passengers cannot, by a contract with one who is a passenger for hire, relieve himself from liability for damages caused by the negligence of himself or his servants." The same author says, in § 3328: "The principle is well settled that a carrier owes the same duty of protection to a simply gratuitous passenger as to a passenger for hire."

In Buswell on Law of Personal Injuries the author, in laying down the rule that a breach of public duty is the foundation of the action for personal injuries, says, in § 3: "The custom of the realm of England, long made a part of the common law, imposes upon common carriers of passengers certain public duties in respect of such passengers, for a breach of which a passenger injured may have his remedy by an action of tort." Again, the author says, in § 116: "In the United States the weight of authority is in favor of the rule that, as to passengers for hire, the stipulation by a common carrier that he will not be liable for damages in case of injury to the passenger will not relieve him from responsibility for the results of the negligence of himself and his servants." Again, the same author says, in § 117: "If a common carrier accepts a person as passenger, there being no contract to relieve the carrier from the legal consequences of his negligence in the case of accident, it is held generally, in the United States, that the carrier remains liable for such negligence, although the plaintiff was to be transported gratuitously. For, having admitted the plaintiff to the rights of a passenger, the defendant is not permitted to deny that he owes to him the duty which, as carrying on a public employment, he owes to all his passengers."

In 2 Parsons on Contracts the author, after referring to various authorities, says, on page 222 [9th ed.]: "Whether a common carrier is liable to a passenger to whom he has given passage, and from whom he has

therefore no right to demand fare, is not so certain; but he would certainly be liable for gross negligence, and probably liable for any negligence. He is certainly not excused by mere nonpayment, unless payment has been demanded and refused." In note "x" it is said: "It is now quite generally held that for negligence there is the same liability to persons riding on free passes as to those who pay full fare."

In 2 Wood on Railroads [Minor's ed.] it is said, on page 1207: "In all cases where the company is required by law to carry a person free, or where he is riding free by the consent of the company fairly obtained, he is a passenger, and entitled to all rights and privileges as such. In the case of a free pass the carrier is under the same obligations as to care and vigilance as he is to a passenger for hire, and as to passengers to whom passes are given which are predicated upon any consideration he cannot absolve himself from liability for injuries resulting from gross negligence by any notice to that effect printed upon the pass, as such conditions are against the policy of the law. It has been held, however, that, when tickets or passes are purely gratuitous, the person receiving may by special agreement assume all risks of the journey incident to the mere negligence of the company."

In Whitaker's Smith on Negligence, while the text does not seem to treat the subject, there are full notes on page 309 showing that the rule is that a common carrier "must exercise the same care and attention in the transportation of gratuitous passengers as of those who have paid their fares, and is liable to the same extent for negligence."

These authorities tend to show that this rule is generally held even in the face of express stipulations of exemption, and universally so in the absence of such stipulations.

In 4 Elliott on Railroads it is said, in § 1497: "The rule, supported by the weight of authority, is that a common carrier cannot by any kind of a contract exempt itself from liability as such for loss or injury occasioned by its own negligence or that of its servants. This rule 'rests upon considerations of public policy and upon the fact that to allow the carrier to absolve himself from the duty of exercising care and fidelity is inconsistent with the very nature of his undertaking.' The employment of a common carrier is a public one, and the fundamental principle upon which the law of common carriers was established was to secure the utmost care and diligence in the performance of their duties. For this reason they are held to the extraordinary

liability of insurers. To permit them to contract against liability for their own negligence or that of their servants would be contrary to the whole spirit and policy of the law governing common carriers, and would, in effect, authorize them to abandon the most essential duties of their employment. When we also consider that the parties do not stand upon an equal footing, and that railroad companies are given many special privileges as corporations for the very reason that they have such duties to perform for the public, there can be no doubt of the justice of this rule, especially as applied to such corporations." The same author says, in § 1578: "We think it is safe to say that the general rule is that every one on the passenger trains of a railroad company, and there for the purpose of carriage, with the consent, express or implied, of the company, is presumptively a passenger. . . . Persons who pay a consideration for passage, no matter in what form, are generally regarded as passengers." And again, in § 1604, he says: "The general rule is that a person riding on a railway train on a free pass, the possession of which was lawfully and rightfully obtained, is a passenger. The possession of the pass must be lawful, for, if it was obtained by fraud or the wrong of the person attempting to use it, he is not a passenger, and the carrier owes him no duty as such." And again, in § 1606, he says: "But where the person riding on a pass is regarded as a passenger, the carrier usually owes to him the same degree of care that it owes to a passenger paying full fare." Again he says, in § 1608: "Passes usually contain a stipulation which in terms exempts the carrier from liability for negligence. As to the validity of such stipulations the authorities are not agreed, some holding that they are valid and binding upon the persons using the pass, others that they are not. In the majority of the states the courts hold that such a stipulation is void and not binding upon the person using the pass, and that the carrier is liable for injuries negligently inflicted upon a person using a pass containing such a stipulation." Again he says, in § 1609: "The relation which the person using the pass bears to the railroad company is also an important element in determining the liability. If he is regarded as a passenger, then the company is bound to use 'the highest practical degree of care,' and for a failure to use such care it will be liable for all injuries approximately caused thereby. But where the person using the pass is an employee, then the carrier will only be liable for such injuries as result from negligence in failing to perform the duties owing to such employees.

. . . The general rule is that, where the holder of the pass is to be regarded as a passenger, any act of negligence may give a right of action."

We cannot better close these citations than by the following clear and terse statement of the principles from 2 Shearman & Redfield on Negligence, which is fully sustained by the authorities we have examined. The eminent authors say, in § 491: "It is well settled that, in the absence of a special contract, a passenger traveling gratuitously has a perfect right of action for injuries suffered by him through the carrier's negligence. The fact that a traveler who ought to pay has not paid, and does not intend to pay, his fare does not, in the absence of actual fraud, deprive him of redress for injuries. There is no practical difference between the degree of care which a free passenger has the right to claim, and that to which a paying passenger is entitled."

To our minds these authorities, taken in connection with the cases cited in them, are conclusive of the question before us. The greater weight of authority is decidedly in favor of the doctrine that a common carrier cannot in any event stipulate against its own negligence, including that of its servants, while it is overwhelming to the effect that, in the absence of such stipulations, it owes to a gratuitous passenger the same degree of care that it does to those that pay. In the case at bar the plaintiff appears to have been a bona fide passenger, and was so recognized by the conductor in charge of the train. Both are conclusively presumed to have known that the contract for a pass was illegal and void, but there is no evidence that either acted in fraud or bad faith. There is evidence that the plaintiff gave some consideration, although legally inadequate; but in any event the worst position in which he can be placed is that of simply a gratuitous passenger. There were no existing stipulations of exemption between him and the defendant. None had ever existed, except the conditions on the back of the pass. These conditions can have no effect, because, in the first place, the pass had expired, and, secondly, had no legal existence before its expiration. A condition, like the leaf on a tree, must be attached to something from which it can draw its life and strength. By practically all the authorities, in the absence of such express conditions, the plaintiff is held entitled to recover. What would have been the legal effect of such conditions if they existed is not strictly before us. We have shown that the decided weight of authority is against their validity, but we did so to show that, if the liability of a com-

mon carrier to a gratuitous passenger could not be waived by an express stipulation, it certainly existed in the absence of any such stipulation. Even those courts that hold it may be waived, necessarily admit its existence in the absence of waiver. If it exists in the absence of contract, and cannot be waived by contract, it must necessarily owe its existence to the policy of the law.

It is contended in behalf of the defendant that there was error in the court below refusing to charge "that there is no evidence to support the plaintiff's allegation [in the complaint] that he was traveling on the defendant's road, on the occasion complained of, as a passenger for hire or compensation." We see no error in its refusal, as, in our view of the case, it was immaterial.

The defendant also contends that its exception to the following charge of the court should be sustained, to wit: "If, when the plaintiff was called on for his fare, he produced to the conductor the pass which had been exhibited in evidence, and the conductor accepted it, the plaintiff was a passenger on the train." We think that whatever error may be found in this instruction is harmless. The pass was in legal effect a blank piece of paper. It had expired by its own limitation, if that can be said to have expired which has never legally existed. Its only effect could have been to convince the conductor of the truthfulness of the plaintiff's statement that he had a contract with the company under which he was entitled to ride free. The result seems to have been his acceptance as a passenger by the conductor, who, being in control of the train, is in the very nature of things the only officer or servant of the company who can accept a passenger. He is charged with that duty by the defendant, who must therefore abide the consequences of his act, especially as there is no evidence of fraud or deception on the part of the plaintiff. The evidence tends to prove that the plaintiff was on the train as a bona fide passenger under an agreement for so-called "free transportation," but ready to pay his fare if demanded. The fact that the previous contract was illegal, and no fare was either demanded or paid, can have no further effect than to reduce the plaintiff to the condition of a merely gratuitous passenger, having no binding contract, and therefore subject to no limitations of liability. As such we now think he was entitled to recover. The petition to rehear is allowed and the *judgment below affirmed*.

Clark, Ch. J., dissenting:

This is a petition to rehear this cause and reverse our opinion filed therein. 132 N. C. 510, 95 Am. St. Rep. 641, 44 S. E. 34. 67 L. R. A.

That opinion is itself a precedent, and to be set aside, like any other precedent, only upon good cause shown. We have had the benefit of full and able argument upon both hearings, and diligent re-examination of the argument and the authorities shows that our former decision is in accord with our own precedents and those to be found elsewhere.

The complaint alleges that on 6th April, 1900, "the plaintiff, being a passenger on said defendant road," was injured by the derailment of the car in which he was riding, caused by the negligent construction of the roadbed and the negligent failure of the defendant to provide sufficient crew for said train, and its negligent failure to use such air brakes and other machinery as were necessary to the safe and proper operation of said road. There is no allegation of wilful and wanton injury, nor proof of such. The complaint alleges that "the plaintiff was a passenger on said railroad for compensation, . . . the defendant having contracted and agreed to carry the plaintiff between said stations for a valuable consideration," and for a negligent breach of such contract of safe carriage this action is brought.

The plaintiff testified that he was editor of a newspaper; that when called on by the conductor for his fare he told him he had a pass for 1899, and showed it to him; that in 1899 he had made a contract with the defendant to publish its time-table in his paper as consideration for the pass, and the defendant had agreed to continue the contract and renew the contract; that he told the conductor he would pay the regular fare if he wanted it, but the conductor accepted his statement and took him as a passenger without payment of fare or ticket, on the strength of the alleged renewal by the company of the contract of 1899. Such contract was illegal, and is forbidden, under the authority of the lawmaking power in this state, under a penalty of "not less than \$1,000 nor more than \$5,000" against the company, and, this not being a valid but an illegal transaction, the plaintiff cannot be accessory to and participate in such act and then ask a court of justice to give him damages for the defendant's negligence in executing such illicit arrangement.

The general assembly has declared that public policy forbids discrimination in the exercise of their quasi public duties by common carriers, and, as was said by us in this case, 132 N. C., at page 512, 95 Am. St. Rep. page 643, 44 S. E. page 35, "nothing could be more clearly a discrimination than the ground upon which the plaintiff asked for and received free passage on this occasion, to wit, that for the year previous he

had advertised the schedule of the defendant company in his paper, and had received therefor a free pass over its line for the previous year, and that this contract had been renewed for the year then current. It does not appear what was the value of the advertising done, charging for the space at the same rates as would be charged others, but, let it be what it may, it could not amount exactly, 'neither more nor less,' to the value of a free pass to travel *ad libitum* an unstipulated number of miles over the defendant's road. Besides, it was an illegal discrimination to sell the plaintiff transportation on credit and not payable in money." We need not repeat the discussion and construction of this statute as laid down in the able and exhaustive opinion of Mr. Justice Montgomery in *State v. Southern R. Co.* 122 N. C. 1052, 41 L. R. A. 246, 30 S. E. 133, and in the very able opinion of Mr. Justice Douglas in that case, in which he referred to evidence of \$250,000 of free transportation being given away annually in this state, the cost of which was necessarily considered in fixing the rates charged the unprivileged many. That opinion and subsequent ones have been long published, and the legislature has not seen fit to change the statute by making editors "a privileged class," who can ride free or on credit, with rates unknown, and thus have the cost of their transportation added to the price of transportation charged the public at large. One ground for this legislation is that discrimination in rates gives these corporations improper weight and influence, and this applies with as much force at least to discriminations and favors to editors as to others. The court in *Greenleaf v. People's Bank*, 133 N. C. 292, 63 L. R. A. 490, 98 Am. St. Rep. 709, 45 S. E. 638, held that lawyers and judges were not a privileged class, and we cannot hold that editors are, unless the general assembly shall give them special privileges as to free or reduced transportation which is forbidden to the public generally.

Either (1) the plaintiff, having produced no ticket, nor paying cash for his transportation, was on the train without authority of any contract, in which case, by all the authorities, he was entitled to what is known as "ordinary care," and hence can recover no damages unless there was wilful and wanton injury (which in this case is neither alleged nor shown) (*Pierce v. North Carolina R. Co.* 124 N. C. 83, 44 L. R. A. 316, 32 S. E. 399; *Cook v. Southern R. Co.* 128 N. C. 333, 38 S. E. 925; *Lewis v. Norfolk & W. R. Co.* 132 N. C. 382, 43 S. E. 919; *Higley v. Gilmer*, 3 Mont. 90, 35 Am. Rep. 450; *Hendryx v. Kansas City, Ft. S. & G. R. Co.* 45 Kan. at page 379, 25 Pac. 67 L. R. A.

893, and cases there cited; *Richmond & D. R. Co. v. Burnsed*, 70 Miss. 437, 35 Am. St. Rep. 656, 12 So. 958; *Chicago, B. & Q. R. Co. v. Mehlsack*, 131 Ill. 61, 19 Am. St. Rep. 17, 22 N. E. 812; *Reary v. Louisville, N. O. & T. R. Co.* 40 Ia. Ann. 32, 8 Am. St. Rep. 497, 3 So. 390; *Illinois C. R. Co. v. Mechem*, 91 Tenn. 428, 19 S. W. 232; *Whitehead v. St. Louis, I. M. & S. R. Co.* 99 Mo. 263, 6 L. R. A. 409, 11 S. W. 751),—for neither the conductor nor the company could give legal assent to his riding contrary to law, without payment of fare, and his condition was that of a trespasser,—not being a passenger; or (2) the plaintiff, as he alleges in his complaint, sues for injuries sustained by breach of the contract of safe carriage caused by negligence of the defendant, and one of his prayers for instruction is based upon the theory that the plaintiff was a passenger for hire and compensation. In such case the rule is thus stated (1 Sutherland, Damages, 3d ed. § 5): "It may be assumed as an undisputed principle that no action will lie to recover a demand or a supposed claim for damages, if to establish it the plaintiff requires aid from an illegal transaction, or is under the necessity of showing and depending in any degree upon an illegal agreement to which he was a party"—citing numerous cases. Judge Sutherland further says that "a bank is not liable for failure to perform its contract to lend or advance money to be used in speculating in futures. *Moss v. Exchange Bank*, 102 Ga. 808, 30 S. E. 267. . . . The sender of a telegram relating to a gambling contract in stocks cannot invoke such contract, or the loss or gain resulting from it, to measure the damages sustained in consequence of its nondelivery. *Morris v. Western U. Teleg. Co.* 94 Me. 423, 47 Atl. 926." In *Griswold v. Waddington*, 16 Johns. 430, Chancellor Walworth says, at page 486: "The plaintiff must recover upon his own merits, and if he has none, or if he discloses a case founded upon illegal dealing, and founded on an intercourse prohibited by law, he ought not to be heard, whatever the demerits of the defendant may be. There is, to my mind, something monstrous in the proposition that a court of law ought to carry into effect a contract founded on a breach of law. It is encouraging disobedience and giving to disloyalty its unhallowed fruits. There is no such mischievous doctrine to be deduced from the books." In *Bowman v. Phillips*, 41 Kan. 364, 3 L. R. A. 631, 13 Am. St. Rep. 292, 21 Pac. 230, it is held: "The courts will not enforce illegal contracts, nor any supposed rights founded thereon, but will leave the parties and those *in pari delicto* where they find them." In *Oscanyan v. Winchester Repeating Arms*

Co. 103 U. S. 261, 26 L. ed. 539, an action for damages for breach of contract, the court held that when such contract is void, because against public policy or in violation of law, the court will nonsuit the plaintiff. In *Phalen v. Clark*, 19 Conn. 421, 50 Am. Dec. 253, the court held: "Where the plaintiff requires any aid from an illegal transaction to establish his demand, he must fail."

In *Welch v. Wesson*, 6 Gray, 505, it is said: It may be assumed as an undisputed doctrine that no action will lie to recover a claim for damages if, to establish it, the plaintiff requires aid from an illegal transaction, or is under the necessity of showing or in any manner depending upon the illegal act to which he is a party. In *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S., at page 150, 43 L. ed., at page 113, 18 Sup. Ct. Rep. at page 813, Mr. Justice Peckham quotes with approval from Lord Mansfield in *Holman v. Johnson* (1775) 1 Cowp. 341: "The objection that a contract is immoral or illegal . . . sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of public policy. . . . The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." It can make no difference whether the action is to recover upon such contract, to enforce specific performance, or (as here) to recover damages for breach thereof. The precise point here presented has been three times passed upon in this court, not only in the case here sought to be reversed (132 N. C. 510, 95 Am. St. Rep. 641, 44 S. E. 34), but in two other cases. In *Turner v. North Carolina R. Co.* 63 N. C. 522, it was held that where a soldier contracted with a railroad for transportation to Johnston's Army, and was injured *en route* by negligence of the company, he could not recover damages (though there the contract was legal when made), Reade, J., saying that, the contract being illegal (in the purview of the court trying the action), the parties were *in pari delicto*, and the court "would consult its dignity, and not interfere in their dispute." Exactly the same decision was made in *Wallace v. Cannon*, 38 Ga. 199, 95 Am. Dec. 385; *Martin v. Wallace*, 40 Ga. 52; *Redd v. Muscogee R. Co.* 48 Ga. 102; *Muscogee R. Co. v. Redd*, 54 Ga. 33,—in all which the court held, as in 40 Ga. 55: "While so engaged, they [the parties] were *in pari delicto*, and the courts . . . cannot lend their aid to assist either in the case of injury sustained by the negligence or misconduct of the other." Another case in this 67 L. R. A.

state is *Waters v. Richmond & D. R. Co.* 110 N. C. 338, 16 L. R. A. 834, 14 S. E. 802, where the court hold (at p. 342, 110 N. C., p. 835, 16 L. R. A., p. 803, 14 S. E.) that, where the illegal purpose of the shipper or passenger enters into the consideration of the contract of transportation, the railroad is exempt from liability for negligence, meaning evidently, that the court will not take jurisdiction of such controversies. Here both parties participated in the illegal purpose of transporting the plaintiff, contrary to law, without payment of fare, and, as in the above cases, while so engaged they [the parties] were *in pari delicto*, and the courts . . . cannot lend their aid to assist either in the case of injury sustained by the negligence or misconduct of the other." It is immaterial whether the plaintiff had in his pocket a free pass from the president of the railroad company, or was allowed by the conductor to ride illegally, without payment of fare, in consideration of the plaintiff's statement that the company had promised to renew the pass. The conductor, no more than the president, could give the plaintiff the legal right to ride free, unless the plaintiff came within one of the excepted classes entitled to that privilege, as railroad employees and officials, charity cases, and the like. It was an illegal contract equally whether made by the conductor or the president. Whether the conductor had the legal right to bind the company by his action, so as to subject it to the penalty denounced by the statute, is not before us. But if he had not, then the plaintiff had no claim to a contract of passage on that ground, and comes under the first head above, not being a passenger, and could only recover for wilful and wanton injury.

The point here presented is well settled in the text-books, and, by decisions in other states, that the plaintiff cannot recover when he is negligently injured while on the train without any valid contract of carriage, *i. e.*, when he is a licensee or trespasser. In such cases he can only recover if wantonly and wilfully injured, or, as it is sometimes styled, for gross negligence, which is the synonym for "wilful and wanton injury," in those cases. Bouvier, Law Dict. Rawle's Rev., *Passenger*, says that a passenger is "one who has taken a place in a public conveyance by virtue of a contract for the purpose of being transported from one place to another on the payment of fare or its equivalent. *Bricker v. Philadelphia & R. E. Co.* 132 Pa. 1, 19 Am. St. Rep. 585, 18 Atl. 983, . . . A carrier is not liable to one who rides by stealth (*Chicago & A. R. Co. v. Michie*, 83 Ill. 427), or who is a trespasser (*Muehlhausen v. St. Louis R. Co.* 91 Mo. 332, 2 S. W. 315), although invited

to ride by an employee of the carrier (*Gulf, C. & S. F. R. Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19), . . . [nor] a voluntary assistant to an express messenger or mail clerk (*Union P. R. Co. v. Nichols*, 8 Kan. 505, 12 Am. Rep. 475), or a newsboy permitted to ride free (*Flower v. Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251; *Snyder v. Hannibal & St. J. R. Co.* 60 Mo. 413). Certainly the plaintiff, who was on this train by an arrangement denounced by the statute, under a penalty of "not less than \$1,000 nor more than \$5,000 fine," is not in so good a situation as those above named as debarred of recovery.

Hutchinson on Carriers, § 555, says: "To be entitled to the rights of a passenger, the plaintiff who sues for an injury occasioned by the negligence of the company must have been lawfully upon its train; and that if sued for the injury it can defend upon the ground that the plaintiff had induced the servants of the company to carry him upon a ticket on which he had no right to ride. 2 Minor's Wood, Railroads, 2d ed. 1213, instances, among persons not entitled to recover for negligent injuries, one who, contrary to the rules, gets on a freight train, even with the assent of the conductor, and pays no fare, or a trespasser upon a regular passenger train. If the assent of the conductor does not make him a passenger when riding contrary to the rules of the company, such assent cannot set aside a statute forbidding the plaintiff to ride without paying fare. 3 Elliott, Railroads, § 1255, says: "A railroad company owes trespassers no contract duty. Indeed, . . . it owes them no duty except not to wilfully injure them." 1 Fetter, Passengers, § 240, uses almost the same language: "The only duty due by a railroad company to one who is an intruder or trespasser on its trains is to refrain from wantonly, wilfully, or intentionally injuring him. It is not liable for an injury caused by the mistake, inadvertence, or negligence of its employees." 2 Shearm. & Redf. Neg. § 489, holds that "one who, by collusion with a servant of the carrier, rides without intending to pay fare, . . . does not bring . . . [him] into contract relation with the company so as to make it liable to him as a passenger." To same purport, Thomp. Carr. Pass. 43. Booth, Street Railways, § 326, says: "The duty of a common carrier does not extend to the personal safety of one who is not actually a passenger;" and the same work, at § 365: "Newsboys who enter street cars for the purpose of selling papers are not passengers, but mere licensees, who assume all the risks of ordinary negligence on the part of the company's servants." Certainly the newsboys who are legally on the car with 67 L. R. A.

the assent of the company have greater rights than this plaintiff, who was riding without payment of fare, in violation of law. Bishop, Noncontract Law, § 60, says: "If the negligent running of a railroad train injures one who is upon it without right, [he] . . . can recover nothing." 2 Jaggard, Torts, 1081, says: "When no consideration is paid, though the plaintiff was aboard the train by the invitation or request of defendant's employees, he cannot recover for negligence;" citing numerous cases.

All the above are based upon the idea that no one can recover for negligent injuries unless a passenger, and that no one is a passenger unless there is a legal contract, express or implied,—a legal obligation to convey him. The above citations from text-books are amply sustained by authorities, among which: "A railroad company owes no duty to a trespasser on its trains, except to abstain from wantonly or maliciously injuring him." *Alabama G. S. R. Co. v. Harris*, 71 Miss. 74, 14 So. 263. One who is allowed by the conductor to ride as an assistant express messenger without paying fare, under a misapprehension of the conductor that he need not pay, cannot recover damages for injuries sustained by negligence of the carrier. *Union P. R. Co. v. Nichols*, 8 Kan. 505, 12 Am. Rep. 475. In the very interesting opinion by Judge Valentine, he says: "The conductor, therefore, did not attempt to confer upon the plaintiff any right to ride upon that train, but simply left the plaintiff with the right which he supposed the plaintiff already had, independent of any authority from himself,"—the same facts as in this case, though under our statute the conductor could confer no right to ride free when the company itself was prohibited by statute from doing so. In *Illinois C. R. Co. v. Meacham*, 91 Tenn. 428, 19 S. W. 233, it is held that the company is not liable for injuries sustained by a trespasser or intruder upon its trains, "except to refrain from wilfully, wantonly, or intentionally injuring him;" and defines a trespasser as one who rides without payment of fare or authorized invitation. In *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 84, 28 Am. Rep. 613, the same ruling as to nonliability was made as to one riding illegally upon a free pass which had been issued to another person; and this has been cited and affirmed in *Chicago, B. & Q. R. Co. v. Mehlsack*, 131 Ill. 61, 19 Am. St. Rep. 17, 22 N. E. 812. The pass there used was not more illegal than the pass which the plaintiff in this case presented. *Eaton v. Delaware, L. & W. R. Co.* 57 N. Y. 382, 15 Am. Rep. 513, held that one not lawfully upon the train, as one riding upon a freight train,

could not recover for negligent injuries, though upon the train by the invitation of the conductor. In *Gulf, C. & S. F. R. Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19, it was held that one injured negligently while riding on a freight train could not recover because unlawfully there; and the same ruling was made, and on the same ground, as to one injured while riding upon the engine by permission of the engineer. *Chicago & A. R. Co. v. Michie*, 83 Ill. 427. The plaintiff in the present case was not lawfully upon the train, it being forbidden by law to carry him without prepayment of fare, and neither the conductor nor the company had authority to receive him on the train without it. In *Condran v. Chicago, M. & St. P. R. Co.* 28 L. R. A. 749, 14 C. C. A. 506, 67 Fed. 522, it is held that one who wrongfully evades payment of fare cannot recover for injuries unless wantonly and wilfully inflicted.

In *Kansas City, Ft. S. & M. R. Co. v. Berry*, 53 Kan. 112, 42 Am. St. Rep. 278, 36 Pac. 53, it is held that one riding upon a railroad train merely by permission of the conductor and without payment of fare cannot recover for personal injuries like a passenger, affirming *St. Joseph & W. R. Co. v. Wheeler*, 35 Kan. 185, 10 Pac. 461. In *McVeety v. St. Paul, M. & M. R. Co.* 45 Minn. 268, 11 L. R. A. 174, 22 Am. St. Rep. 728, 47 N. W. 809, it is held that one "who knowingly induces the conductor of a railway company to carry him without charge" cannot recover as a passenger. In *Williams v. Mobile & O. R. Co.* (1895, Miss.) 19 So. 90, it was held that one illegally riding free by consent of the conductor could not recover, and the same was held in *Alabama & V. R. Co. v. McAfee* (1893) 71 Miss. 70, 14 So. 260, as to one riding free by collusion with the railroad crew and beaten by them. The latter case is put on the ground of *in pari delicto*,—that he had "participated in the violation of duty."

One riding on a train illegally—for instance, contrary to a rule of the company known to him, though with permission of the conductor,—cannot recover for injuries sustained by negligence. *Purple v. Union P. R. Co.* 57 L. R. A. 700, 51 C. C. A. 564, 114 Fed. 123; *Gulf, O. & S. F. R. Co. v. Campbell*, 76 Tex. 174, 13 S. W. 19; *Greenfield v. Detroit & M. R. Co.* 133 Mich. 557, 95 N. W. 546. "The only duty a common carrier owes to one not a passenger is not to injure him wantonly." *Hendryx v. Kansas City, Ft. S. & G. R. Co.* 45 Kan. 377, 25 Pac. 893. "One who is riding on a railroad train free of charge, by 'invitation and permission' of the conductor, is not a passenger so as to entitle him to recover for injuries received." *Staloup v. Louisville*, 37 L. R. A.

N. A. & C. R. Co. (1897) 16 Ind. App. 584, 45 N. E. 802; and there are numerous other decisions to the same effect.

The bed-rock principle deduced from all the decisions and text writers is that an action for injuries for negligence of a common carrier is an action of tort arising on contract, and can never be sustained except when there is a breach of a legal and valid contract of safe carriage; that, as to torts not arising out of contract, recovery can only be had when the injury was inflicted wantonly and wilfully. This is sound in principle, and well settled, if any principle can be settled by precedent.

Taking it in the most favorable light for the plaintiff, he was riding on an extension of an illegal pass. That being so, upon the authorities in our state and those from other states and text writers above cited, the plaintiff cannot recover damages sustained by the negligent breach of such illegal contract of carriage. There are other authorities to the same purport. In Massachusetts, where traveling on the Lord's Day, except from necessity or for purposes of charity was made illegal, it was held in an opinion by that eminent lawyer, Shaw, Ch. J., in *Bosworth v. Swansey*, 10 Met. 363, 43 Am. Dec. 441, that one so traveling illegally could not recover damages caused by a defect in the highway; and to the same purport is *Connolly v. Boston*, 117 Mass. 64, 19 Am. Rep. 396, and *Davis v. Somerville* (1880) 128 Mass. 594, 35 Am. Rep. 399. The same was held as to recovery of damages sustained by negligence of a street car company by one traveling thereon on Sunday (*Stanton v. Metropolitan R. Co.* 14 Allen, 485), and as to one negligently injured at a railroad crossing while illegally traveling along the public road on Sunday (*Smith v. Boston & M. R. Co.* 120 Mass. 492, 21 Am. Rep. 538). In *Gregg v. Wyman*, 4 Cush. 322, it was held that the owner of a horse, who let him for driving on Sunday, against the statute, could not recover damages for the death of the horse by immoderate driving, because the parties were *in pari delicto*, the court saying its conclusion "is fully sustained by numerous decisions both in England and the various states of the Union," many of which it cites; and the same is held in *Way v. Foster*, 1 Allen. 408, and *Parker v. Latner*, 60 Me. 529, 11 Am. Rep. 210. In *Lyons v. Desotelle*, 124 Mass. 387, it was held that one traveling on the Lord's Day in violation of the statute, and who had fastened his horse at the side of the road, could not invoke the aid of the courts to recover damages for injuries to his horse, caused by the negligent act of another in driving against it. In *McGrath v. Merwin*, 112 Mass. 467, 17 Am. Rep. 119,

it was held that one injured by the negligence of the defendant while clearing out a wheel pit, though gratuitously and as an act of kindness, on the Lord's Day, could not recover damages, because participating at the time the injury was sustained in an act in violation of law. In *Wallace v. Merrimack River Nav. & Eap. Co.* (1883) 134 Mass. 95, 45 Am. Rep. 301, it was held that one sailing his yacht on Sunday, in violation of the statute, could not recover damages for being negligently run into by a steamboat, because he was there in violation of law, as the plaintiff was in this case. These decisions were uniform in that state till changed by statute as to injuries from common carriers (Stat. 1877, p. 629, chap. 252), which provides that the General Statute (chap. 84, § 2) "prohibiting travel on the Lord's Day shall not constitute a defense to an action against a common carrier of passengers for any tort suffered by a person so traveling." There is no statute in North Carolina taking away from common carriers the defense of *in pari delicto* in case of one traveling on a free pass. The defendant relied on *Carroll v. Staten Island R. Co.* 58 N. Y. 126, 17 Am. Rep. 221, where it was held that the plaintiff, injured on a ferryboat while traveling on Sunday, contrary to the statute, could recover; but the court put its decision on the ground (p. 132, 58 N. Y., p. 223, 17 Am. Rep.) that, if the plaintiff was going in a case of necessity or charity, he was not traveling illegally, and, as the defendant had the right to carry him and to enforce payment of the fare, if the illegal purpose of the plaintiff was unknown to the defendant, the latter made a valid contract of carriage, and was liable for negligence in executing it. Here the plaintiff solicited the illegal carriage by saying his pass had been renewed, and the conductor acted upon it. Both parties knew of the illegality.

In *Smith v. Rollins*, 11 R. I. 464, 23 Am. Rep. 509, where a livery-stable keeper let his horse for driving on Sunday, contrary to the statute, and the other party drove to a different place and brought the horse back damaged, it was held that the plaintiff could not recover, the court saying (p. 472, 11 R. I., p. 517, 23 Am. Rep.): "If the tort cannot be made to appear without proof of the contract, certainly the contract can hardly be considered immaterial, or as not affecting the liability of the defendant, even though it may not be a part of the cause of action." In *Holcomb v. Dandy*, 51 Vt. 428, the court says (p. 435), affirming previous cases: "It has been repeatedly held in this state that, if a party sustain injury by reason of the insufficiency in the highway while such party is traveling in violation of the stat-

ute, he cannot recover of the town for such injury." In *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290, it was held that the plaintiff could not recover damages for the alleged seizure of his whiskey if he was keeping it for sale in violation of law.

Among many cases holding that a party participating in an illegal act cannot obtain from the court relief for an illegal act or neglect of the other party, if such conduct of the defendant cannot be shown without showing the precedent conduct of the plaintiff in violation of law, are *Winchester Electric Light Co. v. Veal*, 145 Ind. 506, 41 N. E. 334, 44 N. E. 353, which held that a county treasurer loaning out county funds contrary to law cannot maintain an action to recover them back. *Haggerty v. St. Louis Ice Mfg. & Storage Co.* 143 Mo. 238, 40 L. R. A. 151, 65 Am. St. Rep. 647, 44 S. W. 1114, holds that, where it is contrary to law to have game in possession during the "close season," one who has deposited game, in violation of the statute, with a cold-storage company, "cannot recover damages for violation of the contract or for negligence in its performance," the court saying the complaint shows "that plaintiffs contracted with defendant corporation for the commission of a misdemeanor. . . . The law will not stultify itself by promoting on the one hand what it prohibits on the other, and will for this reason leave the parties to this suit where it finds them, unsanctioned by its favor and unaided by its process." That case is identical in principle with this, the plaintiff having committed no misdemeanor, but having procured the defendant to contract to do an indictable act, as in this case.

Upon similar grounds, in *Kitchen v. Greenabaum*, 61 Mo. 110, it was held that the plaintiff could not recover a prize drawn on a lottery ticket, upholding the maxim, *In pari delicto potior est conditio defendentis et possidentis*; not that the defendant has right on his side, but because the court will help neither party to an illegal transaction. In *Youngblood v. Birmingham Trust & Sav. Co.* 95 Ala. 521, 20 L. R. A. 58, 36 Am. St. Rep. 245, 12 So. 579, it was held: "No rights can spring from or be rested upon an act in the performance of which a criminal penalty is incurred, and all contracts which are made in violation of a penal statute are absolutely void." In *Ningara Falls Brewing Co. v. Wall*, 98 Mich. 158, 57 N. W. 99, it was held that a liquor dealer doing business in violation of the statute could not recover damages for violation of a contract by a company to make him its exclusive agent in that locality. The plea that he could legally buy, though he could not legally sell, was over-

ruled on the ground that he was buying to illegally sell. In *Kelly v. Courter*, 1 Okla. 277, 30 Pac. 372, it was held that a tenant selling liquor in violation of law could not recover damages to such liquor caused by the failure of the landlord to supply ice as agreed, the court resting its decision upon a citation from *Ewell v. Daggs*, 108 U. S. 146, 27 L. ed. 683, 2 Sup. Ct. Rep. 412, that the law will not lend its aid where the contract "appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land (Broom, *Legal Maxims*, 108),"—which was the case in this transaction now before the court. The Oklahoma court neatly sums up thus: "The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation." Many cases to like purport could be added, but it is useless to multiply authorities upon a principle so well settled in the law and in reason.

The same general principle that no action can be sustained if based in any wise upon an illegal contract which must be put in evidence—*ex turpi causa actio non oritur*—is supported by all the precedents in this court in which a contract was necessarily alleged, as in this case. *Basket v. Moss*, 115 N. C. 448, 48 L. R. A. 842, 44 Am. St. Rep. 463, 20 S. E. 733; *Burbage v. Windley*, 108 N. C. 357, 12 L. R. A. 409, 12 S. E. 839; *Puckett v. Alexander*, 102 N. C. 95, 3 L. R. A. 43, 8 S. E. 767; *Griffin v. Hasty*, 94 N. C. 438; *Covington v. Threadgill*, 88 N. C. 186; *King v. Winants*, 71 N. C. 469, 17 Am. Rep. 11; *Whitaker v. Bond*, 63 N. C. 290; *Carter v. Greenwood*, 58 N. C. (5 Jones, Eq.) 410; *McRae v. Atlantio & N. C. R. Co.* 58 N. C. (5 Jones, Eq.) 395; *Ingram v. Ingram*, 49 N. C. (4 Jones, L.) 188; *Ramsay v. Woodard*, 48 N. C. (3 Jones, L.) 508; *Allison v. Norwood*, 44 N. C. (Busbee, L.) 414; *Sharp v. Farmer*, 20 N. C. 255 (4 Dev. & B. L. 122), and "there are others." The plaintiff cannot recover for negligence without showing he was on the train under a valid contract of carriage, and the contract he shows is one against public policy, and makes at least one of the parties indictable. Whether the other party is not also indictable as an accessory in procuring such violation of law is an interesting question, but not now before us.

The plaintiff's allegation is that he was on the train by virtue of his contract for a free pass. Such transaction being a discrimination, as above shown, the penalty denounced by the statute upon the common carrier for such violation of law is a fine "not less than \$1,000 nor more than \$5,000," and the penalty of the law upon the other

party is that, if negligently injured during such illegal transportation, he cannot recover in the courts, since he must put forward such illegal transaction as the basis of his action. If his own act was not indictable, he procured an act by the defendant which was a misdemeanor, and obtained transportation thereby. A court of equity will not interfere with a contract, if it be illegal and against state policy, where the contractors are in *pari delicto*. *Taylor v. McMillan*, 123 N. C. 393, 31 S. E. 730, citing *Grimes v. Hoyt*, 55 N. C. (2 Jones, Eq.) 274. If there was no contract of carriage, the plaintiff had no rights as a passenger, but only the right to be protected against wilful and wanton injury, which is not alleged here. If he had any contract, it was one void under our decisions, being forbidden by statute and against public policy, and he is in no better condition.

The decisions in some courts as to persons injured while riding upon legal free passes are not authority in favor of plaintiff, who asked and accepted free transportation illegally. The conductor had no right to receive him as a passenger, and plaintiff was fixed with knowledge of the law, and is in no condition to ask the court for damages not inflicted wilfully and wantonly.

The former judgment of this court ordering a new trial should be affirmed, and the petition to rehear dismissed upon at least three other grounds, not heretofore discussed, because not deemed necessary.

Jones, a witness for the defendant, testified that he had sent the plaintiff the pass as a gratuity, upon his application; that he paid nothing for it; that there was no contract to publish the time-table; and that he made no agreement to renew the pass when it expired. The defendant asked the court to charge "that there is no evidence to support the plaintiff's allegation [in the complaint] that he was traveling on the defendant's road, on the occasion complained of, as a passenger for hire or compensation." It was error to refuse this, for, whether the plaintiff's or the defendant's testimony was correct, whether the pass had been renewed or not, the plaintiff was not a "passenger for hire or compensation." *State v. Southern R. Co.* 122 N. C. 1052, 41 L. R. A. 246, 30 S. E. 133.

The defendant also excepted properly to this charge of the court: "If, when the plaintiff was called on for his fare, he produced to the conductor the pass which has been exhibited in evidence, and the conductor accepted it, the plaintiff was a passenger on the train." The pass on its face had expired, and there was no testimony that it had been renewed. The judge does not add the proviso "if it had been re-

newed," and, if it had not been, certainly it could not make him a passenger. On the contrary, if the plaintiff's own evidence was true that a pass was issued in consideration of publishing the time-table, and, further, that the defendant had agreed to renew it, this being an agreement to make a contract forbidden by our statute against discrimination, the plaintiff was equally not a passenger. In any aspect this instruction was erroneous.

The point here presented has been admirably discussed by Sanborn, United States circuit judge, in a recent case, above cited, of *Purple v. Union P. R. Co.* 57 L. R. A. 700, 51 C. C. A. 564, 114 Fed. 123, which holds: One who, knowing that a conductor has no authority to grant free transportation rides upon a train under an arrangement, or tacit understanding with the conductor that he shall ride free, is not a passenger, but a mere trespasser to whom the only duty of the company is to abstain from wilful or reckless injury; that a contract of carriage is indispensable to a recovery; and that the implied contract from plaintiff being on the train was conclusively negatived upon showing the illegal agreement to transport without payment of fare. To same purport, *Condran v. Chicago, M. & St. P. R. Co.* 28 L. R. A. 749, 14 C. C. A. 506, 32 U. S. App. 182, 67 Fed. 522; *Chicago, B. & Q. R. Co. v. Mehlsack*, 131 Ill. 64, 19 Am. St. Rep. 17, 22 N. E. 812; *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 84, 28 Am. Rep. 613; *Chicago & A. R. Co. v. Michie*, 83 Ill. 431; *Toledo, W. & W. R. Co. v. Brooks*, 81 Ill. 250; *McVeety v. St. Paul, M. & M. R. Co.* 45 Minn. 269, 11 L. R. A. 174, 22 Am. St. Rep. 728, 47 N. W. 809; *Robertson v. New York & E. R. Co.* 22 Barb. 91; *Gulf, C. & S. F. R. Co. v. Campbell*, 76 Tex. 175, 13 S. W. 19; *Prince v. International & G. N. R. Co.* 64 Tex. 146; *Way v. Chicago, R. I. & P. R. Co.* 64 Iowa, 48, 52 Am. Rep. 431, 19 N. W. 828, 73 Iowa, 463, 35 N. W. 525; *Hendryx v. Kansas City, Ft. S. & G. R. Co.* 45 Kan. 377, 25 Pac. 893; *Kansas P. R. Co. v. Whipple*, 39 Kan. 531, 18 Pac. 730; *Aichison, T. & S. F. R. Co. v. Gants*, 38 Kan. 608, 5 Am. St. Rep. 780, 17 Pac. 54; *Union P. R. Co. v. Nichols*, 8 Kan. 505, 12 Am. Rep. 475.

Here the plaintiff was fixed with notice in law that neither the company nor the conductor could transport him without payment of fare. In *McGraw v. Southern R. Co.* 135 N. C. 264, 47 S. E. 758, at this term, it was held that, though one had a ticket, he cannot recover for wilful expulsion if the conductor erroneously, but reasonably, supposed he had no ticket. *A fortiori*, the plaintiff cannot recover when he had no ticket, which the conductor knew, 67 L. R. A.

and there was no force used, but merely negligence is averred. In *Duncan v. Maine U. R. Co.* (1902) 113 Fed. 508, the court says, on this very point, of the plaintiff being injured while riding on a pass illegally, contrary to the Interstate Commerce prohibition (of which ours is a verbatim copy): "Of course if the foundation of the right against a common carrier were contract, it would be apparent that, under familiar maxims of the law, no action would lie, because, even though the plaintiff is not subject to any penalty imposed by the Interstate Commerce Statutes, he would be *in pari delicto*. Indeed, he would be the party especially enjoying the benefit of the combination in violation of law." Here the complaint bases the action, and necessarily so, upon breach of the contract of safe carriage.

Montgomery, J.: I concur in the dissenting opinion of the CHIEF JUSTICE.

Petition for second rehearing denied.

Jane GODWIN, Appt.,

v.

CAROLINA TELEPHONE & TELEGRAPH COMPANY.

(136 N. C. 258.)

A telephone company will not be required to furnish service to a bawdy house.

(October 18, 1904.)

APPEAL by plaintiff from a judgment of the Superior Court for Lenoir County in favor of defendant in a mandamus proceeding to compel defendant to furnish petitioner with telephone facilities. *Affirmed*.

The facts are stated in the opinion.

Messrs. Dortch & Barham, for appellant:

A corporation, either public or quasi public, owes a duty to the public, and it cannot discriminate in favor of or against anyone.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Griffin v. Goldsboro Water Co.* 122 N. C. 206, 41 L. R. A. 240, 30 S. E. 319; 29 Am. & Eng. Enc. Law, p. 19.

The telephone company which refuses to supply all in similar circumstances with similar facilities without discrimination will be compelled by mandamus to do so.

NOTE.—As to compulsory service by telephone companies generally, see *note* to *Rushville v. Rushville Natural Gas Co.* 15 L. R. A. 321; also the later cases in this series of *Nebraska Teleph. Co. v. State*, 45 L. R. A. 113, and *State ex rel. Gwynn v. Citizens' Teleph. Co.* 55 L. R. A. 139.

State ex rel. Gwynn v. Citizens' Teleph. Co. 61 S. C. 83, 55 L. R. A. 139, 85 Am. St. Rep. 870, 39 S. E. 257; 14 Am. & Eng. Enc. Law, p. 163; *State ex rel. American U. Teleph. Co. v. Bell Teleph. Co.* 22 Alb. L. J. 363.

The remedy by mandamus is the appropriate one.

Vincent v. Chicago & A. R. Co. 49 Ill. 33; *State v. Hartford & N. H. R. Co.* 29 Conn. 538; *People v. Albany & V. R. Co.* 24 N. Y. 261, 82 Am. Dec. 295; *State ex rel. American U. Teleph. Co. v. Bell Teleph. Co.* 36 Ohio St. 296, 38 Am. Rep. 583; *State ex rel. Webster v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237.

Defendant, being engaged in the business of transmitting intelligence for hire, is a common carrier.

State ex rel. Webster v. Nebraska Teleph. Co. 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237; *Chesapeake & P. Teleph. Co. v. Baltimore & O. Teleg. Co.* 66 Md. 399, 59 Am. Rep. 167, 7 Atl. 809; *Missouri ex rel. Baltimore & O. Teleg. Co. v. Bell Teleph. Co.* 23 Fed. 539; 25 Am. & Eng. Enc. Law, p. 750.

Messrs. Loftin, Mitchell, & Varner also for appellant.

Messrs. Wooten & Wooten, for appellee:

A mandamus will only be granted where one demanding it shows that he has a "specific legal right," and has no other remedy to enforce it.

Hughes v. Craven County, 107 N. C. 598, 12 S. E. 465; *Hayne v. Hood*, 1 S. C. N. S. 23; *Ex parte Mackey*, 15 S. C. 324; *State ex rel. Conant v. Fuller*, 18 S. C. 250.

The maintenance of a bawdy house is against the policy of the law. To compel the placement of modern improvements by a common carrier of messages in a bawdy house would be against the policy of the law.

State v. Thornton, 44 N. C. (Busbee, L.) 252; *State v. Wilson*, 93 N. C. 608; *State v. Patterson* (29 N. C.) 7 Ired. L. 70, 45 Am. Dec. 506; *State v. Cally*, 104 N. C. 858, 17 Am. St. Rep. 704, 10 S. E. 455.

Mandamus will never issue to compel a respondent to do acts which are in themselves unlawful, nor to do things which is not the duty of the respondent to do.

Chicot County v. Kruse, 47 Ark. 80, 14 S. W. 460; *Wiedwald v. Dodson*, 95 Cal. 450, 30 Pac. 580; *Gruner v. Moore County Judge*, 6 Colo. 526; *People ex rel. Thatcher v. Hyde Park*, 117 Ill. 462, 6 N. E. 33; 22 Am. & Eng. Enc. Law, p. 918.

Clark, Ch. J., delivered the opinion of the court:

The exception to the verification of the amendment to the answer is without merit. 67 L. R. A.

Since *Phifer v. Travelers' Ins. Co.* 123 N. C. 410, 31 S. E. 716, the general assembly has amended § 258 of the Code by providing (Laws 1901, p. 854, chap. 610) that when a corporation is a party the verification of any pleading may be made by a "managing or local agent thereof" as well as by an officer, who alone, formerly, was authorized to make verification in such cases.

This is an application for a mandamus to compel the defendant to put a telephone with necessary fixtures and appliances, in the dwelling house of the plaintiff in the town of Kinston, and admit her to all the privileges accorded to other subscribers to the telephone exchange operated by the defendant in said town. It was admitted by the plaintiff that "she is a prostitute, and keeps a bawdy house within the corporate limits of the town of Kinston, and desires to have said telephone put in said bawdy house." The court being of opinion that the plaintiff was not entitled to a mandamus for such purpose, the plaintiff took a non-suit and appealed.

There was no error. A mandamus lies to compel a telephone company to place telephones and furnish telephonic facilities, without discrimination, for those who will pay for the same and abide the reasonable regulations of the company. This is well settled. 27 Am. & Eng. Enc. Law, 2d ed. p. 1022; 19 Am. & Eng. Enc. Law, 2d ed. p. 877; *Joyce*, Electric Law, § 1036; and numerous cases cited by all these. In *Commercial Union Teleph. Co. v. New England Teleph. & Teleg. Co.* 61 Vt. 241, 5 L. R. A. 161, 15 Am. St. Rep. 893, 17 Atl. 1071, it is said: "A telephonic system is simply a system for the transmission of intelligence and news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all." That case cites many authorities, which are, indeed, uniform, that the telephone business, like all other services fixed with a public use, must be operated without discrimination, affording "equal rights to all, special privileges to none." Telephones "are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public," is said in *Chesapeake & P. Teleph. Co. v. Baltimore & O. Teleg. Co.* 66 Md. 399, at page 414, 59 Am. Rep. 167, 7 Atl. 811, which is another very instructive and well-reasoned case upon the same subject. Telephone companies are placed by our corporation act on the same footing, as to public uses, as railroads and telegraphs, and the corporation commis-

sion is authorized to regulate their charges and assess their property for taxation. But while it is true there can be no discrimination where the business is lawful, no one can be compelled, or is justified, to aid in unlawful undertakings. A telegraph company should refuse to send libelous or obscene messages, or those which clearly indicate the furtherance of an illegal act, or the perpetration of some crime. But recently in New York the telephone and telegraph instruments were taken out of "pool rooms" which were used for the purpose of selling bets on horse races. "Keeping a bawdy house" was an indictable offense at common law, and is still so in this state. *State v. Calley*, 104 N. C. 858, 17 Am. St. Rep. 704, 10 S. E. 455; *State v. Webber*, 107 N. C. 962, 22 Am. St. Rep. 920, 12 S. E. 598. One who leases a house for the purpose of its being kept as a bawdy house, or with the knowledge that it will be used for that purpose, is indictable. 9 Am. & Eng. Enc. Law, 2d ed. p. 527. A mandamus will never issue to compel a respondent to aid in acts which are unlawful. *Wiedwald v. Dodson*, 95 Cal. 450, 30 Pac. 580; *Gruner v. Moore County Judge*, 6 Colo. 526; *Chicot County v. Kruse*, 47 Ark. 80, 14 S. W. 469; *People ex rel. Thatcher v. Hyde Park*, 117 Ill. 462, 6 N. E. 33.

It is argued that a common carrier would not be authorized to refuse to convey the plaintiff because she keeps a bawdy house. Nor is the defendant refusing her a telephone on that ground, but because she wishes to place the telephone in a bawdy

house. A common carrier could not be compelled to haul a car used for such purpose. If the plaintiff wished to have the phone placed in some other house used by her, or even in a house where she resided, but not kept as a bawdy house, she would not be debarred because she kept another house for such unlawful and disreputable purpose. It is not her character, but the character of the business at the house where it is sought to have the telephone placed, which required the court to refuse the mandamus. In like manner, if a common carrier knew that passage was sought by persons who are traveling for the execution of an indictable offense, or a telegraph company that a message was tendered for a like purpose, both would be justified in refusing; and certainly when the plaintiff admits that she is carrying on a criminal business in the house where she seeks to have the telephone placed the court will not, by its mandamus, require that facilities of a public nature be furnished to a house used for that business. For like reason, a mandamus will not lie to compel a water company to furnish water, or a light company to supply light, to a house used for carrying on an illegal business. The courts will enjoin or abate, not aid, a public nuisance.

The further consideration of this matter is not required on this application for a mandamus, but should be upon an indictment and trial of the plaintiff for the violation of law so brazenly avowed by her.

No error.

WASHINGTON SUPREME COURT.

Sewall P. STONE and Wife, *Respts.*,

v.

City of SEATTLE, *Appt.*

(30 Wash. 65.)

1. That a defect in a street is part of the original plan of construction does not relieve the city from liability for injuries to travelers, caused by it.

2. Whether or not a city is negligent in permitting an electric light to be placed in such a manner that the shadow cast by the supporting pole conceals an opening in a cross walk, which may cause injury to pedestrians, is a question for the jury.

(September 23, 1902.)

NOTE.—Municipal liability for defective plan of street construction as distinguished from other defects.

- I. General principles, 253.
- II. Plan must be formally adopted, 256.
- III. Injury to property rights.
 - a. Interference with rights in street, 257.
 - b. Interference with streams, 258.
 - c. Injury by surface water, 260.
 - d. The Missouri cases, 264.
- IV. Injury to travelers.
 - a. Defective streets, 265.
 - b. Defective walks, 266.
 - c. Defective bridges, 268.
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67 L. R. A.

I. General principles.

Considerable needless confusion has embarrassed the discussion of the question how far a municipal corporation is liable for injuries caused by a defective plan of street construction, owing to a failure clearly to distinguish the grounds on which such a liability might rest. It is very obvious that, in the absence of any constitutional provision on the subject, if the municipality should be regarded as a branch of the general government it would be liable only so far as the legislature saw fit to render it so. And so, if it should be regarded merely as a creature of the legislature, that body would have to impose by express mention any liability which it desired should rest upon its creature.

APPEAL by defendant from a judgment of the Superior Court for King County in favor of plaintiffs in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. E. Humphrey and Edward Von Tobel, for appellant:

In the absence of any showing to the contrary, the presumption is that the plans adopted are reasonably safe and proper.

Urquhart v. Ogdensburg, 91 N. Y. 67, 43 Am. Rep. 655; *Lansing v. Toolan*, 37 Mich. 152; *Conlon v. St. Paul*, 70 Minn. 216, 72 N. W. 1073; *Monk v. New Utrecht*, 104 N. Y. 552, 11 N. E. 268.

This latter condition is very nearly that of the various municipal corporations and other quasi governmental bodies in England; and it is therefore held that all liability must depend upon the express terms of the statute.

Thus, in *Boulton v. Crowther*, 2 Barn. & C. 703, it was held that trustees having charge of a road may raise the grade of the road in front of plaintiff's property so as to render the use of his gates inconvenient, and cause some of the earth used in making the filling to fall over upon his property. The statute under which the act was done provided compensation for injuries sustained in case the course of the way was changed through private lands. The court held that the statute did not provide for compensation, and that, in the absence of statute, there was no liability on the part of the trustees for doing what they were authorized to do by act of Parliament. *Littledale, J.*, as a reason for his judgment, says that, where an act of Parliament vests a power in trustees, to be exercised by them, not for their own benefit, but for that of the public, and gives no compensation for damages resulting from an act done by them in the execution of the power, the legislature must be taken to have intended that individuals should not receive any compensation for the loss resulting to them from an act so done for the public benefit.

So, in *British Cast Plate Mfrs. v. Meredith*, 4 T. R. 794, commissioners appointed by a paving act in grading the street raised the grade in front of plaintiff's property so as to prevent the use of the old gate, which would have to be taken down and altered to adapt it to the new conditions. He brought an action for his damages, and the majority of the court said that, the statute having provided that the commissioners might allow such part of the damages as they saw fit, the remedy thereby provided was exclusive. But the opinion seems to be entertained by all the court that the question of allowing or withholding damages lay exclusively with the legislature. *Buller, J.*, saying the case was one of the class in which the maxim, *Salus populi est suprema lex*, applied.

The principles enforced by the English courts can have no application, however, in cases where the act of the municipality will infringe some constitutional right of an individual, or where the municipality is regarded, not as an agent of the legislature in the performance of some governmental duty, but as a corporation organized for the benefit of its own members, 67 L. R. A.

Messrs. J. F. Dore and Noon & Noon, for respondents:

Where a street or walk has been put in a reasonably safe condition for public use, and has subsequently fallen into disrepair and become dangerous, the municipality is liable to the party injured.

McQuillan v. Seattle, 13 Wash. 600, 43 Pac. 893; *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273; *Saylor v. Montesano*, 11 Wash. 328, 39 Pac. 653; *Rowe v. Ballard*, 19 Wash. 7, 52 Pac. 321; *White v. Ballard*, 19 Wash. 284, 53 Pac. 159.

Where a plan for a public municipal improvement is adopted by a municipal corporation, and the work is not carried out in accordance therewith, but in violation there-

and charged with the performance of certain duties for the benefit of the public. Courts have taken different views of the general question as to the liability of a municipality created under such conditions for any defects in its highways; but they have finally come practically to an agreement that there is a liability under such circumstances, for all defects which can be regarded as due to a neglect of mere ministerial duties. With that question this note will not deal, but such liability will, for present purposes, be assumed. The question then arises, What effect if any, on the liability, will result from the fact that the defect is in the original plan of construction, rather than in negligent maintenance. When a municipality is endowed with the right of self-government there is no doubt that this endowment includes certain matters of discretion, with regard to which it cannot be called to account by any individual. Among other things, it may, unless the legislature otherwise directs, determine absolutely whether or not it will make improvements, and, if so, when, and where, and how. No one can require it to locate a street for his accommodation, or to refrain from locating one. No one can dictate the grade of a street which it decides to construct, or the material which shall be used. But a step beyond this point, and the confusion begins. Suppose by the improvement, a direct injury is caused to abutting property, or the improved highway is left unsafe for use. Is the municipality then free from liability? The decisions which attempt to answer these questions are in conflict, but, it would seem, upon principle the answer would not be difficult. Under the spirit of the American Constitutions a municipal corporation, even though it should be regarded as a branch of government, cannot invade or destroy private property rights without condemning them under the power of eminent domain. and, if the duty is imposed upon it to maintain its highways in a condition safe for travel, the liability exists regardless of what may cause the unsafe condition. These principles leave little room for escape from liability because the defect is one of plan, and they have been enforced by a great majority of the courts.

A city, in determining what part of a street it will improve and grade, acts in its delegated governmental capacity, and is not answerable to an individual as for a neglect of duty in determining such question. *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168.

of, and a party is injured thereby, the municipality is liable.

Clemence v. Auburn, 66 N. Y. 334; *Gould v. Topeka*, 32 Kan. 485, 49 Am. Rep. 496, 4 Pac. 828.

The municipality must make the street or walk encumbered with the product of its plan reasonably safe for travel at all times, even if left unsafe by the original plan at the original completion of such improvement in accordance with such plan.

2 Dill. Mun. Corp. 4th ed. § 1046, note; *Elliott, Roads & Streets*, 2d ed. § 479; *Schrader v. Port Huron*, 106 Mich. 173, 63 N. W. 964; *Malloy v. Walker Twp.* 77 Mich. 448, 6 L. R. A. 695, 43 N. W. 1012; *Carver v. Detroit & S. Pl. Road Co.* 61 Mich. 584,

28 N. W. 721; *Sebert v. Alpena*, 78 Mich. 165, 43 N. W. 1098; *Joslyn v. Detroit*, 74 Mich. 458, 42 N. W. 50; *Alexander v. Big Rapids*, 76 Mich. 282, 42 N. W. 1071; *Circleville v. Sohn*, 59 Ohio St. 285, 69 Am. St. Rep. 777, 52 N. E. 788; *Alliance v. Campbell*, 17 Ohio C. C. 595; *Hinds v. Marshall*, 22 Mo. App. 208; *Donahoe v. Kansas City*, 136 Mo. 657, 38 S. W. 571; *Chicago v. Seben*, 62 Ill. App. 248, 165 Ill. 371, 56 Am. St. Rep. 245, 46 N. E. 244; *Chicago v. Langlass*, 66 Ill. 361; *Gould v. Topeka*, 32 Kan. 485, 49 Am. Rep. 496, 4 Pac. 822; *Blyhl v. Waterville*, 57 Minn. 115, 47 Am. St. Rep. 596, 58 N. W. 817; *Conlon v. St. Paul*, 70 Minn. 216, 72 N. W. 1073; *Kendall v. Albia*, 73 Iowa, 241, 34 N.

Under a statute making a municipal corporation liable for defects in cross walks, it is within the discretion of the city authorities as to how many cross walks there shall be, and in what places they shall be laid; and the city cannot be held liable for an accident occurring because of the entire absence of such walk. *Williams v. Grand Rapids*, 59 Mich. 51, 26 N. W. 279.

The action of a municipal corporation in widening a street is legislative, and it cannot be held liable, although the result is to bring an existing nuisance within the limits of the highway. *McCutcheon v. Homer*, 43 Mich. 483, 38 Am. Rep. 212, 5 N. W. 668.

Whether or not a cross walk upon which an accident occurred was necessary is a matter within the exclusive jurisdiction of the municipal authorities, and cannot be reviewed by a jury. But, the power to construct the walk having been conferred upon the municipality, the corresponding duty is imposed to construct it in a reasonable, safe, and secure manner, and the question whether it has done so or not may be considered by the jury. *Easton v. Neff*, 102 Pa. 474, 48 Am. Rep. 213.

As indicated by the above authorities, the city cannot be called in question upon its decision as to what improvements it will undertake. But, as will appear in a subsequent section, it cannot by any plan invade the private property of abutting owners.

Thus, in *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321, which involved a question of liability for injuries done by a sewer, the court says: We are quite clear that the theory that a municipal corporation has a right, in prosecuting a scheme of improvement, to appropriate without compensation, either designedly or inadvertently, the permanent or occasional occupation of a citizen's property, even though for public benefit, cannot be supported upon the principle, *salus populi est suprema lex*.

With reference to the condition in which it leaves a street, its right to exercise a discretion is not entirely withdrawn. It cannot adopt a plan which will render the street obviously defective for travel, but, in case several plans are available, all reasonably safe, it may decide which it will adopt, and cannot be held liable because its choice may not have been the best.

If reasonable minds might differ as to which plan is better, the decision of the municipal authorities is exclusive. But if, in adopting the 67 L. R. A.

plan, there is such great error of judgment as to show that in fact no intelligent judgment was ever exercised, the municipality will be liable. *Conlon v. St. Paul*, 70 Minn. 216, 72 N. W. 1073.

In *Louisville v. Norris*, 28 Ky. L. Rep. 1195, 64 S. W. 958, which was an action for injuries caused by a sewer, the court says whether the necessity for a given improvement of a highway exists is clearly one for the legislative department of the city to decide; also, the character of the improvement is within the legislative discretion, subject to the qualification that the plan adopted must be one not so palpably insufficient as to indicate want of care, or to imply a failure to exercise judgment by the city governing board.

For errors in judgment in devising a plan there is no liability; but there is liability where lack of care and skill in devising the plan is so great as to constitute negligence. *North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821. The court illustrates its meaning as follows: Suppose the common council of a city determine to build a sewer and cover it with reeds, can it be possible that the municipal corporation can escape liability on the ground that the council erred in devising the plan? or, suppose the council were to devise a plan for a bridge that would require timbers so slight as to give way beneath the tread of a child, can the city escape liability on the ground that there was only an error of judgment in devising the plan?

In a case involving the plan of a sewer the court said, if the common council undertakes to prosecute a public work which requires a plan, and that plan can be devised and prepared only by a skillful or experienced man, it will be negligence for it to undertake the work without exercising reasonable care to secure the assistance of such men. Deliberation on the part of the council is futile, unless the members have a fair knowledge of the matter which forms the subject of their deliberation. If councilmen are not skilled in devising plans, no length of time spent in deliberation can establish the fact that due care was exercised. Due care implies the employment of such means as will secure knowledge, not a deliberation without the knowledge. If reasonable care is used to secure the preparation of plans by competent men, and ordinary care is used to see that the skill of the engineer or expert is brought into exercise, there is no negligence and can be no liability, although, when the plan is carried into

W. 833; *Barr v. Kansas*, 105 Mo. 550, 16 S. W. 483; *Poole v. Jackson*, 93 Tenn. 62, 23 S. W. 59; *Dallas v. Jones*, 93 Tex. 38, 49 S. W. 577, 53 S. W. 377; *Sutton v. Snodhomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273; *Saylor v. Montesano*, 11 Wash. 328, 39 Pac. 653; *Lorence v. Ellensburg*, 13 Wash. 341, 52 Am. St. Rep. 42, 43 Pac. 20; *Morgan v. Morley*, 1 Wash. 464, 25 Pac. 333; *White v. Ballard*, 19 Wash. 284, 53 Pac. 159; *Rowe v. Ballard*, 19 Wash. 1, 52 Pac. 321; *Gillespie v. Newburgh*, 54 N. Y. 468; *Jeuchurst v. Syracuse*, 108 N. Y. 303, 15 N. E. 409; *Ivory v. Deerpark*, 116 N. Y. 476, 22 N. E. 1080; *Bryant v. Randolph*, 133 N. Y. 70, 30 N. E. 657; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, 53 Am.

Dec. 316; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321.

The questions of the negligent construction and condition of a street, and whether a defect exists in a walk, are for the jury.

Roice v. Ballard, 19 Wash. 7, 52 Pac. 321; *White v. Ballard*, 19 Wash. 284, 53 Pac. 159; *Saylor v. Montesano*, 11 Wash. 328, 39 Pac. 653; *Ford v. Des Moines*, 106 Iowa, 94, 75 N. W. 630; *Urtel v. Flint*, 122 Mich. 65, 80 N. W. 991; *Palmer v. Andover*, 2 Cush. 600; *Redford v. Woburn*, 176 Mass. 520, 57 N. E. 1008.

Hadley, J., delivered the opinion of the court:

This action was brought to recover for

effect, a defect may develop which destroys or impairs its efficiency. But undertaking to exercise judgment without skill in a matter which requires skill is not a mere error of judgment, but it is negligence. *Terre Haute v. Hudnut*, 112 Ind. 542, 13 N. E. 686.

A municipal corporation is not liable for an injury caused by reason of the improper plan of an alley crossing adopted by it, until it is shown that it had notice that the plan as adopted by it was not reasonably safe for use under ordinary circumstances. *Circleville v. Sohn*, 20 Ohio C. C. 368, Affirmed in 59 Ohio St. 285, 69 Am. St. Rep. 777, 52 N. E. 788.

There are cases, however, which take the view that whenever a matter of discretion is presented to the municipality it cannot be held liable for the result of its exercise.

Thus, in *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 702, the court said, by way of argument, that no action can be maintained against a municipal corporation by an individual, no matter how great an injury he might be able to show for the defects or insufficiency in the plan adopted for sewers or other public improvements; and this is upon the ground that in such matters the corporation is discharging a legislative or quasi judicial function, and its action is not reviewable by the law courts. If the plan adopted for the construction of such public works is not necessarily injurious or dangerous to private individuals, and is executed with skill and prudence, the protection against liability is absolute.

The courts have not been agreed, however, as to the ground of this exemption. As said in *Circleville v. Sohn*, 59 Ohio St. 285, 69 Am. St. Rep. 777, 52 N. E. 788, Michigan puts the non-liability on the ground that it is the exercise of legislative power which is not subject to judicial control; and New York, on the ground that it is an exercise of judicial power for which the municipal authorities are not answerable.

The Mississippi court seems to take broader ground, and hold that in some way individual rights are subordinate to the public good in much the same way as they were held to be in the English cases cited *supra*.

Thus, in *White v. Yazoo City*, 27 Miss. 357, where a ditch was constructed within the limits of a sidewalk in such a manner as to cause injury to abutting property, its owner, who brought an action to recover for the injury, attempted to show the nature and extent of the injury; but the evidence was excluded, and this 67 L. R. A.

ruling was approved by the appellate court upon the general ground that the work was done for the public good and under competent authority, and the case was governed by the principle that the general good must prevail over partial individual inconvenience.

II. Plan must be formally adopted.

Even the states which are inclined to permit the municipality to shield itself from the result of its act on the ground that it was caused by a defect of plan hold that the plan must have been formally adopted by the council, and not merely acted upon by employees.

In order to render the municipality immune from liability for an injury upon a walk which is unsafe because of the plan on which it was constructed it must have formally adopted the plan; and the mere fact that it permits a walk to remain as constructed by abutting owners is not sufficient to show that the plan was adopted. *Urquhart v. Ogdensburg*, 97 N. Y. 238; *Brown v. Syracuse*, 77 Hun, 411, 28 N. Y. Supp. 792.

In order to relieve the municipality from liability the plan must have been its own. *Collett v. New York*, 51 App. Div. 394, 64 N. Y. Supp. 693.

A city cannot escape liability on the ground that the defect was in the plan, if the plan was never adopted by it, but was a mere temporary one utilized by the municipal officers pending the completion of other improvements. In such case, if the device is not reasonably safe for the use for which it is designed, the city is guilty of negligence in permitting it to remain in that condition. *Ford v. Des Moines*, 106 Iowa, 94, 75 N. W. 630.

In order that the city should be protected because the council had adopted the plan, it is necessary that the board should have the exact matter under consideration, and, after due deliberation, should expressly order that the thing be done. *Gould v. Topeka*, 32 Kan. 485, 49 Am. Rep. 496, 4 Pac. 828. In that case the court says, before the court should hold that a street manifestly unsafe and dangerous was so planned and so ordered by the governing authorities of the city, the court should be able to say from the city records that it was so planned and so ordered by the city authorities. There should be no presumption that the city authorities ordered or planned that a public street should be dangerous. Courts should not presume, without formal proof, that the governing board

personal injuries alleged to have been received by respondent Mary E. Stone from a fall caused by stepping into a hole in the street. The evidence shows that at the junction of Kilbourn and Bowman avenues, in the city of Seattle, the outer plank of the cross walk was some inches short, leaving an opening which was at that time 4 or 5 inches deep, and of sufficient size for a person to step into it. This accident occurred at night. Near this opening stood a large electric-light pole, from which an electric arc light was suspended in such a manner as to cast the shadow of the pole over said opening. Mrs. Stone, while passing over this cross walk, stepped into the opening while it was thus covered by the shadow, and fell,

receiving the injuries for which she seeks to recover. It appears from the evidence that the opening had existed from the time of the construction of the walk, some years before. The immediate surroundings had, however, been subsequently changed to the extent of the erection of the electric-light pole and the swinging of the light thereon, by which the shadow was cast over the opening as aforesaid. The evidence further shows that the shadow extended entirely over the opening, and for some distance around it, thus presenting an extended dark and shadowy surface, all having the same general appearance as though cast upon the unbroken surface of the street at that point. The respondent, Mrs. Stone, says that, in

of a city had deliberately done wrong, and especially not for the purpose of relieving the city from the consequences of a wrong for the doing of which it would be held not to be liable if it had done the wrong deliberately, but liable if it had done it merely heedlessly or carelessly.

If the defect is the result of original construction, but no general plan of the improvement has been presented to and adopted by the city council, the work being done by those in charge of the street department merely as a part of their general duties, the defect is regarded, not as one of plan, but of construction, and the liability of the municipality ascertained by the application of the general rules which govern the question of construction or repair according to a previously adopted plan. *Clark v. Chicago*, 4 Biss, 486, Fed. Cas. No. 2,817; *White v. Trinidad*, 10 Colo. App. 327, 52 Pac. 214.

This principle has been applied in Massachusetts to relieve the city from liability for acts of its council on the theory that the council, in adopting the plan, was not its agent, but was a governmental body for whose acts it was not responsible.

Thus, in *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592, which was an action for damages because of the pollution of the water of a stream by emptying a sewer into it, the court says that the council, in determining the outlet of the drain, acted, not as agent of the city or in any manner under the direction of the city, but as public officers. For the incidental disadvantage, loss, or inconvenience necessarily resulting to individuals in their rights of property from such action, no action of tort can be maintained against the city. These exemptions of municipal bodies and their officers from liability, and corresponding subordination of individual rights and interest to the safety, health, and welfare of the general public, are a principle of frequent application.

Such a theory, however, can hardly be relied on as a ground of exemption outside of the jurisdictions where the peculiar Massachusetts theory of municipal corporations prevails.

III. Injury to property rights.

a. Interference with rights in street.

There can be no doubt that the owners of property abutting on a highway have certain property rights in it which cannot be destroyed against their protest. The weight of authority

is that the road cannot be closed so as to cut off access to their property without making compensation to them. See *note to People ex rel. Hart v. Marin County*, 26 L. R. A. 659. So the road cannot be rendered impassable, even though it is the result of a defect of plan.

In *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618, the court in discussing the liability of the municipal corporation for destroying the usefulness of a highway by the construction of a drain through it, says, one would think that the property owner was quite as seriously injured by lack of skill in devising the plan as he could possibly be by any want of care or skill in the performance of the work. Whether unskillfulness of the plan, or the negligent manner of executing it, destroyed the highway, the injury would be the same. The true rule, reasonable in itself and just in its results, is that skill and care must extend both to the plan and its execution. The contention that the action will not lie where the only want of skill is in devising the plan cannot prevail.

Injury caused by altering the grade of a street is usually one of plan, and, as will be seen by referring to the *notes to Selden v. Jacksonville*, 14 L. R. A. 370, and *Hickman v. Kansas City*, 23 L. R. A. 658, there is no liability for mere inconvenience in altering the grade if the access to the property is not destroyed or impaired to such an extent as to require a material part of the value of the property to re-establish it. With reference to the new condition, the Texas court deals in *Houston v. Bartels* (Tex. Civ. App.) 82 S. W. 323. There the city, in constructing an approach to a bridge, lowered the grade of the street to such an extent that it was impossible to construct an approach to abutting property from the street side, whereby the value of the property was greatly lessened, and the owner brought an action for the damages thereby inflicted. The city defended, *inter alia*, on the ground that it had the right to make the improvement without any liability to adjacent property owners if the work was done with reasonable care and skill, but the court held that the legislature had not the power to clothe the city with authority to appropriate private property for public use without compensation, either directly or indirectly.

The cases upon this branch of the subject are collected in the *notes* above referred to. The reasons for the doctrine are various, but the most satisfactory one is that the damages for injuries to abutting property, which will re-

the absence of the shadow, the light would have revealed the opening, which she could have seen and avoided. When the respondents had introduced all their testimony bearing upon the question of negligence on the part of the city, having, as announced by counsel, no other evidence to offer except that of physicians as to the nature and extent of the injuries, a motion for nonsuit was interposed by the city, on the ground that there was a total failure of proof as to any negligence on the part of the city. The motion was granted, and the jury discharged. Thereafter respondents moved for a new trial on the ground that the court committed error in law at the trial; that the evidence was insufficient to justify the court's decision, and was against the law.

The latter motion was also granted, and a new trial ordered. From the order granting a new trial the city has appealed.

The only error assigned is that the court erred in granting the motion for a new trial. It is asserted in appellant's brief that, since the court granted the motion for nonsuit, and dismissed the action, the motion for new trial, under our statute, is not the proper practice, and should not have been granted. The above position assumed by counsel is not discussed in the brief, and, since we see no merit in it, we will not discuss it here. The real contention of appellant is that the opening in the cross walk was not a defect, but was an opening at the inner corner at the point where the cross walk joins the sidewalk, and as such was

sult from the alteration of street grades, are presumed to be assessed and paid at the time the street is opened, so that there is no liability on the part of the municipality for injuries subsequently inflicted on abutting property by raising the roadbed to a new grade. *Healey v. New Haven*, 47 Conn. 315.

So, in *Pontiac v. Carter*, 32 Mich. 164, the court applies the doctrine of nonliability for an exercise of legislative discretion to a change of grade of a street by which the access of an abutting owner was rendered less convenient. The court says the injury is incidental to an exercise of public authority which, in itself, must be assumed to be proper, because it is done by a public body acting within its jurisdiction, and not charged with malice or want of good faith. It must therefore be regarded as an injury that every citizen must contemplate as one that with more or less likelihood might happen. When land was taken for the street, if damages were assessed, they would cover this possible injury, and it would never be known subsequently that the jury, in estimating them, had not calculated upon the change of grade of the proposed street as probable, and have attached considerable importance to it in their estimate. The rule in such cases is that all possible damages are covered by the award, except such as may result from an improper or negligent construction of the public work, or from an excess of authority in considering it.

There is no right of action for changing the grade of a street so as to make access from the abutting property more difficult. *McCullough v. Campbellsport (Wis.)* 101 N. W. 709.

So, if the city adopts a plan for the improvement of the street by grading or otherwise, and the execution of such plan necessarily requires the destruction of the trees, their removal in the prosecution of such work affords no cause of action to the lot owner. *Kemp v. Des Moines (Iowa)* 101 N. W. 474.

But, if the municipality in grading a street excavates the earth in such a way as to cause the soil from an adjoining lot to fall into the street, the municipality will be liable on the theory that such act amounts to a taking of the premises for public purposes. *Damkoehler v. Milwaukee (Wis.)* 101 N. W. 706.

A municipal corporation is not liable for the consequential injuries resulting from the improvement of a public street or alley in a careful and skillful manner; but it is liable for neg-

ligence, either in devising the plans for such improvement, or in executing the same. *Stein v. Lafayette*, 6 Ind. App. 414, 33 N. E. 912.

But where a city, in grading streets, fails to exercise proper care and skill in the selection of a plan, and, by reason thereof, an injury to the owner of private property occurs, which by the exercise of reasonable skill and care would have been avoided, the city is liable for such injury. *Valparaiso v. Adams*, 123 Ind. 250, 24 N. E. 107.

In case the Constitution provides compensation for property injured as well as taken for public use, the owner of injured abutting property may recover, although the injury is the result of a plan.

In *Werth v. Springfield*, 78 Mo. 107, which was an action to recover for injuries to abutting property by reason of the negligent change of a street grade, the court held that it was not necessary for it to determine the remedy in case the work was negligently done under a proper plan, but that, under the Constitution providing for compensation in case of property taken or damaged for public use, the court said there was a right to compensation in some form of remedy.

b. *Interference with streams.*

In planning a highway improvement it is frequently necessary to interfere to some extent with flowing streams, and the scope of municipal freedom from liability is well illustrated by this class of cases. If the interference is with navigation rights the municipality cannot be called in question so long as only the rights of the public are affected. The rights of the public must be protected by the public alone, and, therefore, no individual can sue for municipal interference with them, and resort to the doctrine of defect of plan is not necessary to avoid liability. That doctrine has, however, been made to do service in such a case.

In *Larkin v. Saginaw County*, 11 Mich. 88, 82 Am. Dec. 63, the board of supervisors of a county erected a bridge according to a plan adopted by them across a navigable stream in such a manner as to render the navigation of the stream less easy, and plaintiffs, who were engaged in navigating a boat upon the river, brought an action alleging that they had suffered special injury therefrom. The court held the board of supervisors was clothed with legislative, as well as executive, power; and,

a part of the drainage system of the street; that the opening was necessary in order to admit the surface water from the street into the gutter, and to give opportunity to remove any material that might accumulate in the gutter. It is contended that the street was not out of repair, and that the alleged dangerous condition was caused solely from the manner of construction of the sidewalk, cross walk, and gutter; that the city is not liable for an injury caused by a defective plan of construction, for the alleged reason that the adoption of such original plan by the city was a quasi judicial act, and was also the result of the exercise of legislative and discretionary functions, upon which liability cannot be predicated. In support of this contention, appellant cites

the following cases: *Urquhart v. Ogdensburg*, 91 N. Y. 67, 43 Am. Rep. 655; *Monk v. New Utrecht*, 104 N. Y. 552, 11 N. E. 268; *Lansing v. Toolan*, 37 Mich. 152; *Conlon v. St. Paul*, 70 Minn. 216, 72 N. W. 1073. The cases cited seem to support the contention. The Minnesota case cited states the rule substantially as follows: That, if reasonable men might differ as to which is the better plan, the decision of the city authorities on the question is conclusive, and cannot be reviewed by the courts; that neither the court nor the jury can substitute its judgment for that of the city authorities in such a case; but, when there is such gross error of judgment as to show that in fact the city authorities never exercised an intelligent judgment at all, the city may be liable for con-

while the county might be liable for its acts in the exercise of the executive, it could not be for the exercise of legislative power. The determination that it was necessary to build the bridge, and the whole action of the board in relation thereto, were legislative, and no action could be maintained against the county for any consequences resulting therefrom. What would be a nuisance if erected by an individual is not such when erected by authority of law and by the public, so as to confer a right of private action against the public therefore.

When, however, water is cast on private property, the fact that it is the result of a plan will not defeat liability, for it is a direct trespass.

Towns will not be justified in doing an act lawful in itself in such a manner as to create a nuisance, any more than individuals. Therefore, if part of a highway and bridge is constructed with a span insufficient to carry all the water of the stream, so that its dam backs on the upper proprietor's land, the town is liable for the resulting injury. *Mootry v. Danbury*, 45 Conn. 550, 29 Am. Rep. 703.

In *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, 53 Am. Dec. 316, where, in the improvement of a highway, a culvert was rendered necessary to carry the water of a small stream and the drainage from a large tract of land under the street, the common council acted upon the advice of the city surveyor, who was not a professional engineer, and the culvert proved to be inadequate, so that water was backed onto upper property, and the city was held liable for the injury. The court said, it will not answer for a corporation to select an incompetent agent, and then shield itself from the consequences of his injudicious acts by justifying under his advice. The court continues, the principal question is whether the city is exempt in consequence of any immunity in its municipal character from those liabilities for malfeasance for which individuals would be liable in a civil action. A good deal of obscurity has rested upon this subject arising from the incident that some duties are judicial in their nature while others are merely ministerial. Wherever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him in the manner in which his duties are performed. But this ju-

dicial immunity can extend no farther. The civil remedy depends exclusively upon the nature of the duty which has been violated. When duties which are merely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct. The determination to construct a public work is merely judicial, but the prosecution of the work is merely ministerial, and the city is bound to see that it is done in a safe and skilful manner. The corporation, having undertaken to build the culvert, was bound to exercise such skill in its construction, and to give such sufficiency of capacity to it, as that it should not become a nuisance to the property of those who reside in the neighborhood.

In *Perry v. Worcester*, 6 Gray, 544, 66 Am. Dec. 431, where, in the construction of a bridge, the passageway left for the water was so narrow as to set the water back upon upper property to its injury, Chief Justice Shaw, in delivering the opinion, said, the question raised is whether the damage sustained by plaintiffs shall be claimed as damage and awarded as such by the proper commissioners, or whether an action at law will lie to recover them. We think the distinction well established by authorities, and founded upon just principles, that, where damage is necessarily done to the property of an individual by taking his land for a highway, or by changing the grade of a way where such work is authorized by public authority for public use and all damage necessarily incident to such work, and such works are legally regarded as wanted by the public in the exercise of the right of eminent domain, they are legal and rightful; they are not unlawful; and therefore no action will lie as for a tort, but damage must be sought by the owner of the property pointed out by law. But this presupposes that the public work thus authorized will be executed in a reasonable, proper, and skilful manner, with a just regard to the rights of private owners of estates. If done otherwise, the damage is not necessarily incident to the accomplishment of the public object, but to the improper and unskilful manner of doing it. It is unlawful and a wrong for the redress of which an action of tort will lie. It is further said that the default in the case at bar was in adopting a plan for a bridge not contrived with sufficient skill, and with a proper regard to the volume of water

structing or maintaining an improvement on a defective plan or scheme so adopted by it. The difficulty with the doctrine as stated in the last-named case, it seems to us, lies in the fact that it would probably be difficult to find a case where city authorities have deliberately adopted a plan about which reasonable men might not differ as to whether an intelligent judgment had been exercised, when all the attendant circumstances are considered. Referring to the Michigan case, *Lansing v. Toolan*, 37 Mich. 152, cited by appellant, we find that it had been previously held in Michigan that cities were not liable for injuries resulting from defective streets, on the theory that the streets of a city are public highways, like all other roads, and that no distinction existed

in that state between the liability of cities and that of counties. *Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 450. In harmony with the above case the *Toolan Case* was decided, in which it was held that a city could not be held liable for injuries resulting from a plan of a public work, where the injured person fell into a ditch which was dug across the street by a city contractor, but was not covered the full width of the street, and which ditch was a part of the plan of certain constructive work. In referring to the Michigan doctrine, and while considering cases from that state here discussed, it is observed in a note under § 1024, 2 Dill. Mun. Corp. 4th ed. as follows: "It seems to the author, however, as he understands the facts, that these are cases where

and the capacity of the water way to discharge it; and judgment was given for the plaintiff.

c. Injury by surface water.

Many of the cases involving liability for the defective plan of a street improvement have arisen out of injuries done by surface water. The principles by which this liability is to be determined are clear, but the courts have not been fortunate in all cases in applying them. When natural conditions have not been changed by its own acts the municipality is under no obligation to provide drainage for any private property. Therefore, it cannot be made liable if its plan falls to do so. Moreover, there is no liability for merely altering the relative elevation of adjoining tracts of land so that the natural flow of surface water from one to the other is changed, provided that a natural drainway is not closed. But the city cannot close natural drainways to the injury of private property; nor can it change the course of drainage so as to throw water in a mass on private property, which would not naturally flow there, or gather water from a large section of territory, and either cast it onto private property, or abandon it so that it will find its way there. All these acts are trespasses, and the city cannot escape liability for the result of them by claiming that the injury is due to a plan. If its plan of improvement involves either a change in the natural course of drainage or the gathering together of unusual quantities of water, it must see that no injury is done to private individuals.

The courts, in attempting to apply these principles, have frequently become involved in difficulty by failing to discriminate between the acts which the city had a right to do and those which constituted a direct interference with private property rights, and have in some instances absolved the city from liability in the latter class of cases because it was merely exercising a governmental discretion.

The city is not bound to furnish drainage, and therefore it is not liable for error of judgment in determining the capacity of a drain which forms part of a street improvement so that it does not carry all the water which it was intended to carry, leaving some to find its way onto adjoining property to its injury. *Rozell v. Anderson*, 91 Ind. 591.

So, where the water flowing in a street gutter is no more than would naturally flow there

without the improvement, the municipality cannot be enjoined from maintaining a certain device provided for conducting the water into the sewer, so that at times of heavy rain it overflows the walk onto adjoining property, on the ground that it is not the best that could be provided for that purpose. *Palne v. Delhi*, 116 N. Y. 224, 5 L. R. A. 797, 22 N. E. 405.

So where, in raising the grade of a street, the ordinance directed that the way should be supported in front of plaintiff's property by a dry wall, and the water flowing along the street percolated through the wall to the injury of plaintiff's property, but it did not appear that more water came through than would naturally find its way there, the court held there was no liability, and, as a ground for the ruling, said that in establishing the grade and adopting the plans for the improvement of the street, the council acted judicially, in the exercise of its judgment, and of the discretionary power vested in it, as to what would best serve the public interest; and the rule is that a civil action will not lie for acts that are judicial in their character, and discretionary. But the court further says, no other or better plan has been suggested; nor is it claimed that there was any error in the judgment or discretion of the common council in approving it. *Watson v. Kings-ton*, 114 N. Y. 88, 21 N. E. 102, Affirming 43 Hun, 367.

So, it has been held that a municipality is bound to exercise reasonable care, skill, and judgment in the construction of culverts rendered necessary by the extension of its streets. But if it employs a competent engineer to do the work, and he, in the honest exercise of his judgment, fails to make it of a sufficient capacity by which water is thrown back upon adjoining property, there is no liability on the part of the city. If the engineer is sufficiently competent, and makes a mistake after the honest exercise of his best judgment, it is such a mistake as is inseparable from human action. The making of such mistake cannot be attributed to negligence, for negligence is the failure to exercise ordinary care. *Van Pelt v. Davenport*, 42 Iowa, 308, 20 Am. Rep. 622.

But, if the inadequacy in the size of a sewer which forms part of a street improvement is owing to omission to exercise ordinary skill and care in planning and performing the work, the municipality is liable; but, if the inadequacy of the sewer is attributable to a mere error of judg-

the street was rendered unsafe for travel by the direct act of the city or its contractor, and that the city would be held liable in those states in which an implied municipal responsibility is recognized for unsafe streets; which, however, is not the case in Michigan." Thus it appears to be the view of the author that the doctrine of nonliability because of a defective plan, while it may be consistent with the doctrine then announced in Michigan that municipal liability does not exist for any defect in a street, is nevertheless inapplicable in a state where there is an implied liability for unsafe streets. In this view we concur. Since the above Michigan decisions the legislature of that state has passed an act expressly declaring municipal liability for de-

fective streets, and the supreme court of that state has construed the law to include defects in the plan of construction, as well as those arising by neglect to repair. *Carver v. Detroit & S. Pl. Road Co.* 61 Mich. 584, 28 N. W. 721; *Sebert v. Alpena*, 78 Mich. 165, 43 N. W. 1098; *Schrader v. Port Huron*, 106 Mich. 173, 63 N. W. 964. Thus, by the construction placed upon the statute, the earlier Michigan decisions have been overruled, and the doctrine of nonliability of a municipality for a defective plan in street construction no longer exists in that state. The doctrine announced in the New York cases cited by appellant seems to be in conflict with some other decisions in that state. In *Clemence v. Auburn*, 66 N. Y. 334, the rule is questioned, and the principle of

ment, there is no liability. *Rice v. Evansville*, 108 Ind. 7, 58 Am. Rep. 22, 9 N. E. 139.

A municipal corporation is not liable for adopting and putting into effect a plan of street improvement which merely raises the grades of the streets so as to prevent the surface water from running off of abutting property as it had formerly done, although the result is to create a pond which is a nuisance to neighboring property. *Clark v. Wilmington*, 5 Harr. (Del.) 243. In that case it did not appear whether the obstruction was to a natural drainway, or to the water in its diffused condition. The court, however, intimates that it would be immaterial, except in case of a running stream, since it said that. In case of such stream, there would be no authority to provide for the obstructed water. In this intimation, however, the court is in error, since there is no right to obstruct ancient drainways, and any plan of improvement which might have that effect interferes with the rights of the abutting owner, and gives him a right of action. See 3 Farnham, *Waters*, §§ 889 *et seq.*

The erection of a sewer, rendered necessary by street improvements, of such incapacity that every sane man knows in advance that it will not afford any relief from the consequences of obstruction to the natural drainage caused by the filling of the street, would be dispensing with the use of common sense, and by no means consistent with that reasonable care which the law requires. It would, indeed, be carelessness most gross and wanton,—not merely an error of judgment, but the failure to exercise judgment at all. *Indianapolis v. Huffer*, 30 Ind. 235.

In a case where the city constructed a street across a ravine, and placed an inadequate conduit under the street to carry the water flowing in the ravine so that the water therein was backed upon plaintiff's property to its injury, the city claimed freedom from liability on the ground that it was merely a result of negligence or unskillfulness in devising the plan; but the court held that, under the rule that the municipality was not responsible for error in the exercise of legislative power, it could not be held liable for undertaking, or failing to undertake, the construction of an improvement; but that, when the improvement was undertaken, the work became a ministerial one, and the corporation must exercise ordinary care and skill in 67 L. R. A.

devising the plan as well as in performing the work. *Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86.

Where, in construction of a culvert, the city extended a gas pipe through it which acted as a dam and cast the water back upon upper property, it was contended that the city was not liable for the injury because the decision to put in the gas pipe across the drain was a judicial act, and for an error of judgment as to its effect as an obstruction, the city is not liable. But the court said, this proposition leaves out of view the important consideration that, in putting in said obstruction, or permitting it to be done, the city exercised reasonable prudence and care, but added, for a mere mistake, notwithstanding the exercise of proper care and the employment of competent skill, the corporation will not be liable. *Powers v. Council Bluffs*, 50 Iowa, 197.

However, negligence cannot be inferred as matter of law from the simple fact that culverts constructed as part of a street improvement to carry water collected by the gutters were defective in plan, and became obstructed or filled up by accumulations of dirt and sand, without anything to show the grade on which they were built, the care taken to determine their sufficiency, or other facts bearing upon the question of negligence. *Peru v. Brown*, 10 Ind. App. 597, 38 N. E. 223.

That water is collected in a channel, and poured on the land of an adjoining owner, by the execution of a plan for street improvement adopted by the city council, does not exonerate the city from liability for the injury, since it has no power thus to injure adjoining property without paying the damage, and it is immaterial whether it is done in execution of a plan or not. *North Vernon v. Voegler*, 89 Ind. 77.

So, if the water is gathered together in artificial quantities it must be provided for.

In *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135, where plaintiff's property was injured by the collection, for the purpose of street improvement, of the surface water from a large area, confining it to channels and carrying it to a point where a culvert of insufficient capacity was constructed to care for it, the court held that the collection of the water in one channel, causing it to flow onto plaintiff's property, was certainly a ministerial, and not a legislative or judicial, act. But the court continues, it is not alleged that there was any defect in

the holding in *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321, does not seem to be easily reconcilable with the cases cited. But, whatever may now be said to be the rule in New York, the following cases from other jurisdictions clearly refuse to distinguish between the municipal liability, because of a defective plan of construction and that which arises from negligence to repair. It is held that actionable negligence is included in the one as much as in the other. *Circleville v. Sohn*, 59 Ohio St. 285, 69 Am. St. Rep. 777, 52 N. E. 788; *Hinds v. Marshall*, 22 Mo. App. 208; *Chicago v. Seben*, 165 Ill. 371, 56 Am. St. Rep. 245, 46 N. E. 244; *Kendall v. Albia*, 73 Iowa, 241, 34 N. W. 833; *Poole v. Jackson*, 93 Tenn. 62, 23 S. W. 57; *Dallas v. Jones*, 93 Tex. 38, 40 S. W. 577, 53 S. W. 377; *Gould*

v. Topeka, 32 Kan. 485, 49 Am. Rep. 496, 4 Pac. 822; *Blyhl v. Waterville*, 57 Minn. 115, 47 Am. St. Rep. 596, 58 N. W. 817. The last-named case modifies the rule by the condition that liability shall exist only when there is no necessity or reason for the defective plan; and *Gould v. Topeka*, 32 Kan. 485, 49 Am. Rep. 496, 4 Pac. 822, also limits it by the condition that, if the plan is such that different minds may entertain different opinions as to whether it is dangerous or not, the benefit of the doubt may be given to the board that planned it, and the city held not liable, but that, even in such event, it must appear that the exact matter was under consideration by the governing board, and after due deliberation such plan was expressly adopted, or expressly ratified. The latter condition does not appear from the

the mechanism of the culvert, and it holds that the skill required of the municipality extended to the plan as well as its execution. The court said that it is stretching the doctrine of immunity from liability for consequential injuries to an unwarranted extent to hold that, if the mechanism is perfect, there is no responsibility in case the collected water is not carried away, no matter how greatly disproportionate and inadequate the size and capacity of the culvert to the volume of the water led to and poured against it by means of the drains of the municipality. It is the plain duty of the corporation, when it confines water in one channel, to see to it that suitable provision is made for the escape of the water into natural water courses, or other channels which will carry it off without injury to private property. And that doctrine was followed in *Crawfordsville v. Bond*, 96 Ind. 236.

In *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392, the city, by grading its streets for the purpose of disposing of surface water, caused it to flow onto adjoining property and become stagnant to the injury of a neighboring property owner. The city contended that, if the injury was the result of an exercise of its governmental power to grade the streets, it was not liable for the injury. The court said, we can solve more easily and safely questions of this character if we take pains to free our minds from the false notion that a municipal corporation has some indefinable element of sovereign power which takes from the property of the citizen, as against its aggression, the protection enjoyed against the aggressions of a natural person. The city is not liable for errors of judgment which may affect the convenient use of the street as such; but it cannot, even through the execution of a properly adopted plan, so affect adjoining property as to amount to a partial taking of the property for public use, without being liable to make compensation for the injury done. The court asks: If, in raising the grade of a street, the city turns a stream of mud and water upon the grounds and into the cellar of one of its citizens, or creates in his neighborhood a stagnant pond that brings disease upon his household, upon what ground of reason can it be insisted that the city should be excused from paying for the injuries it has directly wrought? It further asks: If the public interest requires that the lot of an individual

shall be rendered unsafe for occupancy, either wholly or in part, in the process of grading, why should not the public pay for it to the extent to which it deprives the owner of its legitimate use? The theory that private rights are ever to be sacrificed to the public convenience or interest without full compensation is fraught with danger, and should find no lodgment in American jurisprudence. To prevent this was the object of some of the most important of our constitutional guaranties.

If a municipal corporation, by its system of street improvement, collects the surface water from a large area, it will be liable for the resulting injury in case it provides an outlet which is inadequate to carry the accumulated water, so that it overflows onto adjoining property; and it is immaterial that the inadequacy is because of defect of plan. *Seaman v. Marshall*, 116 Mich. 327, 74 N. W. 484.

So a county, in improving a highway, should see that the surface water follows its natural course; and it will be liable if it collects water either from the road itself or from adjoining property, and discharges it on private property, where it would not naturally flow. *Schofield v. Cooper* (Iowa) 102 N. W. 110.

In *Lacour v. New York*, 3 Duer, 417, the municipality adopted a plan for street improvement which contemplated the lowering of several intersecting streets, and then let the contract for the work on one of the streets to be done separately. The result of this was that the street, when brought to the new grade, was much lower than the intersecting street, and in fact constituted a hole or depression, and the municipality made no provision for draining off the water which would naturally accumulate therein. The result was that water collected there and injured the walls of an abutting owner, who brought an action to recover for his injury. The city defended on the ground that the work was within its discretionary and legislative power, but the court held that, after the passage of the ordinance providing for the improvement, all the work was ministerial, and that the city was liable for negligence in its performance, and that it was negligence to carry on the improvement in the manner in which it was done.

Some courts, in considering the effect of the fact that the injury was caused by an exercise of discretionary power, have lost sight of the

evidence in the case at bar. It simply appears that the construction was probably originally made as it now is, but whether the plan was considered and expressly adopted by the proper governing authorities of the city does not appear. We think, in any event, however, that the weight of authority is against appellant's contention, and that a city cannot relieve itself from liability for defective streets because the defect may be part of an original plan of construction. This court held that the question of negligent construction of the street was one for the jury in *White v. Ballard*, 19 Wash. 284, 53 Pac. 159, although the original-plan doctrine here under consideration seems not to have been discussed. We think it was a question for the jury in the case at bar whether the city neglected to keep the street in safe condition, and it

is immaterial whether the defect arose from the original construction or from subsequent causes. There is also an additional element which calls for its submission to the jury, and that is whether the city was negligent in permitting the electric light to be so placed that the shadow of the pole supporting it concealed the opening in the walk, if such be the fact. The evidence introduced by the respondents certainly tended to establish that fact, and it was for the jury to say what was the fact in that particular. We think the case was erroneously withdrawn from the jury, and that the new trial was properly granted.

The judgment is affirmed.

Reavis, Ch. J., and Fullerton, Anders, Mount, Dunbar, and White, JJ., concur.

fact that there had been a positive tort committed against the private individual, and not a mere exercise of a well-defined right by the city.

Thus, in *Mills v. Brooklyn*, 32 N. Y. 489, it appeared that, by the grading of its streets, defendant brought to a point in front of plaintiff's property certain surface water which flowed along the street, and then provided an inadequate sewer to care for all the water so accumulated, so that part of it overflowed onto plaintiff's property to its injury. The court said the grievance of which plaintiff complained is that sufficient sewerage to carry off the surface water from his lot has not been provided, and then proceeded to show that, there being no duty on the part of the municipality to provide sewerage, no complaint can be made because that which was provided was inadequate. The court argues that the duty of draining the streets and avenues of the city is one requiring the exercise of deliberation, judgment, and discretion. This duty is not in a technical sense a judicial one, for it does not concern the administration of justice between citizens; but it is of a judicial nature, for it requires the same qualities of deliberation and judgment. This is a matter which is committed to the municipal council, and cannot be reviewed by court or jury. And it was decided that the action could not be maintained. In this argument the court appears to have missed the whole point of the controversy. The fact that the question whether drainage should be provided, and if so how much, is a matter wholly within the discretion of the municipal authorities, is not subject to dispute, and no action lies for the exercise or nonexercise of the power. But when, by its own improvements, the municipality has gathered a body of water at a point which it would not have reached but for these improvements, it is no longer a matter of discretion whether the municipality will provide for such water or abandon it to injure the abutting property owner; but its absolute duty is to care for it, and, in case it fails to do so, it is liable for the resulting injury. Since the court did not consider this phase of the case, the decision is of little value upon the general question. The doctrine of the *Mills* Case was, however, recognized and followed in *Hines v. Lockport*, 50 N. Y. 238.
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So, in *Carr v. Northern Liberties*, 35 Pa. 324, 78 Am. Dec. 342, the defendant had, by its system of street improvement, conducted large quantities of surface water to a point opposite the plaintiff's store, and then had failed to provide sufficient inlets into the sewer to provide for all of the water. The consequence was that a summer shower precipitated such quantities of water which were not conducted away that it overflowed the sidewalk and filled the basement of plaintiff's property, and he brought an action to recover for the resulting injury. The court said that the question is, Have the citizens of our incorporated towns a legal right to call upon the portion of the people thus incorporated to devise and execute such a system of drainage as will secure all private property against all ordinary or extraordinary flooding by rain or melting snow? Of course the answer to this question must be in the negative, and such answer the court returned; but the trouble was, the court did not correctly state the proposition before it, which was: Must a municipal corporation, which, by its system of street improvement, conducts large quantities of water to a point which it would not otherwise reach, provide a means by which such water can be disposed of without injury to abutting property? The answer to this question must be in the affirmative, so that the decision in the case is of no value because the proposition to be decided was not correctly stated.

But the same principle was applied in *Bear v. Allentown*, 143 Pa. 80, 23 Atl. 1082.

Magarity v. Wilmington, 5 Houst. (Del.) 530, was brought to recover damages for injuries to plaintiff's house by water because of the grading of one street and the manner of constructing sewers in another. The source of the water does not appear, nor does it appear in what manner the injury was effected, so that the case is of little value; but the court takes the broad ground that, for discretionary acts, the city cannot be called into question by private citizens. It says that the grading of the avenue in this case, and the construction of the sewer, were matters for decision by the city authorities, which involved no sort of responsibility to private persons; the determination to grade and construct, and the form of doing both, were a plan of action entirely judicious.

In *Kavanagh v. Brooklyn*, 38 Barb. 232, the city, in grading its streets, caused the water to run along them until it came opposite plaintiff's house, and then, because the city failed to provide for the water, it flowed off from the street onto plaintiff's property, and the court held that there was no liability because the injury was the necessary result of the establishment of a plan of street improvement. The court says: "The ground which plaintiff assumed, and must maintain to entitle him to maintain this action, is that a municipal corporation is liable in damages for an injury or inconvenience to the owner of property upon the streets resulting from the improvement of streets by authority of law, where there is no negligence or unskillfulness in conducting the work. Nothing short of the affirmative of this position will uphold the present action." But it is very obvious that the plaintiff was not required to establish that position in the form in which it was stated by the court. All he had to establish was that the improvement gathered surface water out of its courts and conducted it near plaintiff's property, where it was abandoned to his injury. This gave plaintiff a right of action, whether it was the result of the plan of improvement, or was the result of negligent construction.

In *Carroll v. Rye Twp.* (N. D.) 101 N. W. 894, the defendant township constructed highways by throwing earth from the sides toward the center so as to leave ditches along them. The effect of this was that the ditches acted as drains for the surface water of a large section of territory, and it flowed to a point on the farm of plaintiff where it overflowed, and plaintiff claimed that it had seriously injured his property. Defendant denied the injury. The court says that, in view of its holding with reference to the law of the case, it was not necessary to decide the disputed question; but, for the purposes of the case, they might assume that the plaintiff had been damaged, and that the damage was the proximate result of defendant's acts. The court then discusses the civil-law rule and the common-enemy rule with reference to the right to obstruct the flow of surface water, and holds that, since the highway ditches were not dug for drainage purposes, but were the necessary, incidental result of the only practicable method of making the road fit for travel, whatever damage plaintiff had suffered from surface water diverted by the highways is not traceable to any misconduct on defendant's part, and therefore plaintiff had no right of action. The court, in making this ruling, plainly overlooks the principle on which the decision should have been placed. The controversy between the courts which have adopted the civil-law rule and the common-enemy rule is as to the right to obstruct or dam up natural drainways. All courts, both those which follow the common-enemy rule and the civil-law rule, hold that, if a person or corporation, by means of improvements of his or its own property, gathers surface water from a large section of country, and conducts it to a point where, unless it is cared for, it will do injury to a neighboring property owner, there is a duty to care for the water, and a liability will exist if it is abandoned and permitted to cause such injury. The plaintiff in the case placed his contention of the right to recover directly upon this principle, and it is strange that the court should have failed even to consider the

question of liability on this ground in its opinion, but should have diverged to notice the conflict between the civil-law and the common-enemy rules, and thereby missed the entire point of the controversy.

In *Wilson v. New York*, 1 Denio, 595, 43 Am. Dec. 719, the raising of the grade of a street was alleged to have obstructed the flowing of the surface water from an abutting lot, and to have turned the water and caused it to run upon such premises, and the proof showed that the water ran from a street and from adjacent lots upon the plaintiff's property because of the improvement. The court said that the municipal corporation acted under authority of the legislature, and that, therefore, what was done was lawful, and, if the plaintiff was thereby incommoded, it was *damnum absque injuria*; and gave no right of action against those who had only exercised a legal power vested in them for the public convenience and welfare.

d. The Missouri cases.

Thurston v. St. Joseph, 51 Mo. 510, 11 Am. Rep. 463, which involved the question of liability for injuries caused by the bursting of a sewer, contains a discussion of the principles involved that is so full that it throws much light on the question under discussion. Adams, J., who delivered the leading opinion, says that, if the court is to follow the rule laid down in *St. Louis v. Gurno*, 12 Mo. 414; *Taylor v. St. Louis*, 14 Mo. 20, 55 Am. Dec. 89; and *Hoffman v. St. Louis*, 15 Mo. 651,—which denied the liability of the city for consequential injuries to adjoining property because of the alteration of the grade of the highway, plaintiff could not recover in the case at bar. The judge proceeds to state that the cases which denied liability in such cases were founded upon *British Cast Plate Mfrs. v. Meredith*, 4 T. R. 704, but he denied the applicability of the principle of that decision in this case. The ground of that decision seems to be that Parliament was omnipotent, and, if it saw fit to authorize an improvement without providing for compensation, none could be claimed. There the maxim *Salus populi est suprema lex* applies, and private rights must yield to public convenience. But the Missouri Constitution guarantees a certain remedy for every injury to property, and provides that private property shall not be taken for public use without compensation. Under these provisions, when the legislature confers power upon a municipal corporation to make improvements, the corresponding duty to make compensation must be implied. And since, under the authority of *Lackland v. North Missouri R. Co.* 31 Mo. 180, the right of an owner of a lot in a town to the use of the adjoining street is as much property as the lot itself, the access cannot be cut off by the alteration of the grade without making compensation, thereby overruling the *Gurno*, *Taylor*, and *Hoffman* Cases. In this opinion *Sherwood, J.*, concurs. *Ewing, J.*, concurs in the result. *Wagner, J.*, dissents, and *Vories, J.*, did not sit. But in *Schattner v. Kansas City*, 53 Mo. 162, which involved the question of liability for changing the grade 4 feet, the court returned to the doctrine of the *Gurno* Case, and held that there is no liability. Again, in *Imler v. Springfield*, 55 Mo. 125, 17 Am. Rep. 645, where, during the process of improving a street, the gutter at its side was temporarily filled up so that the water from a sewer ran over the

walk onto plaintiff's property, the court denied the liability of the municipality, saying that in such case no right of action accrues to persons having property fronting on the street improved, unless the injury be shown to have resulted from the negligent or improper manner in which the work is done by the city or its employees. This has been the settled doctrine of this state ever since the case of *St. Louis v. Gurno*, 12 Mo. 414. The court further says, the case was tried upon the theory that it was the duty of the city during the progress of the work to prevent the surface water from flowing upon the lots of the adjoining proprietors, and that it was negligence in the city not to have done so, for which it is liable. But the court held that no such liability exists. Authorities are then cited to the effect that, in grading streets, the municipality is under no obligation to provide means to keep the surface water from flowing onto abutting property. But the court seems to overlook the fact that in the case under consideration the municipality had not simply failed to provide means for keeping the water off from the abutting property, but actually interfered with its flow so as to change its course, and cast it on to the abutting property, which was sufficient to give a right of action. See *3 Farnham, Waters*, § 886. Again, in *Wegmann v. Jefferson*, 61 Mo. 55, in which damages were sought for injuries to abutting property by the change of the grade of a street, the court said it was well settled in that state that a municipal corporation was not liable for consequential injuries caused by the alteration of street grades if it exercised reasonable care and skill in the performance of the work.

Finally, in *Foster v. St. Louis*, 71 Mo. 157, an action was brought to recover damages for injuries caused by water which was gathered by the improvement and paving of a street and precipitated by the termination of the gutter onto plaintiff's property. The court said the evidence tended to show that the street was opened according to a plan; that in said plan no method was devised for the disposition of surface water which might flow along the gutters so that adjoining property owners would not be injured by it; so that the injury resulted from an error of judgment on the part of the city council in ordering the opening of the street at a certain grade without providing some method of disposing of the surface water. The court then proceeded to state that the passage of the ordinance was quasi judicial, and that the rule that the city is not liable for consequential damages arising from a defect in a plan adopted is fully established by the *Imler*, *Schattner*, and *Wegmann* Cases, and the case of *Saxton v. St. Joseph*, 60 Mo. 153, which involved the question of the liability of the city to pay for work done on a street for which the abutting owners were not liable because of a defect in the ordinance authorizing the performance of the work, and in which the court held that the doctrine that the city is liable for the negligent manner in which public duties are carried on does not apply to defective legislation. The question of defective plan was not discussed in either the *Imler*, *Schattner* or *Wegmann* Cases, and the *Saxton* Case is plainly not in point; so that the court in the *Foster* Case, without a particle of authority to sustain the decision, justifies the casting of gathered surface water in a body onto adjoining property because it

was the result of a defective plan. Such a result is, of course, not justifiable on principle. But the principle of that case was followed in *Stewart v. Clifton*, 79 Mo. 603, although in the latter case the injury was in fact caused by a pipe which plaintiff had himself laid, so that the case depends upon entirely different principles from those chiefly discussed by the court.

What effect these decisions had in causing the change in the Constitution cannot be stated, but in 1875 an amendment to that instrument provided that private property should not be damaged for public use without compensation, and, under that amendment, it is intimated in *Werth v. Springfield*, 78 Mo. 107, that compensation must be made in some form for this class of injuries.

IV. Injury to travelers.

a. Defective streets.

When the question of the municipal liability to travelers is considered, such liability is found to depend, not upon any private right of the injured person, but upon his right as one of the public. The public has no rights against the municipality in the absence of legislation conferring them either expressly or impliedly. When it has been established that, under the statutes of a particular state, a city is liable for failure to maintain its streets in a safe condition, the question arises, Is there any ground for distinction between those defects which are the result of the plan on which the work was done, and those which result from the negligent execution of the plan? On principle, it would seem that it was immaterial, so far as the liability of the city was concerned, how the defect arose. If it is bound to keep the streets free from defects, liability is established by an injury caused by a defect, and the city should not be heard to say that it deliberately planned the defect. The majority of the cases take this view of the matter.

The rule of exemption from liability for injuries caused by a defective plan should not be carried to the extent of relieving the city from liability when the plan devised and put in operation leaves the streets in a dangerous condition for public use. And where the injury was caused by a person stepping into the catch basin to a sewer, the court stated that, whatever the evidence as to the original plan might have been, it was shown that it had become enlarged and out of repair after it was finished; but it held that, if the city has adopted a plan and created an existing condition in a street in pursuance thereof, which renders the street unsafe, the city must go further, and perform the duty cast upon it, growing out of the statute, to exercise ordinary care to make the street thus encumbered with the product of its plan reasonably safe for public travel. *Chicago v. Seben*, 165 Ill. 371, 56 Am. St. Rep. 245, 46 N. E. 244.

A city has no more right to plan or create an unsafe and dangerous condition of one of its streets than it has to plan or create a public or common nuisance. *Gould v. Topeka*, 82 Kan. 485, 49 Am. Rep. 496, 4 Pac. 822. The court says, while we recognize the rule that the municipality is not liable for an erroneous exercise of its legislative powers, and think it may have application in some cases, yet we do not think it has very much room for application

where injuries occur to private individuals on account of defective and manifestly dangerous public streets. The control of the streets of cities was not put into their hands for the purpose that they might plan or order that the streets should be made dangerous or unsafe for the public to travel there; nor was such control put into their hands for the purpose that they might plan or order that the streets should remain in an unsafe or dangerous condition if previously dangerous; but such control was given to them for the sole purpose that they should make and keep the streets safe and convenient for the traveling public. If the city should plan or arrange that a street should be made unsafe and dangerous, we should be inclined to think that it would so transcend its powers as given to it by the legislature, and so violate its duties as imposed upon it by the legislature, that it would be liable for any injury which would occur to any individual by reason of such unwise action. Such action would be substantially the same as planning and creating a public nuisance. Where a street as planned or ordered by the governing board of a city is so manifestly dangerous that a court upon the facts could say, as matter of law, that it was dangerous and unsafe, the rule contended for should not have any application, and the city should be held liable; but where, upon the facts, it would be so doubtful whether the street as planned or ordered was dangerous and unsafe or not, that different minds might entertain different opinions with respect thereto, the benefit of the doubt might properly be given to the city.

So, in *Birmingham v. Lewis*, 92 Ala. 352, 9 So. 243, where the accident occurred because of an open catch basin or sewer opening extending into the sidewalk, and it did not appear whether the construction was the result of a plan adopted by the council, or merely of the negligence of those in charge of the streets in making repairs, the court says the city has no more right to plan or create an unsafe and dangerous condition in one of its public streets than it has to plan or create a public nuisance.

The duty to keep streets reasonably safe and fit for travel applies to defects in construction as well as defects in repair. *Plainview v. Mendelson*, 65 Neb. 85, 90 N. W. 956.

Where a traveler in a street fell into an open ditch which had been constructed for drainage purposes, the city contended that the devising of the plan was a legislative or quasi judicial act, for the consequences of which it was not answerable; but the court held that, where jurisdiction over its streets is conferred on a municipal corporation, it carries with it the concomitant and imperative duty and obligation to keep its streets free from obstructions and in a reasonably safe condition for travelers, and it would be absurd to show that it might determine on a plan for the improvement of streets which would expose the public to perils and dangers of life and limb without liability for the result. *Hinds v. Marshall*, 22 Mo. App. 208.

If, after the completion of the improvement, notice is brought home to the municipality that the street is not reasonably safe for use under ordinary circumstances by reason of the faulty construction of the improvement, it becomes the ministerial duty of the corporation to remove the defect. *Dayton v. Taylor*, 43 Ohio L. J. 209.

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A municipal corporation is liable for injuries caused by a dangerous defect in a street under its control without reasonable notice of its unsafe condition, where it arose from the construction of the street in conformity with a plan adopted by the municipal authorities. *Circleville v. Sohn*, 59 Ohio St. 285, 69 Am. St. Rep. 777, 52 N. E. 788.

Where plaintiff was injured because of the city's construction of a raised track to carry traffic along the center of the highway, leaving an unguarded embankment on either side, the court said the doctrine of a general plan or system of grading the streets has nothing to do with the case. The streets should be so graded as to leave them reasonably safe for travel. *Wilson v. Atlanta*, 60 Ga. 473.

A street which is raised over a depression for one half its width, leaving an unguarded embankment several feet high between the improved street and the part left in its natural state, is unsafe as matter of law, and the municipality cannot relieve itself from liability for injuries resulting from such construction by showing that such method of construction was approved by the municipal authorities. *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558.

The question of the sufficiency of a street construction to make it safe for travelers is for the jury. *Berg v. Milwaukee*, 83 Wis. 599, 33 N. W. 890.

Where an injury occurred by reason of a horse backing off a narrow and elevated portion of a highway, the court said streets must be so constructed that the ordinary horse with the ordinary disposition, employed for the ordinary incidents of commerce or freight, can be driven with reasonable safety on them; and it held that it was a question for the jury to determine whether it had been so constructed or not. *White v. Ballard*, 19 Wash. 284, 53 Pac. 159.

In *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273, which was an action to recover damages for injuries caused by a defect in a street, the municipal corporation claimed that it was not liable for neglect of governmental duty; but the court said: We are of opinion that the laying out, repairing, and control of streets by a chartered municipality does not call forth the exercise of strictly governmental functions. In the performance of such duties the municipality acts properly for the benefit of the inhabitants of the particular locality, and for breach of them an action will lie in favor of a person injured.

b. Defective walks.

A municipal corporation having exclusive control of its streets is bound to keep them in safe condition, and cannot escape liability for an accident caused by needlessly leaving a step in a sidewalk, on the ground that the defect was in the plan of the walk, and therefore within the discretionary powers of the municipality. *Blyth v. Waterville*, 57 Minn. 115, 47 Am. St. Rep. 596, 58 N. W. 817. The court says, if two plans of construction are presented, neither of which will be absolutely safe, the municipality cannot be held liable for adopting one rather than the other. To make the corporation liable the plan adopted would have to be so much and so obviously more unsafe than the other as to show a neglect to employ the diligence, judgment, and skill in determining the plan which ordinary care would require.

In *Evans v. Iowa City* (Iowa) 100 N. W. 1112, the defendant was held negligent in constructing a sidewalk of pine board of the poorest grade, less than 1 inch in thickness, laid upon stringers 2x4 in size, placed upon the ground; but there is no discussion of the question whether the plan of construction was adopted by the council or by the officers performing the work.

In *Dallas v. Jones*, 93 Tex. 38, 49 S. W. 577, 53 S. W. 377, a recovery was permitted for injuries caused by the original construction of the walk on a defective plan.

In *Belton v. Turner* (Tex. Civ. App.) 27 S. W. 831, defendant requested an instruction relieving it from liability if the defect was in the plan duly adopted by ordinance; but the court said it would be contrary to all principles governing the liability of municipal corporations to allow them to relieve themselves by ordinance of liability for injuries resulting by their negligence. If the city had an ordinance authorizing the construction of sidewalks dangerous to people traveling thereon, instead of having a tendency to excuse it from liability for the consequence to one innocently traveling there, it would tend to intensify its negligence and more certainly fix its liability.

In *Pfeifer v. Lake*, 37 Ill. App. 367, where plaintiff sustained injury because a step had been constructed in the walk at a point where there was no light at the time of the accident, so that in attempting to pass along the walk she stumbled and fell, the court held that the question whether the walk was safe or not in the manner in which it was left, was for the jury; but the dissenting judge says that the complaint is not that the work it did was improperly or negligently done, but that its plan for the work was improper and injudicious. This is a matter over which the courts have no control. Having discretion as to whether it would improve at all, it has, also, discretion as to the kind of improvement, if any, it will make. Its judgment as to what is the best kind of improvement is not subject to review by court or jury in cases where the court cannot say that the plan itself is so dangerous that its construction is negligent. The judge continues, the greater weight of authority, as well as reason, seems to me to be opposed to any extension of the liability of municipal corporations to cases in which the neglect, if any, consists in an alleged defect in the plan or mode of improvement, and is one concerning which men of experience in such matters might well differ. To declare it to be one of the functions of the jury in all cases to pass upon and pronounce safe or dangerous the plan of street improvement resolved upon and constructed by a municipal corporation is simply to take from the authorities the quasi judicial discretion vested in them in respect to such matters, and to leave it ever uncertain as to what shall be done in order that juries may not punish the municipality for not adopting a plan of improvement such as they deem most secure.

The lower court said that, in addition to the fact that the improvement was in accordance with a plan adopted by the city, there must be the further circumstance that, if the plan were such that the condition of the street necessarily resulting therefrom was rendered unsafe and dangerous, reasonable precautions were employed to protect persons using the street in a

lawful manner and with due care against injury. *Chicago v. Seben*, 62 Ill. App. 248.

Where an injury was caused by a plank set on edge and extended above the level of the sidewalk, the trial court granted a peremptory instruction for the city, on the theory that the defect was a structural one for which the city was not liable. The supreme court, however, said: We think this was carrying the doctrine invoked too far. While it is true the plan of improvement of the streets of the city—and, indeed, whether they should be improved at all—is a matter confined to the discretion of the municipal council, yet, if they do improve them, it must be done upon some plan not palpably dangerous to life and limb of travelers. The council cannot authorize or suffer traps or pitfalls, or such obviously dangerous obstructions, to exist in the public streets, whether structural or otherwise, as indicate a disregard of the safety of pedestrians, without making the city liable for injuries sustained therefrom. *House v. Covington*, 28 Ky. L. Rep. 660, 82 S. W. 374.

As has already been intimated, the city is not liable merely because an accident occurs. It is not possible to insure travelers against all accidents. If several methods of construction are available, either of which is reasonably safe, the city cannot be held liable for adopting one rather than another.

It is for the city to determine and adopt, not only the grade of the streets and sidewalks, but also the material to be used. In this the city acts for and in the interest of the general public. It is not compelled to adopt any particular plan or grade, to use any special kind of material, or to make the improvement to conform to any given standard. The city is not amenable simply because its officers adopt one plan or grade in preference to another, or select one kind of material rather than another, or because streets and sidewalks of a given standard are more perfect and better than that adopted. If the municipality is not negligent in adopting the plan of a sidewalk, the mere fact that it slopes toward the street in such a manner as to afford a smooth and insecure footing when covered with snow and ice will not render the municipality liable for injury to a pedestrian who falls upon the walk. *McQueen v. Elkhart*, 14 Ind. App. 671, 43 N. E. 460.

In *Teager v. Flemingsburg*, 109 Ky. 746, 53 L. R. A. 791, 95 Am. St. Rep. 400, 60 S. W. 718, the court says it is inclined to the view that, while the city governing body may exercise its discretion in the selection of a plan of street improvement, if the plan adopted is one unsafe to travelers the city would be liable. But when the plan is one that many prudent men might approve, or where it would be so doubtful upon the facts whether the street as planned or ordered by the city governing body was dangerous or unsafe or not,—that different minds might entertain different opinions with respect thereto,—the benefit of the doubt should be given to the city, and it should not be held liable. Therefore, the city was held not liable for an injury occurring because of a step in a sidewalk.

If, when a section of a sidewalk is brought to the established grade, it is higher than the adjoining section, which has not been improved, and the municipal authorities exercise their best judgment as to the best method of joining one grade with the other, there will be no liability in case the plan adopted proves to be in-

sufficient to prevent all accidents. *Rotsell v. Warren*, 10 Pa. Super. Ct. 283.

c. Defective bridges.

A city cannot carelessly and negligently adopt an unsafe plan for a bridge, and escape liability for damages resulting from the insufficiency of the plan. *Ferguson v. Davis County*, 57 Iowa, 601, 10 N. W. 906.

In *Weightman v. Washington*, 1 Black, 30, 17 L. ed. 52, the injury was caused by the fall of a bridge which was a part of defendant's highway system, and the defense was made that the giving way of the bridge was solely the result of accident resulting from a defect in the plan under which the bridge had been constructed, and that the plan had been adopted by a competent committee under the advice of scientific men. But the court held that the control and management of the bridge had been placed by the legislature upon the municipal corporation, and it had been charged with the expense of keeping the same in repair, and of rebuilding it when necessary. The court then, without discussing the effect upon the cause of the defect in plan, held that, since the bridge was out of repair and unsafe, and caused the injury complained of, it was error to instruct the jury that plaintiff was not entitled to recover.

A municipal corporation is liable for injuries caused by the fall of a bridge because of its defective plan, where it committed the construction of the bridge to its engineer, and he adopted a defective plan for that purpose. *Dayton v. Pease*, 4 Ohio St. 80. The court says, when a municipal corporation undertakes to execute its own prescribed regulations by constructing improvements for the especial interest and advantage of its own inhabitants, the authorities are all agreed that it is to be treated merely as a legal individual, and as such owing all the duties to private persons, and subject to all the liabilities, that pertain to private corporations or individual citizens. To this class most clearly belong the construction, repair, and maintenance of its streets.

The rule that a municipal corporation acts judicially in selecting a plan on which a public improvement is to be constructed, and that no private action will lie for lack of judgment in that respect, has no application to an injury resulting to a traveler from its negligent construction of a bridge. *Jordan v. Hannibal*, 87 Mo. 673.

In *Kennedy v. Williamsport*, 11 Pa. Super. Ct. 91, it is said, while the law invests a municipal corporation with power to establish and construct sidewalks and bridges upon the highways, and determine their form of construction, it requires, also, that their construction shall be reasonably safe and secure. Whether a bridge where an injury occurred was in fact properly constructed and guarded is a question of fact for the determination of the jury.

But a county is not bound to adopt the best plan for bridge building. Its duty is fulfilled by the adoption of a plan approved by a competent mechanic as suitable for the place where the bridge is to be built. *Childs v. Crawford County*, 176 Pa. 139, 34 Atl. 1020.

So, where there are obstacles to overcome in the construction of a public bridge, and reasonable minds might differ as to whether the plan adopted therefor by the municipality was the best and safest one, the decision of the mu-

nicipality on the question cannot be reviewed by the courts. But the municipality is liable for an injury caused by an unsafe public structure, although the defect exists in the plan adopted for its construction, if there is no reasonable necessity for having the defect. *McDonald v. Duluth* (Minn.) 100 N. W. 1102.

It is not competent to show that the plan of a bridge which falls while a traveler is attempting to pass over it was not the best, or as good, perhaps, as it might have been. *Woodbury v. Owosso*, 64 Mich. 239, 31 N. W. 130.

d. Courts denying liability.

In some cases the liability of the city has been denied. Some of the courts, however, which at first adopted that view, have since changed their opinions, either because of a change in the statute, or upon general principles.

Michigan.

Early cases in Michigan in which the question arose were decided, apparently, upon the ground that there was no liability for a defect in plan, when, in fact, that nonliability was due to the fact that no liability had been imposed by the legislature in any case, and, as soon as this defect was supplied, the liability became general in that state, the same as in others.

In an early case in which the question arose, the court said: The lawful exercise of legislative action cannot be a wrong; and, since the determination of the plan of a public work is in the nature of legislative action, there must be something beside the mere execution of the plan as adopted before the municipality can be held liable as for a tort. Therefore, it was held that the municipality was not liable for injuries to one who fell into an open ditch or sewer which had been constructed across the street, but covered only for a portion of the width of the highway. The court says, in planning a public work a municipality must determine for itself to what extent it will guard against possible accidents. Courts and juries are not to say it shall be punished in damages for not giving the public more complete protection. *Lansing v. Toolan*, 27 Mich. 152.

In *Detroit v. Beckman*, 34 Mich. 125, 22 Am. Rep. 507, action was brought for the death of a person who, driving along a street across a culvert, drove off the end of the structure because its length was less than the width of the roadway, and it was unprotected by railing or guard of any kind. The court said: When complaint is made that the original plan of a public work is so defective as to render the work dangerous when completed it is apparent that the fault found is with legislative action, and a suit granted upon it is granted upon a wrong attributable to the legislative body itself. The prescribing of the plan must be a matter of legislation. The court further said: The distinction in principle between the case where the complaint is that the work must necessarily cause an injury to private property equivalent to an appropriation of some enjoyment thereof to which the owner is entitled, and a case where the fault found is that the plan is not most wise and prudent to protect against accidents, seems distinct and palpable. The public authorities cannot appro-

priate a man's property without making compensation, whether it be done by excluding him from his land, or by flooding, or otherwise injuring, it. But to what extent they shall guard the citizen against dangers when he is making use of a highway or other public convenience is, and must be, a matter of discretion. The court then adds that prior cases decided by that court, to the effect that there is no liability for interfering with navigation by bridging a stream, or in interfering with the access of an abutting owner by changing the grade of the street, are conclusive of the case at bar. And the principle of that case was followed in *Toolan v. Lansing*, 38 Mich. 315.

The Michigan statute making municipal corporations liable for defects in public highways does not seem to have been passed until 1879. See *McKellar v. Detroit*, 57 Mich. 158, 58 Am. Rep. 357, 23 N. W. 621.

But when it was passed the court held that the statute applies to defect of plan. *Schrader v. Port Huron*, 106 Mich. 173, 63 N. W. 964.

In *Malloy v. Walker Twp.* 77 Mich. 448, 6 L. R. A. 605, 43 N. W. 1012, where an accident occurred because of absence of a railing or barrier along the side of an embankment upon which the highway was constructed, defendant contended that it was not liable for injuries caused by reason of the plan or scheme of construction of the road, either as to width or want of barriers. But the court says that the statute is imperative that the highway shall be kept safe and convenient for public travel at all times, and that in *Alexander v. Big Rapids*, 76 Mich. 282, 42 N. W. 1071, where, in the process of making an improvement, a cross walk was removed, leaving an opening into which plaintiff fell, the precise question was determined against the municipality, the court saying that in that case while the improvement was going on there was no right to leave the crossing open to travel, unless it was made reasonably safe and fit therefor. The court decided that the question whether the highway was safe for public travel was for the jury, whether the alleged insufficiency was because of defect of plan or want of repair, saying that this statute cannot be given a construction that would relieve the municipality, upon which a burden is cast to keep its highways in repair and reasonably safe for travel, from liability by saying that it had adopted a method of construction and had built according to a plan. Municipalities cannot construct a dangerous and unsafe road,—one not safe and convenient for public travel,—and shield themselves from liability behind their legislative powers to adopt a plan and method of building and constructing in accordance therewith. The negligence consists, not in the plan of the work, or the manner in which it is done, but in failure to provide suitable protection against accidents after the embankment has been made. *Campbell, J.*, in dissenting, said: "I am not prepared to depart from what I conceive to be the settled law of this state, or to hold that the proper or best method of building roads is among the presumable accomplishments of average jurors. The officers intrusted with the discretion are selected under the law and act on their best judgment, and I do not believe their judgment is open to revision unless so manifestly perverted as to show they have never used their discretion at all." 67 L. R. A.

The statute applies to defects in construction as well as to neglect to repair when the road is unsafe. Therefore, the municipality will be liable if, in constructing the road, it leaves a stump so near the traveled path as to render the way unsafe and dangerous. *Sebert v. Alpena*, 78 Mich. 165, 43 N. W. 1098.

But, even under a statute making the municipal corporation liable for injuries caused by its neglect to keep its streets in repair and in a condition reasonably safe and fit for travel, the city was held not liable for injury caused to one traveling in a buggy by driving upon a stone placed at the end of a drain carrying water across the street to prevent persons from getting off the end of the drain into the gutter, since such defect must be regarded as one of plan, within the legislative discretion of the city, for which it could not be held liable. *Davis v. Jackson*, 61 Mich. 530, 28 N. W. 526.

No, although the statute requires the municipal corporation to keep its cross walks in safe condition for public travel, it cannot be made liable because, in the construction of the walk, a step is left between the curb and the portion of the walk laid in the street. *Shippy v. Au Sable*, 65 Mich. 494, 32 N. W. 741. The court says the village authorities have a perfect right, in the use of their discretion, which courts cannot review, to determine how and where cross walks shall be laid, and how access shall be obtained between the foot walk and the carriage way. The court further says: "All municipal ways must be put under the supervision of the public authorities. It is for them to decide what works shall be undertaken, and how the general safety and convenience require them to be built. There must be some final arbiter as to the proper way of doing this. In many cases plans more or less formal must be considered, and taxes or assessments levied to complete them. If it can be referred to a jury to determine on the propriety of such action, there will be as many views as there are juries, and it can never be definitely known when a municipality is safe. It is beyond human ingenuity to devise a plan which is not capable of danger to heedless persons, or to young children, who cannot be expected to appreciate the danger. Reasonable safety is what the law requires and no more."

New York.

The early New York cases in the court of appeals applied the rule of nonliability; but, in view of the fact that that court has recently affirmed, without opinion, lower-court cases which applied the opposite rule, it would seem that the New York court was inclined to change its position.

No action will lie against a municipal corporation for injuries caused by a fall upon a walk which has too great an incline, where the walk was constructed according to a plan adopted or approved by the city. *Urquhart v. Ogdensburg*, 91 N. Y. 67, 43 Am. Rep. 655. The court says that the rule is well settled that, where power is conferred upon a municipal corporation to make improvements, the duty to make them is quasi judicial or discretionary, involving a determination as to their necessity, requisite capacity, location, etc., and for a failure to exercise this power, or an erroneous estimate of the public needs, no civil action can be maintained; and that case was followed in

Rehrey v. Newburgh, 60 N. Y. S. R. 250, 28 N. Y. Supp. 916.

In Monk v. New Utrecht, 104 N. Y. 552, 11 N. E. 268, where plaintiff fell down an unguarded embankment sloping for 30 feet away from the highway, the court held that, under the circumstances, the want of a guard was not a defect; but, upon the assumption that it might be so, it said the commissioners were called upon, in constructing a plan, to decide upon the safety of the route adopted and the dangers thereby to be encountered, and, if safeguards were necessary to protect travelers in passing dangerous places, to provide them; and, if they failed to do so, it constituted merely a defect in the plan of the work, arising from an error of judgment as to its necessities. For such errors it is well settled that no liability exists.

Error in judgment in establishing the grade of a cross walk so that the approach to it descends 6 inches in 3 feet is not negligence which will render the municipality liable to one injured by falling upon the incline. Betts v. Gloversville, 29 N. Y. S. R. 331, 8 N. Y. Supp. 795.

A city is not liable for an accident which occurs because of a defect of plan in a cross walk, whether the plan was such as would meet the approval of a reasonable, careful, and prudent man, or not. Roach v. Ogdensburg, 80 Hun, 467, 30 N. Y. Supp. 450.

There is no liability for adopting a plan for the construction of cross walks so as to leave an uncovered gutter between the end of the cross walk and the curb. Rhinelander v. Lockport, 38 N. Y. S. R. 567, 14 N. Y. Supp. 850.

But in Clemence v. Auburn, 66 N. Y. 384, where plaintiff fell on a walk improperly constructed with too steep a grade, the court held that the question whether the city was liable for a judicial act was not properly in the case, but remarked that it was questionable whether, the absolute duty being imposed by the law upon the city to construct and keep in repair the sidewalk, it would not be liable to one traveling thereon for the improper construction of the walk; affirming 4 Hun, 380, where the court said: It does not require argument to prove that a walk having in it a stone laid upon a grade having a descent of 6 inches in a distance of 3½ feet is dangerous to persons not aware of such grade. The council may establish such grade for its streets as it sees fit, and is not responsible for an error of judgment in establishing such a grade. But this exemption from liability does not relieve the city from liability if, in sinking or repairing the street or walk, it is left so as to be dangerous to the life of limb of persons passing over it.

So, the lower courts have held that if the failure to erect barriers along a dangerous embankment upon which a highway is laid out is negligence, the municipality cannot shield itself from liability for injuries thereby caused to travelers, on the ground that the defect was one of plan. Maxim v. Champion, 50 Hun, 88, 4 N. Y. Supp. 515. Affirmed without opinion in 119 N. Y. 626, 23 N. E. 1144.

So, the failure to erect barriers along a dangerous embankment upon which a highway is laid out is not an error of judgment, but is negligence, for the consequences of which the municipality will be liable. Wood v. Glilboa, 76 Hun, 175, 27 N. Y. Supp. 586.
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In Klernan v. New York, 14 App. Div. 156, 43 N. Y. Supp. 538, where the accident occurred because of want of a barrier between the sidewalk and a dangerous embankment, the liability of the city was upheld, the courts saying that it could not escape liability on the ground that it acted judicially in determining to leave the place in that condition. The court says: The city very likely would not be held liable because the plan had not provided for such guard or barrier, but, after the work was completed and accepted and maintained without the barrier, the question whether or not the highway was safe was a question for the jury; the court adding, if the condition was not reasonably safe then the city neglected its duty to the public, who had occasion to use, and did use, the walk, and was liable for any injuries caused by such negligence. It cannot be held, as a general proposition, that a city may excuse itself from a charge of negligence as to the construction and care of its streets, merely by claiming that it acted judicially in determining to leave the street in a dangerous condition for public travel. The cases in which any such rule can be applied at all must necessarily be quite limited.

In Lehmann v. Brooklyn, 30 App. Div. 305, 51 N. Y. Supp. 524, where the accident occurred because of a depression in the street caused by surface water flowing towards a catch basin of a sewer, the court, in affirming a judgment in plaintiff's favor, said: For a method of street construction which, under the natural and ordinary action of the elements, will render street travel dangerous, a municipality is as justly subject to liability when the dangerous condition arises as if it had actually created the dangerous condition in the first instance.

In Collett v. New York, 51 App. Div. 394, 64 N. Y. Supp. 893, the city, in laying out a bicycle path, left a curb so near the entrance as to render it dangerous to persons attempting to turn into the path at night, and sufficient light was not furnished to enable travelers to avoid the obstruction. Plaintiff, in attempting to use the path, was injured, and an action in his favor was held to be maintainable, the court saying: "While it is the duty of every corporation which has occasion to lay out a highway or to open a street to use reasonable care to see that the street should be so laid out as to be reasonably safe for persons using it, the law recognizes that, under certain circumstances, it may be necessary so to construct the street that it may not be perfectly safe for travel, and, when that is the case, and the street is in such a condition that it is unsafe as a necessary result of the plan of its construction, the courts have held that the corporation is not liable for any injury to one passing which arises solely and purely because of the defect in the plan adopted. But it is quite manifest that such a rule, tending, as it does, to relieve a corporation very largely from the results of the carelessness or ignorance of its officers, and which tends to increase the danger to persons using the streets, is not to be extended to cases which are not clearly included within it. Before a corporation can claim exemption from liability for a defect in a highway because of a fault in the plan, it must also appear that, if the defect of the plan is such as to make the street dangerous, some steps have been taken, so far as possible,

to remedy the defect, or to advise persons using the highway of the existence of the defect, so that they might protect themselves against it.

In *Hubbell v. Yonkers*, 35 Hun, 349, the horse drawing the vehicle in which plaintiff was riding shied and carried the wagon over an unguarded embankment. Defendant claimed that the defect, if any, was in the plan of the improvement, but the court held that, if the public had a right to require guards for the side of the street to make it safe for travel, the failure to erect them was negligence, and the city was liable for injury resulting from their absence. The court said: If a bridge was built by a city and left without a side guard, or a street was constructed on a causeway high above the natural level of the ground, and left without side rails or protection, responsibility for injuries resulting from their absence cannot be avoided by showing that they were made in accordance with plan. Such a doctrine, carried to its legitimate conclusion and result, might release all municipalities from the duty imposed on them to maintain the streets within their limits in a safe condition for travel in the usual modes. But this case was reversed on appeal on the ground that the highway was not in fact defective. 104 N. Y. 434, 58 Am. Rep. 522, 10 N. E. 858.

Other cases.

Under a statute making a municipal corporation liable for injuries caused by failure to keep its highways in repair, there is no liability for injury caused by the narrow and crooked condition of the street as laid out, since the duty of the municipality to the public under the statute begins only after the road is laid out and constructed. *Smith v. Wakefield*, 105 Mass. 473.

The exercise by a municipal corporation of discretion as to which of several methods it will adopt to connect two sections of walk whose grades are at different levels is not subject to review by the courts so long as the one selected is an appropriate and lawful one. *Hoyt v. Danbury*, 69 Conn. 341, 37 Atl. 1051. The court says the statutory liability placed upon the corporation is for failure to keep the highway in repair. A defect of plan upon which the highway was constructed is not within the statute. If such a defect naturally results in a direct injury to an owner of adjacent land, he has his action at law for this invasion of his proprietary right. But injuries which it may occasion to travelers cannot be made the subject of an action in their favor. They are the result of an error of judgment on the part of the officers of a public corporation on which has been cast the burden of discharging a governmental duty of a quasi judicial nature.

For consequential damage thus occasioned to members of the general public the common law never gave a remedy; nor has the statute changed the rule. If, indeed, a defect in the plan of construction should be so great as soon to require repairs in order to make the highway safe for travel, a neglect to make these repairs might found an action. So, where the plan of construction adopted is one which was utterly inadmissible, the highway would have been in such a defective condition as to be out of repair from the beginning.

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too great an incline at the point where the sidewalk is joined to the street pavement, where the incline is a part of the plan of improvement adopted under authority of the legislature. *Augusta v. Little*, 115 Ga. 124, 41 S. E. 238. The court said it is now settled that, where the legislature delegates governmental authority to a municipal corporation, the municipality is not liable to private individuals for any error in performing legislative or judicial powers. The adoption by a municipality of a plan for grading the streets and sidewalks of a city is a quasi judicial act, and, if the plan adopted be erroneous, the city cannot be held liable to a private person for his injury thereby. Some courts have held that a municipal corporation is liable where it is negligent in selecting a plan in that incompetent persons are employed for that purpose. Even if we considered these decisions sound, they would not be applicable here, for there was no evidence whatever that the city engineer, by whom the plan of the work was adopted, was incompetent. The court continues: Nor do we think that the verdict can be upheld on the ground that the city maintained a dangerous place in the sidewalk after the lapse of a sufficient length of time for it to have ascertained that the place was dangerous. There is a conflict of evidence as to whether the place was dangerous or not.

H. P. F.

S. NORMILE, Appt., v.

NORTHERN PACIFIC RAILWAY COMPANY, Resp't.

(.....Wash.....)

1. A carrier must place freight carried on platform cars to a station where it maintains a freight house, but no agent, in the house, to relieve itself from liability for freight lost through theft, unless it shows that it is not able to do so.
2. Written notice of the arrival of a consignment of freight need not be given to a consignee if he has actual notice thereof.
3. Mailing notice of the arrival of the consignment of freight to the consignee at the place of its destination is sufficient.
4. A consignee of freight loaded on a flat car which is placed on a side track at a station where no agent is maintained by the company is not guilty of laches when, after receiving notice of the arrival of the property and communicating with the agent having supervision of the station, insufficient time remains to effect a removal that day, so that his vehicle does not reach the car until the next morning.
5. The question of what is a reasonable

NOTE.—As to liability of carrier for loss of goods after they reach destination, see also, in this series, *East Tennessee, V. & G. R. Co. v. Kelly*, 17 L. R. A. 691, and note; *Missouri P. R. Co. v. Nevils*, 28 L. R. A. 80; and *Allan v. Pennsylvania R. Co.* 39 L. R. A. 635.

time in which freight is to be removed from the cars by the consignee so as to relieve the carrier from risk of loss is one of law for the court, where there is no dispute about the material facts.

(September 21, 1904.)

APPEAL by plaintiff from a judgment of the Superior Court for King County in defendant's favor in an action brought to recover the value of goods placed in defendant's possession for transportation and alleged to have been lost in transit. *Reversed.*

The facts are stated in the opinion.

Messrs. Bennett & Whitham, for appellant:

The transportation company assumes all responsibility, and is the absolute insurer of the property against loss except by act of God or the public enemy.

Michigan S. & N. I. R. Co. v. Day, 20 Ill. 375, 71 Am. Dec. 278; *Parsons v. Hardy*, 14 Wend. 215, 28 Am. Dec. 521; 5 Am. & Eng. Enc. Law, 2d ed. pp. 234, 235.

It was therefore incumbent upon the company:

To place the goods in a safe and proper car, even though there had been an agreement that it should not be responsible on account of the car or manner in which the freight was forwarded.

Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. 123, 22 L. ed. 827.

To store the goods in its warehouse upon their arrival at their destination, before it could relieve itself of the liability of common carrier, and assume the lesser degree of liability of warehousemen.

Chicago & R. I. R. Co. v. Warren, 16 Ill. 502, 63 Am. Dec. 317; *Stone v. Waitt*, 31 Me. 409, 52 Am. Dec. 621; 5 Am. & Eng. Enc. Law, 2d ed. p. 191; *Story, Bailments*, § 538; *Michigan S. & N. I. R. Co. v. Day*, 20 Ill. 375, 71 Am. Dec. 278; *Angell, Car.* § 282; *DeMott v. Laraway*, 14 Wend. 225, 28 Am. Dec. 523; 2 Rorer, Railroads, §§ 20, 1282-1294; *Crawford v. Clark*, 15 Ill. 562; *Chicago & N. W. R. Co. v. Bensley*, 69 Ill. 630; *Hutchinson, Carr.* § 371; *McMillan v. Michigan S. & N. I. R. Co.* 16 Mich. 79, 93 Am. Dec. 208.

When the goods are stored liability as carrier ceases, and as warehouseman begins.

Illinois C. R. Co. v. Friend, 64 Ill. 303; *Bortholomeu v. St. Louis, J. & C. R. Co.* 53 Ill. 227, 5 Am. Rep. 45; 2 Rorer, Railroads, p. 1224.

Mr. A. A. Booth, with **Messrs. James F. McElroy** and **B. S. Grosscup**, for respondent:

Under the custom and practice of the company, of which appellant, as a shipper, must be aware, goods shipped to prepaid stations are at the owner's risk; and it is not 67 L. R. A.

the custom to maintain a warehouse for storing goods so shipped. A delivery on a side track, or on a platform, at such stations, is sufficient in law.

Allan v. Pennsylvania R. Co. 183 Pa. 174, 39 L. R. A. 535, 38 Atl. 709; *South & North Ala. R. Co. v. Wood*, 71 Ala. 215, 46 Am. Rep. 309; *Armistead Lumber Co. v. Louisville, N. O. & T. R. Co.* (Miss.) 11 So. 472; *Louisville & N. R. Co. v. Gilmer*, 89 Ala. 534, 7 So. 654.

Per Curiam:

Action brought in the superior court of King county by plaintiff, S. Normile, against defendant, the Northern Pacific Railway Company, on account of the loss of freight. The cause was tried to the court without a jury. The following findings of fact and conclusions of law were made in the trial court: "(1) That on December 11, 1901, at Portland, Oregon, the defendant received from the plaintiff for shipment to Fremont, Washington, for the sum of \$34, the following goods, wares, and merchandise, to wit, one donkey engine and tool box and two coils of steel cable. (2) That the allegations set forth in paragraph 3 of plaintiff's complaint are untrue, and that the defendant did safely carry and deliver to the said plaintiff, at Fremont, Washington, in accordance with its contract of carriage, the goods, wares, and merchandise hereinabove described, and that plaintiff has suffered no damage whatsoever. (3) That the allegations set forth in the fourth paragraph of plaintiff's complaint are each and all untrue, and that plaintiff has suffered no damage in the sum of \$100, or in any other sum; that there was no failure on the part of the defendant to deliver said property to plaintiff. Wherefore the court finds as conclusions of law that plaintiff takes nothing by his said action; that the defendant is entitled to judgment for its costs and disbursements herein." Plaintiff duly excepted to each of these findings and conclusions, save as to the first finding of fact above noted. These exceptions were overruled in the lower court. Plaintiff excepted, and judgment was entered dismissing the action, from which plaintiff prosecutes this appeal.

Paragraph 3 of the complaint, which is referred to in the findings, is in the following words and figures: "That the defendant did not safely carry and deliver the said goods pursuant to said agreement, nor any part thereof, except the said engine, but, on the contrary, the said defendant so negligently conducted and so misbehaved in regard to the same, in its calling as carrier, that the said plow, steel cable, and the said tool box, together with the tools contained therein, were wholly lost to plaintiff, to his

damage in the sum of \$243, the same being the value of said property which the said defendant has failed to deliver to plaintiff." The respondent company denied the material allegations of the complaint, and pleaded as a separate defense: "That at the time said goods were received by defendant for shipment, to wit, December 11, 1901, at Portland, Oregon, it was agreed and understood that said defendant should not be responsible for the loss of any article shipped upon open cars; that said goods were shipped upon open cars and at plaintiff's risk." Appellant, Normile, by his reply, denied all the allegations of this affirmative defense. It was stipulated at the trial that the value of the goods lost was \$243, as alleged in the complaint. Fremont was, at the time of the alleged grievances, what was termed a flag or prepaid station located on respondent's line of railroad in King county. The respondent company had no regular agent at such station. The nearest agent of the company at that time was located at Interbay, and had charge of other stations near by, including Fremont, in the matter of the delivery of freight from the cars of respondent company to consignees. Mr. Normile, the appellant, testified that this railway company had a warehouse or some kind of a building at Fremont; that he received the donkey engine, which was shipped with the tools and cables, from the flat car in proper condition; that these tools and cables were designed for use in connection with such engine; that he knew about the shipment of this property from Portland on December 11, 1901; that witness expected it would arrive at its place of destination in three or four days thereafter, and that he purchased such property for use in connection with his business, which was that of a contractor; that in going through Fremont on the street car about 4 o'clock in the afternoon of December 16, 1901; he noticed a donkey engine on one of respondent's flat cars, which he supposed was his property; that the next morning he found his bookkeeper, to whom he gave directions to go and ascertain if his said property had arrived; that when appellant had procured a dray on the morning of December 18th for the purpose of removing this property, the tools and cable were missing; that he did not get his mail at Fremont, and received no notice of the arrival of this freight through the mail; that he did not know that Fremont was a flag or prepaid station; that the weight of this merchandise in question was about 1,500 pounds, and was in two parcels. Mr. Maitland R. Sanford, appellant's bookkeeper, testified in part as follows: "Well, it was on the morning of the 17th, possibly half past nine, that I met Mr. Normile, and 67 L. R. A.

he informed me that in passing through Fremont the night before he had seen a donkey engine on a flat car there. Well, he was expecting an engine for his work on the canal, and he instructed me to look the matter up, and ascertain if that was his, and, if so, to order a dray and remove it. Now, I tried to find the agent; done some telephoning . . . in order to ascertain if that was Mr. Normile's engine before ordering the dray; but I failed to do so. . . . It was nearly noon then; perhaps 11:30. I found a drayman that had a dray of sufficient size to remove the engine, but it was too late for him to get then to Fremont and remove the engine,—too late in the day. Well, of course, if it was too late for him, it was too late for any other drayman to get there. So that was all I could do. I could not get the drayman to take it off on that day. So this drayman came the following morning, and it was too late then. The stuff was taken off then; that is, the tool chest and contents and cable." Witness, continuing his testimony, said that after he was notified by appellant of the arrival of the freight, it took an hour and a half to find the agent of respondent before ordering the dray; that he did not find any agent at Fremont station; that there was none there permanently. A. S. Pattullo, the secretary of the Columbia Digger Company, the consignor of this shipment, testified by deposition that "the Columbia Digger Company had nothing to do with the way it was to be shipped, and there was no arrangement in regard to any reduction of freight." On the part of the defense the affidavit of Mr. James F. McElroy by stipulation was read in evidence. This affidavit related to the testimony of witness Tillotson, who was in the employ of appellant at the time of the arrival of this freight, and was to the effect that the engine and other property which Mr. Normile stated were there for delivery were at Fremont on the morning of December 17, 1901, in the same condition as when loaded on the flat car at Portland, where Tillotson helped load this freight; that the dray Mr. Normile had engaged to convey such property from the car to be used on the Lake Washington Canal did not arrive till December 18, 1901; that witness then went with four assistants to unload such freight from the car on to the dray, and found that the tools and cable had been removed. W. S. Clark, a witness for respondent, testified in part that in December, 1901, he was respondent company's agent at Interbay; that he had in his possession the data with reference to the shipment of the above property to appellant; that it arrived at Fremont on December 14, 1901; that the bill of this shipment was received by witness about 9

o'clock in the morning of that day; that he sent notice of the arrival of this freight to appellant by postal card, which he deposited in the postoffice at Ballard on the afternoon of December 14th, directed to Mr. Normile at Fremont; that the first time witness learned about the loss of this freight was about December 26, 1901, when he received a letter through the mails from appellant's attorney, Mr. Whitham.

The respondent contends that appellant, by preparing to remove these goods on the 17th day of December, 1901, accepted the delivery thereof on the side track at Fremont. For the purposes of this controversy, we think that it is immaterial whether this freight arrived at Fremont on the 14th or 16th of December, 1901, though, from the testimony adduced in appellant's behalf and the statements contained in Mr. McElroy's affidavit, it would seem that the latter date is the correct one. There is no question but that these goods arrived at Fremont in the same condition as when the same were loaded on the car at Portland, and they were at such station on December 17, 1901. We must bear in mind that the days at that season in the year were and are of short duration. "Where goods are shipped to a place where there is a side track, but no depot, platform, or agent of the carrier, and this is known to the parties, and is not unreasonable in view of the small amount of business, it has been held that leaving the car of goods upon the side track is a good delivery, and relieves the company from further responsibility." 4 Elliott, Railroads, § 1521. The rule was enunciated in the case of *Kirk v. Chicago, St. P. M. & O. R. Co.* 59 Minn. 161, 50 Am. St. Rep. 397, 60 N. W. 1084, that while it is usual for the consignees themselves to unload and carry away certain kinds of freight, such as coal, lumber, and the like, directly from the cars, "it is also true . . . that there is nothing to prevent a carrier, at least under special circumstances, from using the car as its warehouse for the storage of freight. But in the case of portable boxes or packages of valuable merchandise we think that, under any ordinary circumstances, . . . in order to terminate the carrier's liability, he must remove the goods from the car in which they were transported, and place them for safe-keeping in his freight house." It is impossible to formulate any general rule, applicable to all cases, as to what constitutes a good and sufficient delivery of freight by the carrier to consignees. Each case must necessarily to a great extent depend upon its own particular circumstances. The question of delivery to a consignee is usually a question of fact, or a mixed question of law and fact, for the jury under proper instructions 67 L. R. A.

from the court. Sometimes, where the facts are undisputed, a question of law only is presented for the decision of the court. Elliott, Railroads, *supra*, § 1517, and authorities cited. "It may be stated, generally, that every delivery must be made to the right person, at a reasonable time, at the proper place, and in a proper manner. These are all requisites of a valid delivery, except in so far as a compliance with them may be waived by the party entitled to the goods." Hutchinson, Carr. 2d ed. § 340. Unquestionably, as a general rule, the manner of delivery may be regulated by contract, but, in the absence of any specific stipulation upon the subject, it is in a great measure determined by custom. The carrier must, however, afford the consignee an opportunity to unload and remove his goods. On the other hand, the consignee must exercise reasonable diligence in the matter of the receiving and removal of his freight. The appellant prepaid the regular freight charges on this shipment, and was entitled to the protection that the law afforded him in that behalf. The following propositions of law pertinent to this controversy are enunciated by a learned author: "The carrier's responsibility does not end by mere delivery on the platform or dock at the place of destination. There must be such actual delivery as fills the contract of carriers; or, if not applied for by the consignee, the goods must be safely warehoused. Then the liability as carrier ceases, and that of warehouseman begins. . . . And so jealous is the law in guarding the rights of shippers against contracts of carriers exempting themselves from the consequences of their own negligence, and so obligatory is the duty of carriers to furnish suitable vehicles and appliances for the transportation of property received to be carried, that the knowledge of shippers of the character of cars furnished will not exempt the company from liability for loss occasioned by the insufficiency thereof, although the contract of shipment be that there shall be no such responsibility on the part of the company." 2 Rorer, Railroads, pp. 1292, 1293. While it is true that these goods which were lost or stolen were intended for use in connection with the donkey engine, and that it was more convenient for the respondent to load the whole shipment on one flat car, as such engine could not well have been placed in a box car for shipment, and that it was intended by both carrier and consignee to be unloaded and received direct from the flat car at the place of destination, still it does not appear by any testimony in the record but that this respondent company might have placed these particular goods (the tools and cable) in its warehouse or build-

ing at Fremont station; that otherwise respondent is liable to appellant for their value. It would seem from the showing made in the record that appellant was not afforded a reasonable opportunity to enable him to remove these particular goods from the car prior to their loss, and that such loss should be borne by the respondent.

The principal authority cited by respondent's counsel in support of their contentions is *Allam v. Pennsylvania R. Co.* 183 Pa. 174, 39 L. R. A. 535, 38 Atl. 709. The points decided are fairly presented by the syllabus: "As a general rule, a common carrier must give to the consignee of goods notice of their arrival at the point of destination. While a common carrier cannot stipulate for a release from the consequences of his own negligence or fraud, yet he can modify his liability as such so far as to provide that notice of the arrival of goods need not be given at small stations where no station house has been built and no freight agent located. A contract that at such stations the goods shall be at the 'risk' of the owner until loaded into cars and when unloaded therefrom is not against public policy, and will be enforced. Where goods are carried under such a contract all responsibility for protecting the same after the goods reach their destination is assumed by the consignor." It would seem that in the matter of such shipments the consignor acts as the agent of, or represents, the consignee. In this Pennsylvania case the bill of lading under which the goods were received by the carrier contained the following provision: "When merchandise is destined to or from way stations and platforms where station buildings have not been established by the carrier, or where there are no regularly appointed freight agents, it shall be at the risk of the owner until loaded into the cars and when unloaded therefrom; and when received from or delivered on private turnouts it shall be at the owner's risks until cars are attached to and after they are detached from the train." We find no such stipulation in the bill of lading which was received in evidence in the action at bar. Furthermore, it appeared in the authority last cited that at Strafford, the place where the goods were to be received, there was no shelter, and no regular agent of the carrier company to take charge of the freight upon its arrival. "The only convenience at Strafford for the receipt and delivery of goods was a platform by the side of the road." Thus it is plain to be seen that the facts in the *Allam Case* are noticeably dissimilar to those in the present controversy; that while it may have been inconvenient for the respondent to have unloaded the goods in question, and stored them in its station

house or building at Fremont, still, in the absence of any express stipulation, it was bound to properly care for these goods upon their arrival, both in the capacity of a carrier and warehouseman, under the well-established rules of the common law in that regard. See *Rorer, Railroads*, pp. 1292, 1293, *supra*. Regarding the matter of notice to Normile, the consignee, we think that, under the facts as disclosed by the record, no notice was required; but, assuming that such notice was necessary, the agent, unless otherwise advised, had the right to assume that notice addressed to the consignee at the point of destination would reach him in the due course of the mail. Appellant, on the arrival of these goods at Fremont station, pursued the safer method of first communicating with the agent on the 17th day of December, 1901, before removing the same from the car. It would therefore seem unreasonable to charge the appellant with laches in not being prepared to receive and remove this freight until the morning following the date last named. There is no showing made in the record other than that the appellant acted with reasonable diligence in this particular. Where there is no dispute about the material facts, this question of reasonable time in which goods are to be removed by the consignee is one of law for the court. *Hedges v. Hudson River R. Co.* 49 N. Y. 223.

The judgment of the lower court is reversed, and the cause remanded, with instructions to enter a judgment for the agreed value of the goods lost.

DEER TRAIL CONSOLIDATED MINING COMPANY *et al.*, *Respts.*,

v.

MARYLAND CASUALTY COMPANY, *Appt.*

(.....Wash.....)

1. **Want of knowledge of the policy by one of two mine operators** for whose benefit an insurance against liability for accidents to employees has been effected by the other, and want of knowledge of the accident by the latter, will not excuse failure to comply with a requirement in the policy that immediate notice of an accident be given to the insurer.
2. **Notice to the insurer, given eight months after the occurrence, of an accident to an employee, is not within a reasonable time, so as to establish the lia-**

NOTE.—For another case in this series as to effect of stipulation in policy against employer's liability requiring immediate notice of loss, see *Travelers' Ins. Co. v. Myers*, 49 L. R. A. 760.

bility of the insurer upon a policy insuring against liability for accidents to employees which requires immediate notice of the accident to be given to the insurer.

3. **The statement of a general agent of a corporation which has insured employers against liability for accidents** to their employees by a policy requiring immediate notice of accidents to be given to the company, upon receiving notice of an accident eight months after it occurred, that formal notice would be soon enough if given six or seven days later, does not waive the provision of the policy requiring immediate notice, since liability on the policy had terminated when the accident was first brought to his attention.

(October 5, 1904.)

APPPEAL by defendant from a judgment of the Superior Court for Spokane County in plaintiffs' favor in an action brought to enforce liability on a policy insuring against employers' liability. *Reversed.*

The facts are stated in the opinion.

Messrs. Danson & Huneke, for appellant:

The statement, "Very well; that will be soon enough," evidently meant no more, and was not intended or understood to mean any more, than that notice given on the 28th would do as well as notice given on the 22d, and had no reference whatever to, and was not intended or understood to be a waiver of, any of the provisions of the contract.

Kirkman v. Farmers' Ins. Co. 90 Iowa, 457, 48 Am. St. Rep. 454, 57 N. W. 952; *Cleaver v. Traders' Ins. Co.* 65 Mich. 527, 8 Am. St. Rep. 908, 32 N. W. 660; *Alabama State Mut. Assur. Co. v. Long Clothing & Shoe Co.* 123 Ala. 667, 26 So. 655; *Fitchpatrick v. Hawkeye Ins. Co.* 53 Iowa, 335, 5 N. W. 151; *Alston v. Northwestern Live Stock Ins. Co.* 7 Kan. App. 179, 53 Pac. 784; *Underwood v. Farmers' Joint Stock Ins. Co.* 57 N. Y. 501; *Iowa L. Ins. Co. v. Lewis*, 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 126.

The acts or conduct of a party, in order to operate as an estoppel against him, or as a waiver of his rights, must have been done with the knowledge of the facts and the true situation of matters.

Dichl v. Adams County Mut. Ins. Co. 58 Pa. 443, 98 Am. Dec. 307; *Hubbard v. Mutual Reserve Fund Life Asso.* 80 Fed. 682; *Bennecke v. Connecticut Mut. L. Ins. Co.* 105 U. S. 355, 26 L. ed. 990; *Globe Mut. L. Ins. Co. v. Wolff*, 95 U. S. 326, 24 L. ed. 387.

The provision in such policy requiring prompt notice of an accident is of the substance and very essence of the contract, and a condition precedent to any liability on the part of the company, and a failure to give

notice as required is fatal to any right of recovery on the policy.

Travelers' Ins. Co. v. Myers, 62 Ohio St. 529, 49 L. R. A. 760, 57 N. E. 458; *Employers' Liability Assur. Corp. v. Light, Heat & P. Co.* 28 Ind. App. 437, 63 N. E. 54; *Ermentrout v. Girard F. & M. Ins. Co.* 63 Minn. 305, 30 L. R. A. 346, 56 Am. St. Rep. 485, 65 N. W. 635; *Shapiro v. Western Home Ins. Co.* 51 Minn. 239, 53 N. W. 463; *Home Ins. Co. v. Lindsey*, 26 Ohio St. 348; *Underwood v. Farmers' Joint Stock Ins. Co.* 57 N. Y. 500; *Blossom v. Lycoming F. Ins. Co.* 64 N. Y. 162; *Gould v. Dwelling-House Ins. Co.* 90 Mich. 302, 51 N. W. 455; *Armstrong v. Agricultural Ins. Co.* 130 N. Y. 560, 29 N. E. 991; *Patrick v. Farmers' Ins. Co.* 43 N. H. 621, 80 Am. Dec. 197; *Trask v. State F. & M. Ins. Co.* 29 Pa. 198, 72 Am. Dec. 622; *Erway v. Fire Asso.* 119 Iowa, 304, 93 N. W. 290.

The delay in this case of more than eight months to give notice is, as a matter of law, fatal to the right of recovery.

Trask v. State F. & M. Ins. Co. 29 Pa. 198, 72 Am. Dec. 622; *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31; *Ermentrout v. Girard F. & M. Ins. Co.* 63 Minn. 305, 30 L. R. A. 346, 56 Am. St. Rep. 485, 65 N. W. 635.

The agents had no power or authority to waive notice.

Travelers' Ins. Co. v. Myers, 62 Ohio St. 529, 49 L. R. A. 760, 57 N. E. 458; *Kirkman v. Farmers' Ins. Co.* 90 Iowa, 457, 48 Am. St. Rep. 454, 57 N. W. 952; *Crutchfield v. Union Cent. L. Ins. Co.* 113 Ky. 53, 67 S. W. 67; *Thornton v. Travelers' Ins. Co.* 116 Ga. 121, 94 Am. St. Rep. 99, 42 S. E. 287; *Cleaver v. Traders' Ins. Co.* 65 Mich. 527, 8 Am. St. Rep. 908, 32 N. W. 660; *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31; *Hankins v. Rockford Ins. Co.* 70 Wis. 1, 35 N. W. 34; *Cook v. Standard Life & Acc. Ins. Co.* 84 Mich. 12, 47 N. W. 568; *Union Cent. L. Ins. Co. v. Hook*, 62 Ohio St. 256, 56 N. E. 906; *Murphy v. Royal Ins. Co.* 52 La. Ann. 775, 27 So. 143; *Lippman v. Etna Ins. Co.* 108 Ga. 391, 75 Am. St. Rep. 62, 33 S. E. 897; *Carey v. German American Ins. Co.* 84 Wis. 80, 20 L. R. A. 267, 36 Am. St. Rep. 907, 54 N. W. 18; *Smith v. Niagara F. Ins. Co.* 60 Vt. 682, 1 L. R. A. 216, 6 Am. St. Rep. 144, 15 Atl. 353; *Employers' Liability Assur. Corp. v. Light, Heat & P. Co.* 28 Ind. App. 437, 63 N. E. 54; *Dwelling-House Ins. Co. v. Snyder*, 59 N. J. L. 18, 34 Atl. 931; *Gould v. Dwelling House Ins. Co.* 90 Mich. 302, 51 N. W. 455; *Maier v. Fidelity Mut. Life Asso.* 24 C. C. A. 239, 47 U. S. App. 322, 78 Fed. 566; *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308,

46 L. ed. 213, 22 Sup. Ct. Rep. 133; *Nixon v. Travellers' Ins. Co.* 25 Wash. 254, 65 Pac. 195.

Messrs. Tolman & Kimball and Happy & Hindman, for respondents:

Forfeitures are odious in the eyes of the law, and will not be decreed unless it is manifestly the plain intention of the contract that such is the intention of the parties.

4 Joyce, Ins. § 3282; *Steele v. German Ins. Co.* 93 Mich. 81, 18 L. R. A. 85, 53 N. W. 515; *Tubbs v. Dwelling-House Ins. Co.* 84 Mich. 646, 48 N. W. 298; *Kenton Ins. Co. v. Downs*, 90 Ky. 236, 13 S. W. 882; *Hall v. Concordia F. Ins. Co.* 90 Mich. 403, 51 N. W. 526; *Vangindertaelen v. Phenix Ins. Co.* 82 Wis. 112, 33 Am. St. Rep. 29, 51 N. W. 1123; *American Cent. Ins. Co. v. Heaverin*, 18 Ky. L. Rep. 190, 35 S. W. 922.

The company is not restricted by a limitation contained in the policy, but can itself waive such limitations, either orally or in writing. They can also delegate to an agent coextensive powers with the company.

Hall v. Union Cent. L. Ins. Co. 23 Wash. 612, 51 L. R. A. 288, 83 Am. St. Rep. 844, 63 Pac. 505; *Globe Mut. L. Ins. Co. v. Wolff*, 95 U. S. 320, 24 L. ed. 387; *Graton & K. Mfg. Co. v. Redelsheimer*, 28 Wash. 370, 68 Pac. 879, 16 Am. & Eng. Enc. Law, 2d ed. p. 942; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689; *Citizens' Ins. Co. v. Stoddard*, 197 Ill. 330, 64 N. E. 355; Joyce, Ins. § 580; *Stevens v. Citizens' Ins. Co.* 69 Iowa, 658, 29 N. W. 769; *Lycoming County Mut. Ins. Co. v. Schollenberger*, 44 Pa. 259.

The giving of notice, as required by this policy, is a condition subsequent, and not precedent, to the right of recovery. The liability of the company becomes complete by the happening of the accident, and the defense that immediate notice was not given is construed by the courts to be a technical defense, and only slight evidence is necessary for an adjudication of the court that an agent has waived such provisions.

Munz v. Standard Life & Acci. Ins. Co. 26 Utah, 69, 62 L. R. A. 485, 99 Am. St. Rep. 830, 72 Pac. 182; *Woodmen Acci. Asso. v. Pratt (Woodmen Acci. Asso. v. Byers)* 62 Neb. 673, 55 L. R. A. 291, 89 Am. St. Rep. 777, 87 N. W. 548; *Union Casualty & S. Co. v. Mondy*, 18 Colo. App. 395, 71 Pac. 677; *Remington v. Fidelity & D. Co.* 27 Wash. 429, 67 Pac. 992; *Citizens' Ins. Co. v. Stoddard*, 197 Ill. 330, 64 N. E. 365; *Harrison v. German-American F. Ins. Co.* 67 Fed. 587; *Indiana Ins. Co. v. Capehart*, 108 Ind. 270, 8 N. E. 287; *Franklin F. Ins. Co. v. Chicago Ice Co.* 36 Md. 102, 11 Am. Rep. 468; *Viele v. Germania Ins. Co.* 26 Iowa, 9, 96 Am. Dec. 107; *Firemen's Fund Ins. Co.* 67 L. R. A.

v. Western Refrigerating Co. 162 Ill. 322, 44 N. E. 746; *New Orleans Ins. Asso. v. Matthews*, 65 Miss. 301, 4 So. 62; *Carson v. Jersey City Ins. Co.* 43 N. J. L. 300, 39 Am. Rep. 584; *O'Brien v. Ohio Ins. Co.* 52 Mich. 131, 17 N. W. 726; *Loeb v. American Cent. Ins. Co.* 99 Mo. 50, 12 S. W. 374; *Whited v. Germania Ins. Co.* 76 N. Y. 422, 32 Am. Rep. 330; *Travelers' Ins. Co. v. Harvey*, 82 Va. 949, 5 S. E. 554; May, Ins. § 511, p. 777; 16 Am. & Eng. Enc. Law, 2d ed. p. 952; *Dwelling House Ins. Co. v. Dowdall*, 159 Ill. 179, 42 N. E. 608; 1 Joyce, Ins. § 439.

The time for furnishing proof of the accident was extended or waived by the agents.

Frasier v. New Zealand Ins. Co. 39 Or. 342, 64 Pac. 815; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572, 577, 24 L. ed. 841, 843; *Hartford Life Annuity Ins. Co. v. Unsell*, 144 U. S. 439, 36 L. ed. 496, 12 Sup. Ct. Rep. 671; *Hollis v. State Ins. Co.* 65 Iowa, 454, 21 N. W. 774; *Hudson v. Northern P. R. Co.* 92 Iowa, 231, 54 Am. St. Rep. 550, 60 N. W. 608; *Phenix Mut. L. Ins. Co. v. Doster*, 106 U. S. 30, 27 L. ed. 65, 1 Sup. Ct. Rep. 18; *Lyon v. Travelers' Ins. Co.* 55 Mich. 141, 54 Am. Rep. 354, 20 N. W. 829; *Dibbrell v. Georgia Home Ins. Co.* 110 N. C. 193, 28 Am. St. Rep. 678, 14 S. E. 786; *Trippe v. Provident Fund Soc.* 140 N. Y. 23, 22 L. R. A. 432, 37 Am. St. Rep. 529, 35 N. E. 316; 16 Am. & Eng. Enc. Law, 2d ed. p. 938; *Dwelling House Ins. Co. v. Dowdall*, 159 Ill. 179, 42 N. E. 607; *Mia v. Royal Ins. Co.* 169 Pa. 639, 32 Atl. 460; *Kingman v. Lancashire Ins. Co.* 54 S. C. 599, 32 S. E. 762; *New York L. Ins. Co. v. Baker*, 27 C. C. A. 658, 49 U. S. App. 690, 83 Fed. 652; *Smith v. St. Paul F. & M. Ins. Co.* 3 Dak. 80, 13 N. W. 355; 1 Joyce, Ins. p. 555.

The company retained the premium, and has not offered to return it.

Schmurr v. State Ins. Co. 30 Or. 32, 46 Pac. 363; *Hibernia Ins. Co. v. Malevinsky*, 6 Tex. Civ. App. 81, 24 S. W. 804; *Phenix Ins. Co. v. Spiers*, 87 Ky. 285, 8 S. W. 453; *New York L. Ins. Co. v. Baker*, 27 C. C. A. 658, 49 U. S. App. 690, 83 Fed. 652.

The defendant in this case required the furnishing of proof of the accident, and it is fundamental, where a company requires such a condition, that it waives the breach.

16 Am. & Eng. Enc. Law, 2d ed. p. 941; *New York L. Ins. Co. v. Baker*, 27 C. C. A. 658, 49 U. S. App. 690, 83 Fed. 652.

Giving time to furnish the proof of accident waives the forfeiture.

1 Joyce, Ins. p. 554; *Home F. Ins. Co. v. Kuhlman*, 58 Neb. 488, 76 Am. St. Rep. 111, 78 N. W. 936; *Brink v. Hanover F. Ins. Co.* 80 N. Y. 112; *Ostrander, Fire Ins.* p. 278; *Frasier v. New Zealand Ins. Co.* 39 Or. 342,

64 Pac. 815; *Union Casualty & S. Co. v. Mondy*, 18 Colo. App. 395, 71 Pac. 680; *Goodwin v. Massachusetts Mut. L. Ins. Co.* 73 N. Y. 480; *Shelden v. National Masonic Acci. Asso.* 122 Mich. 403, 81 N. W. 266; *Moore v. Wildcy Casualty Co.* 176 Mass. 418, 57 N. E. 673; *Searle v. Duelling House Ins. Co.* 152 Mass. 263, 25 N. E. 290.

The question whether notice was given immediately is a question of fact for the jury, under all the circumstances surrounding this particular transaction.

Munz v. Standard Life & Acci. Ins. Co. 26 Utah. 69, 62 L. R. A. 485, 99 Am. St. Rep. 830, 72 Pac. 182; *Horsfall v. Pacific Mut. L. Ins. Co.* 32 Wash. 132, 63 L. R. A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028; *Woodmen Acci. Asso. v. Pratt* (*Woodmen Acci. Asso. v. Byers*) 62 Neb. 673, 55 L. R. A. 291, 89 Am. St. Rep. 777, 87 N. W. 546; *Carey v. Farmers' & M. Ins. Co.* 27 Or. 146, 40 Pac. 91; 2 Wood, Fire Ins. 2d ed. 952; *Remington v. Fidelity & D. Co.* 27 Wash. 429, 67 Pac. 991; *Joyce, Ins.* §§ 3289, 3292.

The respondent the Deer Trail Consolidated Mining Company had no knowledge of the accident until the commencement of the proceedings by Johnson against it. This would excuse that company from giving notice.

McElroy v. John Hancock Mut. L. Ins. Co. 88 Md. 137, 71 Am. St. Rep. 400, 41 Atl. 114; *Phillips v. United States Benev. Soc.* 120 Mich. 142, 79 N. W. 1; 4 *Joyce, Ins.* § 3283; *Trippe v. Provident Fund Soc.* 140 N. Y. 23, 22 L. R. A. 432, 37 Am. St. Rep. 529, 35 N. E. 316.

And the Yarwoods had no notice or knowledge of the issuance of the insurance policy, and they were also excused.

Konrad v. Union Casualty & S. Co. 49 La. Ann. 336, 21 So. 721.

Mount, J., delivered the opinion of the court:

In the years 1900 and 1901 the respondents were the owners of certain mines in Lincoln county, Washington. The respondents Yarwood Brothers were operating these mines, and the net proceeds thereof were divided equally between the Yarwood Brothers and the Deer Trail Consolidated Mining Company. On March 20, 1900, the Deer Trail Consolidated Mining Company applied to the appellant for an indemnity insurance contract in favor of itself and the Yarwood Brothers. This contract was issued by appellant in favor of the respondents, indemnifying them for the period of one year against loss from statutory and common-law liability for damages on account of bodily injury suffered by an employee of the assured. It was delivered to the Deer Trail Consolidated Mining Company, and

the premium paid. The Yarwood Brothers were not informed and did not know of the contract of insurance. On the 19th of May, 1900, one Nels Johnson, while in the employ of respondents, and while performing his duty as such employee, was injured through the negligence of respondents. W. J. Yarwood was general manager of the mines at the time of the injury, but he did not know of the injury, and did not hear thereof for several days after it had happened. When he heard of it he went to Johnson, and asked him if he was hurt. Johnson replied, "My thumb is sore yet, but I will get to work in a day or two." A few days after this Johnson went to work in the mine, and continued to work until the mine closed down in September following. During the time he was working he made no complaint on account of being injured. Yarwood did not know of the existence of the policy of insurance, and did not notify the Deer Trail Consolidated Mining Company of the accident. In January, 1901, Johnson commenced an action against respondents to recover damages for his injuries. This was the first time he had made any claim for his injuries. The complaint was served on the Deer Trail Consolidated Mining Company on January 22, 1901. On the same day P. A. Daggett & Co., the local agents of the appellant, were notified of the action, and requested to defend the same, which they refused to do. The respondents thereupon defended the action, and subsequently a judgment was rendered against them in favor of Johnson for \$1,717.60. Respondents paid this judgment in favor of Johnson, and also paid costs of defending the action amounting to \$268.85, in addition to the amount of the judgment named. Respondents thereupon brought this action against appellant upon the contract of insurance. The complaint sets out a copy of the policy, alleges its execution and delivery on March 20, 1900, and the payment of the premium. It alleges the injury to Johnson on May 19, 1900, while he was in the employ of respondents; that the injury was not known to the Deer Trail Consolidated Mining Company until January 21, 1901, and that Yarwood did not know of the insurance until January 22, 1901; that respondents did not know that Johnson intended to make any claim for damages until that time; that Johnson, on January 21, 1901, commenced an action for \$2,000 damages against the respondents; that thereupon respondents notified appellant thereof, and that appellant thereupon agreed to and did extend the time for giving notice of the accident to January 28, 1901, and furnished blanks to respondents for that purpose; that, relying upon this extension

of time, respondents, at great trouble and an expense of \$50, gave a written notice to appellant on January 28, 1901. The complaint also alleges that Daggett & Company are the general agents of the appellant, authorized to issue and settle policies of insurance, and that, knowing of the facts, they extended the time for giving notice of the accident and authorized the attorneys for the appellant company to appear in the action of *Johnson v. Yarwood Brothers* and the Deer Trail Consolidated Mining Company, and that said attorneys thereupon did appear in said cause, and filed a motion requiring said Johnson to give a bond as security for costs; that thereafter appellant refused to proceed further in said case. The complaint then alleges that Johnson obtained a judgment against respondents, and the payment thereof. The appellant appeared and demurred to the complaint. This demurrer was overruled, whereupon appellant filed an answer denying any liability under the policy of insurance. Upon a trial of the cause to a court and jury a verdict was returned for the full amount claimed, and judgment was entered upon the verdict.

Appellant defended the action in the lower court upon the ground that no notice had been given of the accident according to the terms of the policy, and that there had been no waiver of the notice. Upon this appeal they rely on the same points. The contract sued on provides, among other things, as follows: "This insurance is subject to the following conditions, which are to be construed as conditions precedent to this contract: 1. The assured, upon the occurrence of an accident, shall give immediate notice thereof in writing with the full particulars to the home office of the company at Baltimore, Maryland, or to its duly authorized agent. . . . 10. An agent has no authority to change this policy or to waive any of its provisions, nor shall notice to any agent or knowledge of his or of any other person be held to effect a waiver or change in this contract, or in any part of it. No change whatever in this policy, nor waiver of any of its provisions, shall be valid unless an indorsement is added hereto, signed by the president or secretary of the company, at its home office, expressing such waiver or change." It is conceded that the accident occurred on May 19, 1900, and that no notice thereof was given to the appellant until January 21, 1901. The excuse offered in the complaint and by the witnesses for this failure to give notice was that the Yarwood Brothers, who had charge of the mine and the men working therein, had no knowledge or notice of the policy. The Deer Trail Consolidated

Mining Company, which procured the policy, had no notice of the accident. This condition of affairs was brought about solely by the neglect of one of the insured to notify the others of the contract, and, as a matter of course, is no excuse for failure to notify the appellant of the accident according to the terms of the policy. This court has heretofore held that "immediate notice" in policies of this kind means notice within a reasonable time. *Remington v. Fidelity & D. Co.* 27 Wash. 429, 67 Pac. 989; *Kleeb v. Long-Bell Lumber Co.* 27 Wash. 648, 68 Pac. 202; *Horsfall v. Pacific Mut. L. Ins. Co.* 32 Wash. 132, 63 L. R. A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028. Under this rule, we think the lower court properly held that eight months was not within a reasonable time, and that respondents did not comply with this requirement of the policy, which was a reasonable one for appellant's protection and benefit.

The respondents' evidence upon the question of the waiver of the notice was given by Mr. Kimball, one of the respondents' attorneys, and is as follows: "I went to the office of P. A. Daggett & Company, general managers of the Maryland Casualty Company, taking the complaint with me. In the meantime I had looked up the number of the policies which the Deer Trail Consolidated Mining Company held, and I went down to report to them that we had been sued upon an accident policy, which was alleged to have happened in May previous, and we took the complaint and went over it and looked up the dates and descriptions, and Mr. Daggett asked me if any proof of this accident had been sent in, and I told him not to my knowledge had there been any sent in. . . . As I say, I told Mr. Daggett to the best of my knowledge there had been no proof of this accident furnished this company, and there was no papers in my possession, or in Mr. Tolman's possession as general manager, speaking of any accident of this kind; that it was absolutely unknown in our office, and that this was the first advice or knowledge of the accident that had been brought to our knowledge; and Mr. Daggett made this statement: 'Well, if you didn't know about it, you could not very well make a report of the accident. and we must get in a report as soon as possible.' . . . We took the complaint, and went over it carefully as to the dates and everything else, so as to acquaint ourselves as best we could of the nature of the claim and the history of the injury as alleged by Mr. Johnson. . . . Mr. Daggett stated that Messrs. Danson & Huneke were attorneys for the company, and that they would defend the action, and told me I had better see them, and acquaint them

with the facts. I left the complaint with P. A. Daggett & Company, and the next morning I went to the office of Danson & Huneke, and found the complaint in their possession. . . . As I stated a moment ago, Mr. Daggett said, 'You could not very well make proof of the accident without knowing about it, and we must get in proof as soon as possible,' and he asked me when I could furnish proof, and I said that we would have to correspond with the people at the mine, and then I told him that Mr. Leyson, the foreman and superintendent, would be down here on the 28th or 29th of January, and that I would write to him at once, and have him ascertain all the facts, so that we could make out proof of the accident at the time; and he says, 'Very well, that will be soon enough.' " The testimony of this same witness shows that subsequently, on the 28th day of January, he notified Mr. Daggett that Mr. Leyson had come to Spokane, and that thereupon Mr. Daggett went to Mr. Kimball's office with blanks, which were filled out upon information furnished by Mr. Leyson, and that Mr. Daggett took a copy away with him. This is all the evidence on the part of the respondents to show a waiver of the provision for immediate notice of an accident. Mr. Daggett, for the appellant, denied the statements attributed to him. Before the cause was submitted to the jury, the appellant moved the court for a directed verdict, upon the ground that the evidence of the respondents failed to show a waiver. This motion should have been granted. Assuming that the evidence given by Mr. Kimball was true, it was clearly insufficient to show a waiver on the part of the company. The statement of Mr. Daggett, "Very well; that will be soon enough," when taken in connection with the rest of the conversation, cannot be reasonably interpreted to mean that the company thereby waived its right to have notice of the accident within a reasonable time after it had happened. What he said clearly meant that, if the proof or statement of Mr. Leyson was furnished by the 28th or 29th, it would do as well then as at the date of the conversation, which was on January 22d. Eight months had already expired since the accident, without any reasonable excuse for not complying with the terms of the policy. It was too late on January 22d to give the notice. The respondents were then in default. The conversation with Daggett, even if relied upon, caused no injury to the respondents which they had not already suffered. We think there is nothing in this evidence to show any intent to waive the time for giving the notice, or to waive any right of the company under the policy. If the respondents had 67 L. R. A.

actually made out their notice of the accident and handed it to Mr. Daggett, the agent of the company, on January 22, 1901, the fact that he received the notice for the company would certainly not be held to be a waiver of the right of the company to defend against the policy upon the ground that notice had not been given within a reasonable time. The most that can be claimed for the evidence above set out is that notice of the accident was given to the company on January 22d, the date of the conversation. The lower court rightfully held that this did not comply with the requirements of the policy. He should have held also that the evidence failed to show a waiver of the time for notice of the accident.

The judgment is therefore reversed, with instructions to dismiss the action.

Fullerton, Ch. J., and Hadley and Anders, JJ., concur.

STATE of Washington, *Respt.*,

v.

C. W. IDE, *Appt.*

(35 Wash. 576.)

1. Popular acquiescence in a particular mode of levying taxes for a long period of time cannot make it legal if it clearly contravenes the provisions of the Constitution.
2. A poll tax for street purposes upon male inhabitants between the ages of twenty-one and fifty, except members of voluntary fire departments, contravenes a constitutional provision authorizing the legislature to empower municipal corporations to levy taxes which shall be equal and uniform in respect to persons within the jurisdiction of the body levying them.

(Fullerton, Ch. J., dissents.)

(August 24, 1904.)

APPEAL by defendant from a judgment of the Superior Court for Jefferson County convicting him of refusal to pay a street poll tax as required by a municipal ordinance. *Reversed.*

The facts are stated in the opinion.

Messrs. Brinker, Coleman, & Ballinger, for appellant:

"Poll," or "capitation" taxes must be shared equally by all, except under governments where privileged orders are recog-

NOTE.—For full collection of authorities respecting poll taxes, see also *note* to *Short v. State*, 29 L. R. A. 404; also the later case in this series of *Kansas City v. Whipple*, 35 L. R. A. 747.

nized, and where they might be graded according to the orders to which the several persons taxed belong.

Cooley, Taxn. 2d ed. 26; *Sutton v. Louisville*, 5 Dana, 28.

If the burden is arbitrarily imposed upon the few, from which the many are exempt, it is of no consequence whether it is imposed through the taxing power, or in some other manner.

Jolliffe v. Brown, 14 Wash. 155, 53 Am. St. Rep. 868, 44 Pac. 149.

The mere fact of classification is not enough. It must be natural, not arbitrary.

McDaniels v. J. J. Connelly Shoe Co. 30 Wash. 549, 60 L. R. A. 947, 94 Am. St. Rep. 889, 71 Pac. 37; *Dorgan v. Boston*, 12 Allen. 223; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 560, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 294, 42 L. ed. 1037, 1043, 18 Sup. Ct. Rep. 594.

Acquiescence in the law is not conclusive of its validity.

State ex rel. Chamberlin v. Daniel, 17 Wash. 111, 49 Pac. 243; *State ex rel. Heaton v. Beman*, 15 Wash. 24, 45 Pac. 652; *Graves v. Seattle*, 8 Wash. 248, 35 Pac. 1079; *Semon v. Callvert*, 27 Wash. 679, 68 Pac. 350; *State ex rel. Rogers v. Jenkins*, 21 Wash. 364, 58 Pac. 217.

Mr. A. W. Buddress for the State.

Anders, J., delivered the opinion of the court:

On June 22, 1903, William Furlong filed a verified complaint in the police court of the city of Port Townsend, alleging, in substance, that he was at said time the city marshal and city street poll-tax collector of the city of Port Townsend, a city of the third class, in the county of Jefferson, and state of Washington, and that on said day one C. W. Ide, then and there being a male inhabitant of said city between the ages of twenty-one and fifty years, and not a member of any volunteer fire company of said city nor a member of the militia of the state of Washington, did then and there commit the misdemeanor of failing and refusing to pay to said city street poll-tax collector, on demand, his (the said defendant's) city annual street poll tax for the year 1903, committed as follows: That the said city street poll-tax collector did then and there personally demand of and from said defendant, C. W. Ide, the sum of \$2 for the payment by defendant to said city and to its said street poll-tax collector, the said city annual street poll tax for the year 1903, 67 L. R. A.

but said defendant did then and there willfully and unlawfully fail and refuse to pay to said city street poll-tax collector said sum of \$2 for his city annual street poll tax of said city for the year 1903, contrary to ordinance No. 675 of said city, entitled "An Ordinance Imposing and Levying an Annual City Street Poll Tax for the Year 1903, and Providing for the Collection Thereof," approved June 3, 1903, and contrary to ordinance No. 639 of said city, entitled "An Ordinance to Provide for the Collection of a City Street Poll Tax, and Making the Refusal to Pay the Same a Misdemeanor, and to Provide for the Appointment of a Tax Collector and Deputy," approved on May 3, 1899. A warrant was issued on this complaint, and the defendant, having been arrested thereon and brought into court, filed a demurrer to the complaint on the following grounds: First, that it appears upon the face of the complaint that defendant has not violated any law; second, that said complaint fails to state facts sufficient to constitute a crime or misdemeanor of any kind; third, that said complaint does not charge any offense against the laws of the state of Washington; fourth, that said complaint does not charge defendant with the commission of any crime or misdemeanor under the ordinances of the city of Port Townsend. The demurrer was overruled, and on the hearing in the police court the defendant was convicted and fined, and from the judgment he appealed to the superior court. The demurrer was again argued and considered in the superior court, and was by that court overruled. Upon the trial in the superior court the defendant was convicted, and fined \$2 and costs, and it was thereupon adjudged that he be imprisoned in the county jail until such fine and costs be paid, unless otherwise discharged by law. From this judgment and sentence the defendant has appealed to this court.

Section 1 of ordinance No. 675, which is mentioned and referred to by its title and date of approval, provides "that there be and hereby is imposed and levied an annual city street poll tax upon each male inhabitant between the ages of twenty-one and fifty years, residing in said city, excepting any member of any volunteer fire company in said city, the sum of \$2, payable on demand between the 1st day of June, 1903, and the 1st day of September, 1903." And § 2 provides "that the poll tax hereby imposed and levied shall be collected as provided by ordinance No. 639 of said city entitled 'An Ordinance to Provide for the Collection of a City Street Poll Tax, and Making the Refusal to Pay the Same a Misdemeanor, and to Provide for the Appoint-

ment of a Tax Collector and Deputy,' passed by the city council of said city on the 2d day of May, 1899, and approved on the 3d day of May, 1899." Ordinance No. 639, above mentioned and described, contains, besides others, which it is not necessary to mention, the following provisions:

"Section 1. That it shall be the duty of the city marshal between the 1st day of May and the 1st day of September, of each year, to collect all city street poll taxes levied or assessed by the city council, as herein provided, and shall give to each person paying such city street poll tax a receipt therefor. . . .

"Sec. 2. That the said city marshal shall receive in full compensation for his services for the collection of the said city street poll tax, under this ordinance, the sum of 10 per centum upon all moneys so collected.

"Sec. 3. If any person liable for the city street poll tax herein provided for shall fail, refuse, or neglect to pay the same upon demand by the city marshal, the city marshal shall proceed to collect the same as herein provided."

"Sec. 5. That any person who shall fail, refuse, or neglect to pay upon demand to the city marshal, or his deputy, the annual street poll tax, which shall have been levied or assessed by the city council of said city, or which may be hereafter levied or assessed by the city council of said city, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding \$25, or be imprisoned not exceeding thirty days, or both such fine and imprisonment in the discretion of the court.

"Sec. 6. That it shall be the duty of the city marshal to collect all the city street poll tax from every person liable therefor, and on the neglect or refusal of such person to pay the same, he shall collect the same by seizure and sale of any personal property owned by such person. The sale to be made after three days' written notice of time and place of such sale to be posted in three of the most public places of said city before the day of sale."

"Sec. 13. The city marshal shall enforce the payment of the city street poll tax by any and all the modes herein provided in the name and at the cost of the city."

The Constitution of the state (art. 11, § 10) provides that the legislature shall, by general laws, provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, and it is conceded that Port Townsend is a city of the third class, duly organized and existing under and by virtue of a general law passed by the legislature in accordance with the mandate of the Constitution. By that 67 L. R. A.

law (§ 938 of Ballinger's Anno. Codes & Statutes) the city council of such city is empowered: "(7) To impose on and collect from every male inhabitant between the ages of twenty-one and fifty years an annual street poll tax not exceeding \$2 and no other road poll tax shall be collected within the limits of such city: Provided, that any member of a volunteer fire company in such city shall be exempt from such tax." "(16) To impose fines, penalties, and forfeitures for any and all violations of ordinances, and for any breach or violation of any ordinance to fix the penalty by fine or imprisonment, or both; but no such fine shall exceed \$300, nor the term of such imprisonment exceed the term of three months." If the provisions of § 938 of the Code, which we have quoted, are not in conflict with the Constitution of the state or of the United States, it can hardly be disputed that the ordinances founded thereon, and numbered 675 and 639, are valid enactments of the city of Port Townsend. And, if the ordinances in question are valid, we think the averments of the complaint are sufficient to constitute an offense, and that the demurrer thereto was properly overruled.

But it is earnestly insisted by the learned counsel for the appellant that the ordinances and statute providing for the imposition and collection of this city street poll tax are, each and all, violative of the Constitution of the state and of the 14th Amendment to the Constitution of the United States. Before proceeding to the consideration of the objections interposed by appellant to this poll-tax law and these city ordinances, we deem it proper to observe that it is settled by the highest authority that a legislative enactment is presumed to be constitutional and valid until the contrary clearly appears. In other words, the courts will presume that an act regularly passed by the legislative body of the government is a valid law, and will entertain no presumptions against its validity. And when the constitutionality of an act of the legislature is drawn in question the court will not declare it void unless its invalidity is so apparent as to leave no reasonable doubt upon the subject. *Cooley, Const. Lim.* 7th ed. pp. 252-254, and cases cited; *Id.* p. 255. See also *Francis v. Atchison, T. & S. F. R. Co.* 19 Kan. 303-306. We have mentioned these well-established rules because we believe that they should always be kept in mind when the court is called upon to declare invalid an act of the law-making body, a co-ordinate and independent department of the government.

The first and chief contention of appellant is that subdivision 7 of § 938 of the

Code, above quoted, and the ordinances founded thereon, are unconstitutional and void, for the reason that the tax attempted to be levied and collected under the ordinance is levied and imposed upon males between the ages of twenty-one and fifty years alone, and not upon females, nor upon males over the age of fifty years, nor upon males under the age of twenty-one years, nor upon the members of volunteer fire companies. Although the sum involved in this case is small, the question presented for our determination is one of great importance to the various municipalities of the third class throughout the state. This is the first time this precise question has been before this court for determination, and we find, upon investigation, that the decisions of other courts of last resort bearing directly upon the question are far from numerous. It is true, we have several times had occasion to pass upon the validity of statutes, and ordinances providing for the payment of license taxes or fees by persons engaged in certain occupations or callings, and have held that such exactions, although imposed by the taxing power, are not taxes within the meaning of the Constitution or of the ordinary revenue laws. See *Fleetwood v. Read*, 21 Wash. 548, 47 L. R. A. 205, 58 Pac. 665; *Stull v. De Mattos*, 23 Wash. 71, 51 L. R. A. 392, 62 Pac. 451; *Walla Walla v. Ferdon*, 21 Wash. 308, 57 Pac. 796. And in *State v. Clark*, 30 Wash. 439, 71 Pac. 20, we held that the inheritance tax law, which exempts from its provisions sums below \$10,000 when the estate passes to direct heirs and kindred, but grants no such exemption to collateral heirs or strangers to the blood who are devisees, and which does not require all classes of persons mentioned therein to pay taxes on the property received by them at a uniform rate, is not in conflict with the constitutional provisions requiring uniformity in the rate of assessment and taxation of property, for the reason that the so-called inheritance tax is only a charge upon the passing of the estate by succession and the privilege of the heirs or devisees to take it, and not a tax on property. The tax in question is not a tax on property, but it is, nevertheless, a tax, under any proper definition of that term. It is a poll or capitation tax, and is so denominated both in the statute and the ordinances. It is levied for a public purpose, and is clearly a revenue measure. But its assessment is not governed by the general revenue law, or, strictly speaking, by § 2 of article 7 of the state Constitution, which declares that the legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state according to its value in money. It

is settled law that the power of taxation is a legislative power, and an incident of sovereignty, and when the people adopt a Constitution, and thereby create a department of government upon which they confer the power to make laws, the power of taxation is conferred as a part of such general power. And, unless its power of taxation is limited by constitutional provisions, the state, by virtue of its sovereignty, has the power to tax all persons and property within its jurisdiction. *Cooley*, Taxn. 2d ed. pp. 4, 5; *Id.* 3d ed. pp. 7-9, and cases cited. See also *Judson*, Taxn. § 431. Several of the state Constitutions provide for the imposition of poll taxes, but such taxes are, it seems, prohibited by the Constitutions of Ohio and Maryland. See 1 *Desty*, Taxn. p. 296. Our Constitution does not expressly mention such taxation, and, as that instrument is not a grant of power, but a limitation of power inherent in the state, independent of that instrument, it follows that this tax must be declared valid, unless the legislature was indirectly and by necessary implication prohibited from authorizing it to be levied by some provision of the Constitution. While it is conceded by counsel for appellant that the legislature may, in the absence of constitutional restrictions, "confer upon a city almost supreme power over local taxation," yet they contend that the tax in question, by reason of its lack of uniformity, is repugnant to § 9 of article 7 of our Constitution, and therefore void. That section of article 7 reads as follows: "The legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same." Section 12 of article 11 of the Constitution provides that "the legislature shall have no power to impose taxes upon . . . cities . . . or upon the inhabitants or property thereof, for . . . city . . . purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." These two provisions are the only ones relating to the vesting of the power of taxation in municipal corporations. And they clearly indicate—especially the latter—that the legislature may authorize the taxation, by cities, of persons, as well as property, within their limits. Conceding, as we must, that the legislature had the right to delegate to cities of the third class the power to levy poll taxes

on the inhabitants thereof, the question naturally arises whether, in this instance, they exercised the power in conformity with the Constitution. As we have seen, § 9 of article 7 of the Constitution, empowers the legislature to vest all municipal corporations with authority, for corporate purposes, to assess and collect taxes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body levying the same. It is claimed by the learned counsel for the respondent, as we understand his argument, that this constitutional provision applies only to the taxation of property, and that this court has so decided in several cases. But counsel is in error, so far as the decisions of this court are concerned. The cases referred to relate to license taxes and the like, which are not deemed taxes, as that term is ordinarily understood, and they are, therefore, not applicable to the case in hand. The Constitution says, in effect, that all municipal corporations may tax persons, as well as property, if authorized so to do by the legislature; and we are not at liberty to construe that provision so as to eliminate, or give no effect to, the words "as to persons," therein contained, which we would be obliged to do in order to hold that it was the intention of the framers of that instrument that property alone should be taxed by municipal corporations. All the power possessed by cities and other municipal corporations to tax either property or persons is conferred upon them by the legislature, whose power, as we have already intimated, is practically, though perhaps not absolutely, unlimited, in the absence of constitutional restrictions. And it will be observed that the only restriction imposed by the Constitution upon the power of the legislature to vest municipal corporations with the authority to tax persons and property is that "such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same." It is conceded by counsel for appellant that the uniformity rule in taxation usually prescribed by law does not preclude the legislature from selecting and classifying, in a proper and reasonable manner, the subjects of taxation; and that rule is so firmly established that the citation of cases in support of it is entirely unnecessary.

But it is claimed on behalf of the appellant that the rule of uniformity prescribed by the state Constitution was in this instance wholly disregarded and ignored by the legislature in exempting from the tax all females, all males not within the designated ages, and members of volunteer fire companies; and that the classification of the persons to be taxed is arbitrary and unlawful.

reasonable, because it is not based upon any "difference which bears a just and proper relation to the attempted classification." As to the right to classify subjects of taxation, this court, in *McDaniels v. J. J. Connelly Shoe Co.* 30 Wash. 549, 60 L. R. A. 947, 94 Am. St. Rep. 889, 71 Pac. 37, where the question of classification was under consideration, said: "It is true that the mere fact of classification is insufficient to relieve a statute from the reach of this clause of the Constitution,—that it must appear that the classification is made upon some reasonable and just difference between the persons affected and others to warrant classification at all." And in *Gulf, C. & S. F. R. Co. v. Ellis*, 185 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, in which the question of the power of classification is elaborately discussed, the Supreme Court, respecting such power, observed: "That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis." The classification made in imposing this tax is based solely upon age and sex. It has no relation to the property of the persons to be taxed, or to their ability to pay. The persons selected to bear the burden are under no greater obligations to pay for keeping the streets in repair than others who are exempted from the payment of the tax. Does such classification, then, rest upon a reasonable difference between the persons taxed and others who are not taxed? It has been stated by our highest court that there is no precise application of the rule of reasonableness of classification, and that there cannot be an exact exclusion or inclusion of persons and things. *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 296, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594. Where exemptions from taxation are permissible, the reasonableness of the classification of subjects must, therefore, be determined from the facts and circumstances appearing in each particular case. It is urged on the part of the respondent that the statute under consideration ought to be upheld, because the people have acquiesced in it, and these taxes have been levied and collected under it in cities throughout the state ever since the organization of the state government; and *Faribault v. Misener*, 20 Minn. 396, Gil. 347, is cited in support of that proposition. The Constitution of Minnesota contained the following clause: "All taxes to be raised in this state shall be as nearly equal as may be." Pursuant to the authority given by its charter, the city of Faribault in each of the years 1872 and 1873 levied and assessed a poll tax of \$2

on every qualified voter, except members of fire engine, hook and ladder, and hose companies. The defendant, Misener, refused to pay the poll tax assessed against him for each of those years, and an action was brought against him before a justice of the peace to recover the same. The justice rendered judgment in favor of the defendant, which on appeal was affirmed by the district court, and the plaintiff appealed to the supreme court. The principal question before the court in that case was whether the clause in the city charter exempting firemen from the payment of poll tax was repugnant to the provision of the state Constitution above set forth, and the court held that it was not. It seems apparent from expressions in its opinion that the decision of the court was largely influenced by the fact that a long-continued acquiescence of the people in the statute under which the taxes in question had been collected had established a legislative and popular construction of the Constitution, which, in the opinion of the court, was entitled to great consideration. And it is true that in case of doubt in the mind of the court as to the proper construction of any particular provision of the Constitution a contemporaneous interpretation or the subsequent practical construction of such provision is entitled to great weight. But, in the language of Judge Cooley: "Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period, in violation of the constitutional prohibition, without the mischief which the Constitution was designed to guard against appearing, or without anyone being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the Constitution. We think we allow to contemporary and practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed." Cooley, Const. Lim. 7th ed. pp. 106, 107. See *State ex rel. Chamberlin v. Daniel*, 17 Wash. 111, 49 Pac. 243.

The Minnesota case above cited is confidently relied on by counsel for the respondent as supporting the ruling of the trial court in this case, and it is in fact more nearly in point than any other of the numerous cases cited. But, conceding that decision to be correct under the Constitution and laws of Minnesota, it cannot be 67 L. R. A.

said to be entitled to controlling influence here, for the reason that the general constitutional provision there considered is materially different from the provision of our Constitution now before us for interpretation, and which declares, as we have seen, that taxes for corporate purposes "shall be equal and uniform in respect to persons and property within the jurisdiction of the body levying the same." The tax attempted to be collected in this instance is not uniform, even as to the persons included in the classification made by the legislature for some persons in the general class are exempted from the payment of the tax. It would therefore seem clear that the section of the statute now under consideration is repugnant to § 9 of article 7 of the Constitution, and consequently void. This conclusion is fully supported by the decision of the supreme court of Illinois in *Hunsaker v. Wright*, 30 Ill. 146, wherein the constitutionality of a county tax levied upon property within the limits of the city of Cairo was in question, the provision of the Constitution there interpreted being, in substance, identical with § 9 of article 7 of our Constitution. The lower court in that case enjoined the collection of the tax, and its ruling was affirmed by the supreme court. The Constitution of that state declared that "the general assembly shall provide for levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his or her property," and that "the corporate authorities of counties, . . . cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same." And with regard to those provisions the court said: "These provisions were manifestly inserted in the fundamental law for the purpose of insuring equality in the levy and collection of the taxes to support the government, whether levied for state, county, or municipal purposes. The design was to impose an equal proportion of these burdens upon all persons within the limits of the district or body imposing them. Under these provisions the legislature has no power to exempt or release a person, or community of persons, from their proportionate share of these burdens. Not having such power themselves, they are unable to delegate such power to these inferior bodies." See also, to the same effect, Cooley, Taxn. 2d ed. pp. 25, 26.

We have refrained from discussing the numerous cases cited by counsel upholding levies of taxes payable in labor on highways, for the reason that we have deemed such

cases inapplicable to the case at bar. Though in the nature of a tax, such levies are, in general, referable to the police power. "Neither in common speech, nor in the customary revenue legislation, would a burden of this nature be understood as embraced in the term 'tax;' and statutory provisions for assessment are not, therefore, applicable to it, unless made so in express terms." Cooley, Taxn. 2d ed. p. 15.

Our conclusion is that both the ordinances

for the violation of which appellant was tried and convicted and the provision of the statute upon which they are founded are unconstitutional and void, and the judgment and sentence is therefore reversed, and the action dismissed.

Hadley and Mount, JJ., concur. **Fulleton, Ch. J.**, dissents.

Rehearing denied.

ALABAMA SUPREME COURT.

Columbus TONEY, *Appt.*,

v.

STATE of Alabama.

(.....Ala.....)

A statute making it a misdemeanor for one under contract to labor, or work land, to break his contract and enter into another with a different person, without the consent of his employer, and sufficient excuse, to be adjudged by the court, and without giving notice of his contract to the person with whom he makes the new one, violates the constitutional guaranties of life, liberty, and property, and abridges the privileges and immunities of citizens of the United States.

(July 21, 1904.)

A PPEAL by petitioner from a decree of the Probate Court for Russell County denying him release, in a habeas corpus proceeding, from custody to which he had been committed for violation of the statute against breach of a labor contract. *Reversed.*

The case sufficiently appears in the opinion.

Mr. Frank M. De Graffenried for appellant.

Mr. Massey Wilson, Attorney General, for the State:

Farm laborers, the class referred to in the act, have been under the regulation of the legislature for many years. An employer is entitled to the protection of the statute in dealing with his laborers. The statute is a wise one, and should be upheld.

Tarpley v. State, 79 Ala. 272; *Murrell v. State*, 44 Ala. 367.

Sharpe, J., delivered the opinion of the court:

Authority for the warrant under which petitioner is imprisoned does not exist unless in an act approved March 1, 1901 (Acts 1900, 1901, p. 1208), which purports to apply in Russell and other counties of this state, and which declares "that any person who has contracted in writing to labor for, or serve, another for any given time, or any person who has by written contract leased or rented land from another for any specified time, or any person who has contracted in writing with a party furnishing the lands, or the lands and teams to cultivate it, either to furnish the labor, or the labor and teams to cultivate the land, with stipulations, express or implied, to divide the crops between them in certain proportion, and who before the expiration of such contract and without the consent of the other party, and without sufficient excuse, to be adjudged by the court, shall leave such other party, or abandon said contract, or leave or abandon the leased premises, or the land furnished as aforesaid, and who shall also make a second contract, either parol or written, of a similar nature or character to any of said aforementioned contracts, though differing in some particulars in the terms, stipulations, or period of time, with a different person, without first giving notice to such person of the existence of the said first contract, shall be guilty of a misdemeanor, and on conviction be fined not exceeding \$50, or sentenced to hard labor for not exceeding six months, one or both," etc. This enactment cannot operate consistently with the guaranties of equality, liberty, and property made by the Federal and also by the state Constitution. In the

NOTE.—As to constitutionality of statutory restrictions on contracts between master and servant, see also, in this series, *Com. v. Perry*, 14 L. R. A. 325, and *note*; *State v. Loomis*, 21 L. R. A. 789; *Braceville Coal Co. v. People*, 22 L. R. A. 340; *Re House Bill No. 1,230*, 28 L. R. A. 344; *Ritchie v. People*, 29 L. R. A. 67 L. R. A.

79; *State v. Julow*, 29 L. R. A. 257; *Harding v. People*, 32 L. R. A. 445; *Re Morgan*, 47 L. R. A. 52; *State v. Haun*, 47 L. R. A. 369; *Re Preston*, 52 L. R. A. 523; *State ex rel. Zillmer v. Kreutzberg*, 58 L. R. A. 748; *Wenham v. State*, 58 L. R. A. 825; and *Republic Iron & Steel Co. v. State*, 62 L. R. A. 136.

state Constitution as it existed when this act was passed, and as it now exists, "life, liberty, and property" are enumerated as being among the inalienable rights of all men; and to protect the citizen in the enjoyment of "life, liberty, and property" is declared to be the sole object and only legitimate end of government. In the 14th Amendment to the Federal Constitution it is declared: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law." In interpretation of this it was said in *Allgeyer v. Louisiana*, 165 U. S. 578, 579, 41 L. ed. 832, 17 Sup. Ct. Rep. 427: "The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." In support of that interpretation the court rendering it quoted approvingly from the opinion of Justice Bradley in *Butcher's Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652, the following: "The right to follow any of the common occupations . . . is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen. . . . I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." The court further said in *Allgeyer's Case*, 165 U. S. 591, 41 L. ed. 836, 17 Sup. Ct. Rep. 427: "In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property must be embraced the right to make all proper contracts in relation thereto," etc. On the same subject, the court said in *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285: "A person living under the protection of this government has the right to adopt and follow

any lawful industrial pursuit, not injurious to the community, which he may see fit. And as incident to this is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties," etc. In the same case it was said: "The right to use, buy, and sell property, and contract in respect thereto, including contracts for labor—which is, as we have seen, property—is protected by the Constitution. If the legislature, without any public necessity, has the power to prohibit or restrict the right of contract between private persons in respect of one lawful trade or business, then it may prevent the prosecution of all trades, and regulate all contracts." The principles so announced are by the above-cited and other authorities recognized as correct. See *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; *People ex rel. Valentine v. Berrien Circuit Judge*, 124 Mich. 664, 50 L. R. A. 493, 83 Am. St. Rep. 352, 83 N. W. 594; *Chicago v. Nether*, 183 Ill. 104, 48 L. R. A. 261, 75 Am. St. Rep. 93, 55 N. E. 707. Occupations there are in which the public have such interest as will make them subject to statutory regulation, or even prohibition. The constitutional provisions referred to were not designed to interfere with the states' public powers; and within the limits set by the Constitution, state and Federal, the legislature is free to determine what subjects are proper to be legislated upon in conservation of order, morals, health, and safety; but a constitutional right "cannot be imposed on or destroyed under the guise or device of being regulated." *South & North Ala. R. Co. v. Morris*, 65 Ala. 193; *Joseph v. Randolph*, 71 Ala. 499, 46 Am. Rep. 347.

The act in question purports to prohibit the employee and renter to make contracts of the kind he may have abandoned except under one of three alternative conditions. The first of these, the employer in the case of the employee, or the landlord in the case of the renter, could, by withholding his consent, render unavailable; the second—the existence of an excuse for the abandonment, to be judged of by the court—could never be known to be available except at the risk of, and at the end of, a criminal prosecution; the third—that of giving notice of the existing contract—would tend to prevent the making of a similar contract with a new employer or landlord, and this for reasons which are obvious, if regard be had to the risk of prosecution to which such new employer or landlord would be subject under another act in *pari materia* with this, and approved on the day before the approval of this act. Acts 1900, 1901, p. 1215. If

the conditions prescribed by this act can be validly imposed, the door is open for the imposition of others more onerous. "Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed." *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678. Because of the restrictions it purports to place on the right to make contracts for employment and concerning the use and cultivation of land, this act is wholly invalid. Whether a like con-

clusion might be reached upon other considerations urged in the brief for petitioner, it is unnecessary to consider.

A forceful opinion opposed to the constitutionality of this act was recently rendered by Judge Jones, and is reported in 123 Fed. 671 (*Peonage Cases*).

The act for which petitioner is held was not a criminal offense, and therefore the judgment appealed from will be reversed, and it will here be ordered that the petitioner be discharged from custody.

Reversed and rendered.

NORTH DAKOTA SUPREME COURT.

Celestia E. VAN DUSEN, *Respt.*,
v.

Benjamin F. BIGELOW, *Appt.*

(.....N. D.)

*Where a party accepts an agency to take charge of a house and lot belonging to his principal, collects the rents, pays taxes, and sees to repairs, and gives advice as to the value of the principal's unimproved farm lands, a fiduciary and confidential relation is thereby created between them in regard to everything connected with such property; and, if the agent purchases such farm lands for himself and in his own name, he is bound to make full disclosure of all facts bearing on the value of such lands material for the principal to know in order to act intelligently, and if the agent conceals such facts the conveyance is voidable at the principal's election.

(July 5, 1904.)

APPEAL by defendant from a judgment of the District Court for Stutsman County in favor of plaintiff in an action brought to compel reconveyance of certain real estate alleged to have been obtained by defendant from plaintiff by means of a fraudulent concealment of facts which it was his duty to disclose. *Affirmed.*

The facts are stated in the opinion.

Messrs. John Knauf and Oscar J. Seiler, for appellant:

The complaint does not state a cause of action in equity. It is necessary for the plaintiff to allege that, before beginning the

action, he had restored, or had offered to restore, to the defendant everything of value received from the defendant under the contract.

Kelley v. Owens, 120 Cal. 502, 47 Pac. 369, 52 Pac. 797; *Loaiza v. Superior Court*, 85 Cal. 31, 9 L. R. A. 376, 20 Am. St. Rep. 197, 24 Pac. 707; *Dotterer v. Freeman*, 88 Ga. 479, 14 S. E. 863; *American Freehold Land & Mortg. Co. v. Jefferson*, 69 Miss. 770, 30 Am. St. Rep. 587, 12 So. 464; *Burgett v. Teal*, 91 Ind. 260; *Godding v. Deoker*, 3 Colo. App. 198, 32 Pac. 832.

Therefore this action is one at law for the recovery of damages for fraud and deceit, and the defendant was entitled to a jury trial.

Agency is a simple question of fact.

Mechem, Agency, § 106; *Roberts v. People*, 55 Mich. 367, 21 N. W. 319; *Saginaw, T. & H. R. Co. v. Chappell*, 56 Mich. 190, 22 N. W. 278.

Power to superintend, make contracts relating to, with power to release and bind as to, real and personal estate does not constitute agency to sell real estate. Authority to sell real estate must be clear, concise, and express.

Billings v. Morrow, 7 Cal. 171, 68 Am. Dec. 235; *Lord v. Sherman*, 2 Cal. 498; *Jones v. Marks*, 47 Cal. 242; *De Rutte v. Muldrow*, 16 Cal. 505; *Treat v. De Celis*, 41 Cal. 202; *Hay v. Mayer*, 8 Watts, 203, 34 Am. Dec. 453.

The burden of showing agency to sell was upon the plaintiff, and she testified that the authority was made and accepted in writing. It should have been established at the trial in writing, as she alleged it to have been made.

1 Am. & Eng. Enc. Law, 2d ed. p. 968; *Montgomery v. Pacific Coast Land Bureau*, 94 Cal. 284, 28 Am. St. Rep. 123, 29 Pac. 640; *Busch v. Wilcox*, 82 Mich. 336, 21 Am.

*Headnote by MORGAN, J.

NOTE.—For other cases in this series as to rule that agent must not profit at his principal's expense in the matter of his agency, see *Tyler v. Sanborn*, 4 L. R. A. 218, and *note*; *McNutt v. Dix*, 10 L. R. A. 680; *Jansen v. Williams*, 20 L. R. A. 207; *Boswell v. Cunningham*, 21 L. R. A. 54; *Kimball v. Ranney*, 46 L. R. A. 403; *Holmes v. Cathcart*, 60 L. R. A. 734; and *Trice v. Comstock*, 61 L. R. A. 176.
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St. Rep. 563, 47 N. W. 328; *Kelly v. Strong*, 68 Wis. 152, 31 N. W. 721.

Such proof must be clear and succinct.

Hodge v. Combs, 1 Black, 192, 17 L. ed. 157; *Louisville & N. R. Co. v. Gilmer*, 89 Ala. 534, 7 So. 654; *Taylor v. Merrill*, 55 Ill. 52; *Proudfoot v. Wightman*, 78 Ill. 553; *Hood v. Adams*, 128 Mass. 207.

Agency to sell is a contract, to constitute which the principal must appoint and the agent must accept. In this case neither appointment nor acceptance is shown.

Hermann v. Niagara F. Ins. Co. 100 N. Y. 411, 53 Am. Rep. 197, 3 N. E. 341; *Anderson v. State*, 22 Ohio St. 305; *Mechem, Agency*, p. 1.

One cannot be held liable as an agent where he has never accepted appointment as such, and no appointment takes effect until accepted.

Mechem, Agency, § 108; *First Nat. Bank v. Free*, 67 Iowa, 11, 24 N. W. 566; *Collar v. Ford*, 45 Iowa, 331; *Cameron v. Seaman*, 49 N. Y. 396, 25 Am. Rep. 212.

To constitute an agency to sell real estate in this case, the contract of agency must be in writing and acknowledged.

N. D. Rev. Code 1899, §§ 3531, 3887, 4314, subdiv. 5; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Mechem, Agency*, § 103.

Messrs. E. M. Sanford, W. A. Martin, and F. Baldwin, for respondent:

A party will not be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation thereto which is inconsistent with his character as a purchaser on his own account.

Jansen v. Williams, 36 Neb. 869, 20 L. R. A. 207, 55 N. W. 279.

Where confidence is reasonably reposed, that confidence must not be abused.

Casey v. Casey, 14 Ill. 112; 1 Wait, Act. & Def. 246.

Morgan, J., delivered the opinion of the court:

This equitable action is brought for a reconveyance of certain real estate which was conveyed to the defendant by the plaintiff while defendant is alleged to have been plaintiff's agent for the sale of such real estate and failed to communicate to plaintiff that he had received an offer for said land for a much larger sum than that for which the plaintiff sold the same to the defendant. The substance of the allegations of the complaint is that defendant took advantage of the confidence reposed in him by plaintiff as her agent and purchased the land himself, under fraudulent concealment of facts, for a sum much less than that which he could have sold it for, and much less than the actual value of the land. In the complaint 67 L. R. A.

plaintiff offers to return all money and the security received by her from the defendant under such conveyance. The defendant by answer denies that he was plaintiff's agent for the sale of such land, and denies that he was offered a larger sum for such land than he paid for it, and denies that he fraudulently concealed any facts from plaintiff, and denies that the land was worth any more than he paid for the same. Whether defendant was plaintiff's agent for the sale of her lands, and whether defendant had an offer for the land of \$1,400 when he purchased it for himself for \$900, were the issues that were contested at the trial. The trial court found against the defendant on both these issues, and ordered that a reconveyance be made upon restoration by plaintiff of all that she had received under the sale. The defendant appeals from a judgment rendered on such findings, and requests a review of the entire record under § 5630, Rev. Codes 1899.

It is urged that the judgment is not sustained by any evidence that defendant was plaintiff's agent for the sale of the land. This contention is based on the fact that secondary evidence was received of the contents of exhibit A, which was found missing from plaintiff's deposition taken at Chicago, to which said exhibit should have been attached. The notary taking the deposition certifies that exhibit A was attached, but upon being opened it was not attached nor inclosed in the envelope containing the deposition. For the purposes of this case it will be conceded that all of plaintiff's evidence pertaining to the contents of said exhibit A, and all secondary evidence given as to its contents, would be excluded on trials not under § 5630, Rev. Codes 1899. The evidence will not, therefore, be considered on this appeal. Without such evidence we think the record contains evidence sufficient to warrant a recovery by the plaintiff. There is evidence in the record that is not disputed that, for nearly four years prior to the sale of the land to the defendant by the plaintiff, defendant had been the general agent of the plaintiff for taking care of her property in the city of Jamestown. He had charge of renting and repairing her house in said city, and collected the rent for the same, and paid the taxes on this house and lot, as well as on the land that is the subject of this action. Plaintiff and defendant had corresponded in reference to the sale of said land and its value. Her testimony is that she relied on him as to the value of said land, and made no inquiries elsewhere as to its value. On June 19, 1901, the defendant wrote her that he considered this land worth \$4 per acre, and further said: "It would be well for you to name the amount you

could sell for, and a purchaser might be found." Prior to this, and on December 21, 1899, he wrote her as follows: "As to price of house and land, would say if you were going to trade I would think about \$1,600 for house and quarter section of land. If you could get cash you might take less. Harvey sold his quarter for \$650, crop payment plan." It is also shown by uncontradicted evidence that he had full charge of her city property, and that she left matters to his judgment, and relied on him to protect her interests as to repairs and collections of rents, and in one letter said: "It seems as though it was not best to let them get so far behind, but you, of course, being there, understand the circumstances best." She further testified that she relied on him as her agent to fix the selling price of her land, and that she did not know the value of the land in March, 1902, when she sold it to the defendant. On March 7, 1902, defendant wrote her on other matters, and at the close of the letter asked her: "Would you accept \$900 for the south half of section 6; \$500 cash, balance in two years at 6 per cent interest? Please let me know." She answered that she would accept such an offer. She conveyed the land to him in March, 1902, and he paid her \$500 cash and gave her a mortgage on the land for \$400. This action was commenced September 10, 1902. The trial court found as a fact that defendant was plaintiff's agent for the sale of this land on March 7, 1902, and for a long time prior thereto.

That he was in correspondence with her about the sale and value of this land, and advised her concerning the same, is undisputed, and is shown by his own letters outside of exhibit A. That he was her sole agent to care for her other property is also beyond dispute. That he alone looked after all her interests in Jamestown and vicinity is also beyond question. Defendant was her agent as to certain matters, and as to those matters he had her confidence, and as to those matters she relied on his judgment. Whether he was her authorized agent to sell the land—that is, whether he was such agent in respect to the sale of the land that his contract for the sale of the land would bind her—need not be determined. We think that he was her agent in respect to the land, and, as such agent, he was under obligations to advise her fully as to all facts within his knowledge bearing upon the value of the land, and upon all matters in reference to the sale thereof. Defendant had been her agent for several years. We think the evidence in the record, outside of exhibit A, is sufficient to show that he was her agent to sell this land. That such agency to sell the land is not shown by explicit writing is en-

tirely immaterial in this kind of action. It is not a case of enforcing a contract against a principal made by an agent with a third person. In a case like the one at bar the agency may be shown by parol, as there is no statutory provision that requires an agency to negotiate for a sale to be in writing. It is the confidential relation existing between them, followed by concealment of facts, that is the gist of the cause of action. He was her agent for specific purposes connected with this land and with her other property. By virtue of such agency he became acquainted with the value of the land, and knew that she knew nothing of its value, and that she was relying wholly upon him. It is the existence of such confidence, arising out of their business relations as to a specific agency, that gives rise to a duty on his part to disclose all facts known to him in reference to the value of the land if he chose to buy it himself. It is not claimed that he made false or fraudulent statements. It is claimed that he should have disclosed that he had an offer of \$1,400 for the land when he bought it for \$900, and that this was a fraudulent concealment. The relation existing between them, as shown by the evidence referred to, was such as demanded frank and full disclosures of all facts known to him bearing on the value of the land before he could become a purchaser of the same, although avowedly made for himself. In *Norris v. Taylor*, 49 Ill. 17, 95 Am. Dec. 568, it was said: "Where a party accepts the position of an agent to take charge of the lands of his principal, collect the rents and royalty, and pay the taxes, a fiduciary and confidential relation is thereby created in regard to everything relating to such lands; and, in treating with his principal for the property, the agent is bound to make the fullest disclosures of all matters connected therewith, within his knowledge, which it is important for his principal to know in order to treat understandingly." In *Davis v. Hamlin*, 108 Ill. 39, 48 Am. Rep. 541, it was said: "It is contended by appellant's counsel that the rule we apply, which holds an agent to be a trustee for his principal, has no application to the case at bar, because Davis was not an agent to obtain a renewal of the lease, and was not charged with any duty in regard thereto; that his was but the specific employment to engage amusements for the theater, and that he was agent only within the scope of that employment; that Hamlin, having a lease which would expire April 16, 1883, had no right or interest in the property thereafter; and that Davis, in negotiating for the lease, did not deal with any property wherein Hamlin had any interest, and that such property was not the subject-matter of any trust between them.

Although there was no right of renewal of the lease in the tenant he had a reasonable expectation of its renewal which courts of equity have recognized as an interest of value, secretly to interfere with which and dis-appoint, by an agent in the management of the lessee's business, we regard as inconsistent with the fidelity which the agent owes to the business of his principal. . . . In applying the rule, it is the nature of the relation which is to be regarded, and not the designation of the one filling the relation." In *Cook v. Berlin Woolen Mill Co.* 43 Wis. 433, the court said: "But, whatever may be the nature of the agency, a court of equity regards every purchase by an agent from his principal with jealous scrutiny, to see that the agent takes no advantage from the confidence of his principal; with jealousy almost invincible, as Judge Story calls it. And there is a class of agents who are held to a very strict rule, a good deal like the rule which courts of equity once generally applied to trustees, and some few courts still apply. When the nature of the agency has given the agent control in the management of the principal's property, and peculiar opportunity of knowing its condition and value, a purchase of it by the agent will be avoided at the suit of the principal, unless the agent make it affirmatively appear that the transaction was fair, and that he imparted to the principal all his information concerning the property, and acted throughout *uberrima fide*." Pomeroy on Equity Jurisprudence (vol. 2, § 959) lays down the rule as follows: "Any unfairness, any underhanded dealing, any use of knowledge not communicated to the principal, any lack of the perfect good faith which equity requires, renders the transaction voidable, so that it will be set aside at the option of the principal. If, on the other hand, the agent imparted all his own knowledge concerning the matter, and advised his principal with candor and disinterestedness as though he himself were a stranger to the bargain, and paid a fair price, and the principal on his side acted with full knowledge of the subject-matter of the transaction and of the person with whom he was dealing, and gave a full and free consent,—if all these are affirmatively proved,—the presumption is overcome and the transaction is valid." See also *Ingle v. Hartman*, 37 Iowa, 274; *Rubio v. Parks*, 48 Cal. 215; *Cotton v. Holliday*, 59 Ill. 176; *Jackson v. Pleasanton*, 95 Va. 654, 20 S. E. 680; *Andrews*, Am. Law, p. 813, and cases cited; *Mechem*, Agency, § 466, and cases cited; 1 Am. & Eng. Enc. Law, p. 1081, and cases cited; *Wharton*, Agency, § 235, and cases cited; *Ruckman v. Bergholz*, 37 N. J. L. 437; *Jansen v. Williams*, 36 Neb. 869, 20 L. R. A. 207, 55 N. W. 279; *Casey* 67 L. R. A.

v. Casey, 14 Ill. 112; *Stewart v. Gilruth*, 8 S. D. 181, 65 N. W. 1085.

A duty of full disclosure of all material facts within his knowledge bearing on the value of the land rested upon the defendant, and, unless he made such disclosures before himself becoming a purchaser, the conveyance becomes voidable upon plaintiff's election to so consider it. The concealment charged against the defendant is as to the value of the land. It is insisted that defendant knew its value to have been greater than that offered, and the fact claimed, that he was offered \$500 more than he bought it for, is cited as conclusive evidence that he failed to disclose a material fact bearing upon its value. The trial court found that such an offer was made, and further found that the value of the land, when conveyed to defendant by plaintiff for a consideration of \$900, was \$1,920. The evidence as to the value of the land and as to the making of an offer of \$1,400 for the land is conflicting. On reading the entire record, we find that defendant's testimony upon three disputed questions is contradicted by three witnesses, one alone testifying upon one disputed question. There is no more reason for finding that defendant is telling the truth upon the question of the offer to him for the land than as to the other disputed questions. To reverse the judgment and find for the defendant would be finding that the plaintiff's witnesses are each mistaken upon material matters testified to, concerning which they have no interest. Defendant's interest in the result is apparent. The trial court saw and heard the witnesses testify, and had superior advantages for determining as to the credibility of the witnesses. The finding that an offer of \$1,400 had been made to the defendant, as agent for the plaintiff, when he commenced negotiating for the purchase of the land for himself on March 7, 1902, is justified by the evidence.

Before the trial commenced, the defendant demanded that the issues be submitted to a jury for determination, and now claims that he was entitled to a jury trial as a matter of right. His contention is that the action is one for damages, and that all issues "of fact in an action for the recovery of money only" must be submitted to a jury, under § 5420, Rev. Codes 1899, if demanded. We do not agree with appellant that the action is one for the recovery of money only. The relief demanded in the complaint is that the defendant "be required to reconvey said land . . . to plaintiff, . . . and that in lieu thereof that defendant have judgment for \$1,020," etc. The primary relief asked is equitable in its nature, and does not pertain to damages. The damages are asked as alternative relief to

meet a possible state of facts where the defendant had placed it beyond his power to reconvey. A court of equity will always award damages in case equitable relief cannot be given, or has become impracticable for any reason. 1 Pom. Eq. Jur. § 237. The action being not one for the recovery of money only, the defendant was not entitled to a trial to a jury as a matter of right.

Objections were also made on which was based a motion to suppress the deposition of the plaintiff. Such objections relate to the alleged fact that the notary before whom

the deposition was taken acted as attorney for the plaintiff. The record fails to show any misconduct on his part. The defendant was represented by his attorney at the taking of the deposition, and defendant's interests were protected in every way.

The judgment is therefore affirmed.

All concur.

Petition for rehearing denied August 2, 1904.

IOWA SUPREME COURT.

STATE of Iowa

v.

Jack PHILLIPS, *Appt.*

(119 Iowa, 652.)

1. **Proof of absolute necessity is not necessary to justify an officer in killing a person whom he is attempting to arrest for misdemeanor, where the statute requires him to employ no more force in effecting the arrest than to him, acting as an ordinarily prudent person would, under the circumstances, seem reasonably and apparently necessary to effect the result.**
2. **An officer cannot be convicted of murder for killing a person whom he is attempting to arrest for misdemeanor or by striking him on the head with a billy, if he uses no more force than is necessary in case of an ordinary person, although it proved fatal in the particular case because of the thinness of the prisoner's skull, of which the officer had no knowledge.**
3. **The jury must decide whether, under all the circumstances, an officer attempting to arrest for misdemeanor**

a drunken person who resists the arrest at a time when bystanders are present, who presumably would render assistance, is justified in striking him on the head with a billy, and, if so, whether or not he exerts more force than is permissible, where the blows result in death.

4. **In a criminal case, if the accused has actually overlooked an error in the original submission which might have misled the jury in reaching their verdict, the court will correct it on rehearing.**

5. **A grand jury which has been adjourned to the next term of court "unless sooner called by the court" may be recalled for the purpose of considering other cases before the termination of the existing term, although the statute provides that the jury shall, on completion of its business, be discharged.**

(April 8, 1903.)*

*A decision was reached and opinion handed down in this case on April 10, 1902, affirming the conviction. But a rehearing was granted and the present conclusion reached, which supersedes the former opinion, and the publication of that opinion is therefore omitted.

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A PPEAL by defendant from a judgment of the District Court for Wapello County convicting him of manslaughter. *Reversed.*

The facts are stated in the opinion.

Messrs. I. H. Tomlinson and M. A. McCoid for appellant.

Messrs. Charles W. Mullan, Attorney General, and **Charles A. Van Vleck**, for appellee:

It was absolutely unnecessary, under the circumstances, to strike the blows in the manner in which they were struck, for they were not necessary to subject Debard to the submission and control of the officer, and to enable him to conduct him to the lock-up. They were inflicted as punishment, and not for the purpose of subduing and sub-

jecting him to the control and custody of the officer.

Skidmore v. State, 2 Tex. App. 20.

Officers should use such means to secure their prisoners as will enable them to hold them in custody, without resorting to the use of firearms or dangerous weapons, and they will not be excused for taking life in any case where, with diligence and caution, the prisoner could be otherwise held.

Reneau v. State, 2 Lea, 722, 31 Am. Rep. 626; *Head v. Martin*, 85 Ky. 485, 3 S. W. 622.

Ladd, J., delivered the opinion of the court:

The accused was acting as special policeman in the town of Eldon during the period

I. Scope.

This note is designed in a general way to cover all cases of homicide committed by persons acting officially, or in the performance of official duty, or under superior orders emanating from governmental authority, or by persons assuming so to act, including homicide in carrying out death sentences, and by persons charged with other official duties, either civil or military, as well as homicide in making arrest. Homicide committed for the purpose of preventing criminal acts, however, and homicide in defense of property, or the person of another, though frequently committed by officers of justice owing to the character of their duties, seem to some extent to be governed by different principles, and to furnish proper subjects for independent notes, and, therefore, have not been included in this note.

II. Homicide by authority of law or under official direction.

a. In execution of death sentence.

The law on the question of homicide in the execution of a death sentence, as laid down by the early writers, seems to have been so clear and so just as to have remained unquestioned ever since. As stated by Blackstone, citing earlier writers (4 Bl. Com. 178), it is, that the putting a malefactor to death who had forfeited his life by the laws and verdict of his country, by one whose office obliges it, is a civil duty, and not only justifiable, but commendable where the law requires it. But the laws must require it; extrajudicially to kill the greatest malefactor is murder. And, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder. And such judgment, when legal, must be executed by the proper officer or his duly appointed deputy, and, if another person doth it of his own head, it is murder, even though it be the judge himself. And the execution must pursue the sentence of the court, the substitution, by the officer charged with the duty of execution, of one method of killing for another being murder. In modern times these matters are controlled largely by statutory enactments, which, like all penal provisions, must be strictly construed and accurately followed.

Justifiable homicide is where a person takes

another's life by unavoidable necessity, without any will, intention, desire, negligence, or inadvertence on his part, as where a sheriff hangs a prisoner in pursuance of the sentence of the court and in conformity therewith, or where an officer, in due execution of his office, kills a person who assaults or resists him. *State v. Dugan*, Houst. Crim. Rep. (Del.) 563.

b. In discharge of ordinary official duty.

Where an officer, in the performance of what he conceived to be his duty as such, transcends his authority, and invades the rights of individuals, he is answerable to the government or power under whose authority he is acting, but he is not liable to answer to criminal process of a different government. This is the general rule laid down and acted upon in *Re Fair*, 100 Fed. 149, a homicide case, and it is also asserted in *Re Lewis*, 83 Fed. 159, and *Re Waite*, 81 Fed. 359, and numerous other cases involving matters other than homicide.

And where an officer of the United States is held in custody under process of a state court for a homicide committed within the authority conferred upon him by the laws of the United States, the United States government will protect itself by procuring his release through its judicial department. *Re Fair*, 100 Fed. 149.

And a United States court will not, in habeas corpus proceedings by an officer of the United States charged with homicide in a state court, examine the evidence for the purpose of determining whether he should be found guilty or innocent; but it may and should examine the evidence for the purpose of determining whether the act alleged to be criminal was done while in the performance of his duty as such officer. *Ibid.*

Thus, a deputy marshal of the United States, charged with protecting and guarding a judge of the United States court, while in the discharge of his official duty, against assault, being present at the critical moment when prompt action is necessary, is justified in killing a person making such assault if necessary to protect the life of the judge. *Re Neagle* (*Cunningham v. Neagle*) 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658.

Such a killing for the purpose of saving the life of the judge, or saving him from great bodily harm, if an offense at all, is an offense under

of the fair, and on the 4th day of September, 1900, had cautioned the deceased, Clarence Debard, who was somewhat intoxicated, against "kicking up a disturbance" and returning to the saloon. Notwithstanding this, the deceased undertook to return, but seems to have stopped on the way at a wienerwurst stand, and, while there, grabbed for, but did not reach, a knife. Thereupon he was put under arrest by defendant, and taken toward the jail, all the time making resistance by jerking and trying to get away, and also using profane and threatening language. This continued until they reached a point in front of a printing office, where the defendant struck the deceased over the head with a club or "billy" such as is usually carried by policemen. The evi-

dence is in conflict as to whether Debard had broken loose at the time, some of the witnesses testifying that there was no halt, and that the prisoner had not broken away, and others that he had, and had turned upon the defendant with his fists. In any event, he fell to the ground on one hip and his hand, and, though repeatedly requested, refused to arise and go with the officer. As the defendant walked around him, Debard turned, attempting to guard himself from seizure, and, as the officer reached for his shoulder, he kicked at him, and was dealt another blow on the head. The defendant denied striking the deceased more than twice, and in this is somewhat corroborated; but several eyewitnesses testified that he beat him on the head three or four times.

the laws of the state, and only the state can deal with it in that aspect; but, when done in the performance of his duty in protecting the life and person of the justice from assault and violence because of his judicial decisions, it is an act done in pursuance of a law of the United States, and is not and cannot be an offense against the laws of the state no matter what the statutes of the state may be, the laws of the United States being the supreme law of the land. *Re Neagle*, 5 L. R. A. 78, 14 Sawy. 232, 39 Fed. 833, Affirmed in 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658.

And where the deputy marshal acted under instructions from his superior officers, and was arrested upon state authority, and held upon a charge of murder for such act, the United States circuit court may, upon habeas corpus, discharge the marshal from the custody of the state authorities upon its being shown that the homicide was necessary, or that it was reasonably apparent to the mind of the deputy marshal at the time and under the circumstances surrounding him that the killing was necessary in order to protect and defend the justice from great bodily injury, or save his life. *Ibid.*

And where several lives were in danger, the deputy marshal, being in a position to judge as to the dangers and requirements of the occasion, was the one to determine when the proper moment arrived to slay such assailant in order to be justified by law, and, if he acted in good faith and with reasonable judgment and discretion, the law will justify him, though he erred. *Ibid.*

So, one who, acting under a valid process issued from a Federal court commanding the arrest of a person, was suddenly set upon and violently resisted by the person sought to be arrested, who actually endeavored to kill him, was justified in killing such person where it was necessary in his own defense; and where he was imprisoned, under state authority for such killing, he was imprisoned for an act done in pursuance of a law of the United States, or of a process of a court or judge of same, and is entitled to discharge on habeas corpus. *United States ex rel. Roberts v. Fayette County Jailor*, 2 Abb. (U. S.) 265, Fed. Cas. No. 15,463.

And where United States deputy marshals attempt to make an arrest under a warrant charging a person with conspiracy and murder, which is an offense indictable under the laws of the 67 L. R. A.

United States, and the party sought to be arrested resists so as to compel them to take his life, either in their own self-defense, or for the purpose of executing the warrant, and they are arrested for murder by the state authorities, Federal courts have jurisdiction to issue a writ of habeas corpus, and, on its return, summarily to hear the evidence, and dispose of the accusation against the officers in such a manner as justice may require. *Kelly v. Georgia*, 68 Fed. 652.

And the right of revenue officers in such case to a writ of habeas corpus to remove the case to a Federal court is not affected by the fact that there is no provision of law for trial by jury in the enactments of Congress providing for the writ of habeas corpus and the procedure thereunder. *Ibid.*

An officer acting under process issued from a Federal court, who kills the person sought to be arrested, and is prosecuted in a state court for the homicide, however, is not entitled to discharge on habeas corpus issued from a Federal court, where the evidence does not justify the conclusion that the shooting was done in order to enable the officer to perform his duty, or execute the process in his hands; and in such case he must be remanded to the state court there to stand trial. *United States ex rel. Weeden*, 2 Filipp. 76, Fed. Cas. No. 14,412.

And a soldier in a time of peace is as much bound as a citizen to respect the laws of the state, and is justified in disobeying improper and illegal orders; and, where he constitutes a part of the posse of a revenue officer, he has only the same rights of self-defense that a citizen would have under the same circumstances, and, even though ordered by his military commander to fire a fatal shot, he is responsible for the result if the order is unlawful. *Georgia v. O'Grady*, 3 Woods, 496, Fed. Cas. No. 5,352.

And where the only danger to be feared by officers within a building from a mob outside is the breaking in of the door, the officer in charge is not justified or excused in ordering his men to fire on the crowd in case the door is broken open, on the ground that he is endeavoring to protect the public property. *State v. Colt*, 8 Ohio S. & C. P. Dec. 62.

And if a person came to his death by a bullet shot by a person inside the building under such an order, it devolves upon the person giving the order to show by a preponderance of the evi-

and that, when last hit, deceased threw back his head, and fell to the ground unconscious. He was then carried to the jail by defendant and others, and died the next morning. From the time of his arrest until the last blow, the deceased was violent in manner and in speech, declaring that "there was not enough . . . officers in Eldon to take him to jail;" that "the officers could beat his head off, but could not take him;" that he would whip defendant if he would discard the "billy." Some of the evidence was to the effect that the first blow was very severe, and that the last ended all conscious resistance. Undoubtedly, the conduct of Debard was extremely exasperating, but his only offense prior to arrest was drunkenness and disorderly conduct. The court, in

the sixth paragraph of the charge, instructed the jury that "the defendant had the right to use such a degree of force as was reasonably necessary to reduce said Debard to submission; and if resistance, if any there was, was violent and determined, the defendant was not required to make nice calculation as to the degree of force necessary to accomplish the purpose. But, to excuse the taking of life in making an arrest in cases of misdemeanor, it must be shown that the killing was necessary to effect the object. Hence, if you find from the evidence in this case beyond a reasonable doubt that the defendant, whilst making the arrest of Debard, struck him with a club or billy, and that Debard died from the effects of such blow, and you further find that it was not neces-

dence that he was legally justified and excused in giving the order to fire. *Ibid.*

So, it is murder on the part of a jailer, or any person employed under him, to cause a person's death by putting him against his will in an unwholesome and dangerous room, and keeping him there. *Rex v. Huggins*, 2 Ld. Raym. 1574, 2 Strange, 882.

And a subject of Great Britain, who, under directions from the legal authorities of Canada, commits homicide in New York in time of peace, may be prosecuted in New York courts as a murderer, even though his Sovereign approves his conduct by adopting the directions under which he did it as a lawful act of government. *People v. McLeod*, 1 Hill, 377, 25 Wend. 483, 37 Am. Dec. 328.

And in such case the jurisdiction of the New York courts in respect to the person committing the deed is not superseded by the fact that the whole matter has become a subject of diplomatic negotiation between the United States and Great Britain. *Ibid.*

c. In the discharge of military duty.

It is legal for a soldier to kill an alien enemy in the heat and exercise of war. *State v. Gut*, 18 Minn. 341, Gll. 315.

Rules, laws, and regulations for the efficiency and discipline of the Army of the United States are matters vested by the Constitution solely in the general government, and an officer or general of the United States who commits a homicide, or does some other act which is within the scope of his authority as such officer or agent, cannot be held to answer therefor under the criminal laws of another and different government. *Rc Fair*, 100 Fed. 149.

And an order given by a military officer to a private soldier should be obeyed by the private, and will be his full protection in a criminal prosecution, unless the illegality of such order is so clearly shown on its face that a man of ordinary sense and understanding would know when he heard it read or given that it was illegal. *Ibid.*; *McCall v. McDowell*, 1 Abb. (U. S.) 212, Fed. Cas. No. 8,673; *Riggs v. State*, 3 Coldw. 85, 91 Am. Dec. 272.

So, the authority of ordinary civil officers of the government is subordinated to that of the military officer, when the government, in response to a call for military aid to restore order which the civil officers are unable to maintain, details a military officer, with troops at his 67 L. R. A.

command, to perform that duty; so that, when the military forces are in active service for the suppression of disorder and violence, a soldier killing a person under military orders cannot be punished by civil authorities. *Com. ex rel. Wadsworth v. Shortall*, 206 Pa. 165, 65 L. R. A. 193, 98 Am. St. Rep. 759, 55 Atl. 952.

And the acts of a subordinate officer in compliance with his supposed duty as a soldier are justifiable, and he will be protected against the consequences, unless they are manifestly beyond the scope of his authority, and such that a man of ordinary sense and understanding would know to be illegal, where he acts in good faith and without malice. *United States v. Clark*, 31 Fed. 710.

And a sergeant of the guard in charge of a person under conviction of a court martial for conduct prejudicial to military discipline has the right to shoot him to prevent an escape, where it can be accomplished by no other means. *Ibid.*

Nor can officers of the United States in charge of a war vessel, charged with manslaughter in taking the life of a seaman belonging to the ship, claimed by them to have been done in the rightful exercise of their authority as such officers, be held for trial by a court of civil jurisdiction when cognizance thereof has been taken by court martial. *United States v. Mackenzie*, 1 N. Y. Legal Obs. 371.

And the killing of a person by a soldier under orders from a superior was not unlawful, where, at the moment he fired he had reasonable ground to believe, and did believe, that the killing or serious wounding of the deceased was necessary to the suppression of a mutiny, then and there existing, or of a disorder, which threatened speedily to ripen into mutiny. *United States v. Carr*, 1 Woods, 480, Fed. Cas. No. 14,732.

And a private soldier, who has been stationed to guard a residence which, during a time of rioting and disorder, has been dynamited, and against which threats have been made to repeat the offense, with orders to shoot to kill any person found prowling about the house, is guilty of no crime if he shoots a person approaching the building and refusing to obey his command to halt. *Com. ex rel. Wadsworth v. Shortall*, 206 Pa. 165, 65 L. R. A. 193, 98 Am. St. Rep. 759, 55 Atl. 952.

And the principle of law that, when men are assembled for an illegal purpose, the commission

sary to strike and kill Debard, if he did, in order to effect such arrest, you will find the defendant guilty of manslaughter." This general statement of the right of the officer finds support in many authorities. See *State v. Garrett*, 60 N. C. 144, 84 Am. Dec. 359; *State v. Dierberger*, 96 Mo. 666, 9 Am. St. Rep. 380, 10 S. W. 168; 2 Bishop, New Crim. Law, § 650; 1 Bishop, Crim. Proc. § 161; 1 Wharton, Crim. Law, 402 *et seq.*; note to *Hawkins v. Com.* 61 Am. Dec. 163. On the other hand some authorities, while admitting that the officer is never required to retreat, and may meet force with force, seem to hold that in arresting for a misdemeanor only, as well as preventing the escape of a person after being arrested therefore, life may not be taken, even though

of any offense by any one of the party is the act of the whole, is not applicable to a soldier entering the military service; and he cannot be held liable for the killing of a person, unless it was his act, or he aided and abetted the act. *Riggs v. State*, 3 Coldw. 85, 91 Am. Dec. 272.

But, while an alien enemy may be killed in the heat and exercise of war, it is murder to kill him after he has laid down his arms, and especially when he is in prison. *State v. Gut*, 18 Minn. 341, Gil. 315.

And a state officer cannot, by proclamation, offer a reward for the killing of Indians, making the killing of an Indian legal if not done in the heat and exercise of war. *Ibid.*

And an order of a nation at war, directing the destruction of the property or life of its enemy within the territory of a neutral power, is void, and affords no protection to persons acting under it. *People v. McLeod*, 1 Hill, 377, 25 Wend. 483, 37 Am. Dec. 328.

And a plea of an Indian war by members of Indian tribes living within the bounds and under the protection of an organized territorial government cannot avail to secure immunity, for acts of treachery and murder committed by individual Indians belonging to tribes, not engaged in war, living among whites and in a part of the country not involved in hostility. *Yelm Jim v. Territory*, 1 Wash. Terr. 63.

And it is doubtful whether such tribes have such a national character that they can at their will make war, and claim immunity for acts of indiscriminate and barbarous murder on the plea of legal hostility. *Ibid.*

Nor does the mere fact that a person killing another was sergeant of the guard at a fort, and the person killed was at the same time and place a private soldier, of itself, make the killing a lawful homicide. *United States v. Carr*, 1 Woods, 480, Fed. Cas. No. 14,732.

And, while a soldier in the service of the United States is bound to obey all lawful orders of his superiors, and his acts in obedience to such orders will not constitute an offense against the law, and killing in obedience to such orders would not be an offense,—if the order is illegal in itself and not justified by the rules and usages of war, so that a person of ordinary sense and understanding would know when he heard it read or given that it was illegal, it would afford no protection in a prosecution for a criminal act. *Riggs v. State*, 3 Coldw. 85, 67 L. R. A.

necessary to make the arrest or prevent the escape, save when the officer has the reasonable apprehension of peril to his own life or great bodily harm. 1 McClain, Crim. Law, § 298; *Thomas v. Kinkead*, 55 Ark. 502, 15 L. R. A. 558, 29 Am. St. Rep. 68, 18 S. W. 854; *Brown v. Weaver*, 76 Miss. 7, 42 L. R. A. 423, 71 Am. St. Rep. 512, 23 So. 388; *Reneau v. State*, 2 Lea, 720, 31 Am. Rep. 626; *United States v. Clark*, 31 Fed. 710; 2 Am. & Eng. Enc. Law, p. 849, and cases cited. But the correctness of the instruction in this respect is not challenged, for it was, if anything, too favorable to the defendant. Appellant does insist, however, that it is defective in that (1) it requires a finding of absolute necessity in order to justify the taking of De-

91 Am. Dec. 272; *United States v. Carr*, 1 Woods, 480, Fed. Cas. No. 14,732.

And if a sentinel stationed at the gate of a fort should wantonly shoot a civilian endeavoring to enter in the daytime; or an officer should recklessly slay a soldier for some misconduct or breach of discipline,—no supposed obligation on his part to do so would excuse so gross an outrage. *United States v. Clark*, 31 Fed. 710.

It has been held, however, that military officers, when called in aid of the civil authorities, have no power, under a constitutional provision declaring the military shall be in strict subordination to the civil power, to act independently of the civil authority; they can act as an armed police subject to exclusive control and direction of civil authorities, and the civil authorities cannot delegate their authority to the military force summoned to their aid, or vest in the military authorities any discretionary power to take any independent step, or do any act, or suppress a mob or riot; though military officers have discretion as to the best methods of carrying out such orders. *State v. Colt*, 8 Ohio S. & C. P. Dec. 62.

And it was also held in that case that a military officer called upon by civil authorities to quell a riot and prevent a lynching is under duty to use only such force as is necessary and proper for the purpose of protecting the prisoner and the public property, and he cannot legally take human life in accomplishing those ends, unless he has first ascertained, by prudent and reasonable exercise of his faculties, that the same is necessary and proper to accomplish the purpose in hand; and that a colonel of a regiment of a state national guard is not a public officer in such case, and is entitled to none of the usual presumptions in favor of the legality of the acts of public officers; and that if he acted solely in his capacity as a military officer in performing orders given him by the civil authorities, and not as an individual in self-defense, or in preventing a felony, or dispersing a riot,—the rightfulness or wrongfulness of his conduct is to be measured by the rules which govern the conduct of military officers while acting in aid of the civil authority. *Ibid.*

Homicide is presumed to be malicious until the contrary appears, and, whether it is justifiable or excusable on the facts as an act of war or of self-defense is a question for the jury in

bard's life, and (2) that it excludes all questions with respect to the result being accidental. The only answer to the first of these is the caution concerning nice distinctions as to the degree of the force employed. But this is followed by the unqualified statement that the killing, to be excusable, must have been necessary, and that, before the jury could convict, it must be found to have been unnecessary. Certainly, proof of absolute necessity was not required. The law exacted no more from defendant than that in what he did he employed no more force in effecting the arrest than to him, acting as an ordinarily prudent person, would, under like circumstances, seem reasonably and apparently necessary to effect

the arrest of deceased. Section 5194 of the Code. The state argues that, even if this instruction is not sufficiently explanatory, the error is cured in the instruction following. The error is the rather emphasized in that, for, while exacting a finding that the killing was not necessary to justify a conviction, the jury are told to acquit if "you further find that it was reasonably necessary, taking into consideration all the circumstances in evidence, for the defendant to use such club or billy, if he did use one, in the manner it was used; and further find beyond a reasonable doubt that the defendant could not have effected the arrest of said Debard, and taken him to jail, without so using such club or billy, if he did use

a prosecution therefor. *People v. McLeod*, 1 Hill, 377, 25 Wend. 483, 37 Am. Dec. 328.

And the trial and acquittal of a soldier of the United States by a court martial for homicide is not a bar to an inquiry and prosecution as to the crime by the proper civil authorities. *Re Fair*, 100 Fed. 149; *United States v. Clark*, 81 Fed. 710.

Though great weight should be given the finding as an expression of opinion of the military court on the question of the magnitude of the offense. *United States v. Clark*, 31 Fed. 710.

III. Effect of official character and action in case of arrest.

An officer charged with preserving peace and good order, and maintaining the supremacy of the law, and executing its mandates, must, of necessity, act on the aggressive in many instances, and is not confined, in the use of physical force, to that which may be lawfully used by a private person in his relations with others; he is clothed with authority to exert such force as may be necessary to the proper performance of the functions of his office, though death be the result. *State v. Dierberger*, 96 Mo. 666, 9 Am. St. Rep. 380, 10 S. W. 168; *State v. McNally*, 87 Mo. 644; *Bowman v. Com.* 96 Ky. 8, 27 S. W. 870.

While the law will generally presume murder in the second degree from the simple act of killing, an instruction to that effect should not be given in a prosecution against an officer for killing a person while seeking to arrest him for a breach of the peace. *State v. Dierberger*, 96 Mo. 666, 9 Am. St. Rep. 380, 10 S. W. 168.

And under Mo. Rev. Stat. § 1235, declaring a homicide justifiable when necessarily committed in the attempt, by lawful ways and means, lawfully to suppress a riot or insurrection, or in preserving the peace, where a peace officer is sent to quell a disorderly person, and in doing so kills him, it is error, in a prosecution for the killing, for the court in its instruction to ignore his official character. *State v. McNally*, 87 Mo. 644.

So while, under Mo. Const. § 6, art. 14, requiring all officers under the authority of the state, before entering upon the discharge of the duties of their office, to take and subscribe to an oath of affirmation to support the Constitution and faithfully demean themselves in office, a duly appointed deputy constable, who has not taken the oath of office, is not an officer *de jure*; 67 L. R. A.

he is an officer *de facto*; and, where he kills a man in an attempt to arrest him for a breach of the peace, the instructions in a prosecution for the killing should proceed upon the theory that he was such an officer. *State v. Dierberger*, 96 Mo. 369, 2 S. W. 286, 96 Mo. 666, 9 Am. St. Rep. 380, 10 S. W. 168.

But error in an instruction in a prosecution against a marshal for killing a person in an attempt to arrest him for disorderly conduct, in not assuming that he was a marshal, is not ground for reversal on appeal, where it was admitted by the prosecution that he was a marshal, and the fact was testified to by several witnesses without contradiction. *Davis v. Com.* 25 Ky. L. Rep. 1426, 77 S. W. 1101.

And an instruction in a prosecution for homicide against an officer for killing a person whom he attempted to arrest, that if certain things are proved beyond a reasonable doubt, among which are that the defendant at the time of the homicide was a constable in the exercise of his official duty, the jury should find the defendant guilty, is not subject to objection that the official character of the defendant is a matter of defense, and that the instruction virtually required that it must be proved beyond a reasonable doubt. *People v. Adams*, 85 Cal. 231, 24 Pac. 629.

A surety on a bail bond occupies the same position toward the person for whom he is surety, and has the same rights and privileges, that a sheriff or constable has when acting under a warrant on a charge of a misdemeanor; and, where such a surety endeavors to surrender the other, and is resisted, he has a right to remain firm and use all reasonable means to take him to the jailer for the purpose of relieving himself from liability on the bond, and he need not flee to avoid or avert danger, but may meet force with force. *Finney v. Com.* 26 Ky. L. Rep. 785, 82 S. W. 636.

And the refusal of the jailer to accept into his custody the person sought to be surrendered does not affect the right of the surety thereafter to hold the person sought to be surrendered; and an instruction that it deprives him of the right of restraint in a prosecution against him is damaging and prejudicial. *Ibid.*

IV. General rules as to use of force in making arrest.

a. In case of felony.

Any peace officer or private person present

it." The matter is referred to only incidentally in the other instructions, and not in connection with the evidence. The second criticism possibly is included in the first. The jury might have found that defendant had no intention of killing deceased. The *post mortem* demonstrated that the latter had an exceedingly thin skull, and there was evidence tending to show that force which, if applied to the ordinary head, would cause no serious injury, might have produced a fracture in Debard's skull. If so, then death might have resulted from a blow of the "billy" applied with no greater force than might have seemed reasonably necessary to subject deceased to restraint, and the jury should have been advised that, if no more force was exerted than permissi-

ble, as hereinbefore stated, and yet death resulted because of the character of Debard's skull, when, had it been of ordinary thickness, this would not have happened, the defendant should not be held responsible. As argued by the state, there is much evidence tending to prove that the blows were severe, and unnecessarily administered. The deceased was intoxicated, and unarmed, as defendant knew. Bystanders were within easy call during the entire transaction, and presumably would have rendered assistance, according to their duty, had this been required. But the defendant testified that the blows were not administered with unusual force, and it was for the jury to say from the evidence whether, under the circumstances disclosed, the defend-

when a felony is committed is bound by law to arrest the felon, and may justify killing him when he cannot otherwise be taken. *Brooks v. Com.* 61 Pa. 352, 100 Am. Dec. 645; *People v. Adams*, 85 Cal. 231, 24 Pac. 629; *Lamma v. State*, 46 Neb. 236, 64 N. W. 956; *State v. Dugan*, *Houst. Crim. Rep.* (Del.) 563.

And it is his duty to make such arrest either with or without a warrant. *People v. Adams*, 85 Cal. 231, 24 Pac. 629; *State v. Bryant*, 65 N. C. 327; *North Carolina v. Gosnell*, 74 Fed. 734.

And a person seeking to arrest a felon need not engage with him on equal terms, but may overcome resistance by superior force. *State v. Bryant*, 65 N. C. 327; *North Carolina v. Gosnell*, 74 Fed. 734.

Nor does the fact that the discharge of an officer's pistol while he was attempting to arrest a person for a breach of the peace was accidental, instead of intentional, affect his right to justify the shooting, where the person sought to be arrested was killed, on the ground that it was necessary in order to effect the arrest. *State v. McNally*, 87 Mo. 644.

And felonious rioters resisting lawful authority may be slain with impunity by officers of justice proceeding in the lawful execution of their duty to suppress riots. *Re Riots of 1844*, 2 Clark (Pa.) 275.

So, a conviction of manslaughter in the fourth degree under Wis. Rev. Stat. § 4363, providing that every other killing of a human being by the act, procurement, or culpable negligence of another, when such killing is not justifiable or excusable, or is not declared in this chapter murder or manslaughter of some other degree, shall be deemed manslaughter in the fourth degree, cannot be upheld if it appears in proof that accused is guilty of some other degree of crime; and, where it appears that deceased was shot when engaged in resisting the service upon him of legal process by an officer legally authorized to make such service, thus attempting to commit an unlawful act, and that the officer shot him while resisting such attempt, the officer would be guilty of no crime unless he shot unnecessarily; and if he shot unnecessarily he was guilty of manslaughter in the second degree, under Wis. Rev. Stat. § 4351, providing that any person who shall unnecessarily kill another while resisting an attempt by such other to commit any felony, or do any unlawful act, or after such attempt shall have failed, shall

be deemed guilty of manslaughter in the second degree, so that he cannot be held for manslaughter in the fourth degree. *Doherty v. State*, 84 Wis. 152, 53 N. W. 1120.

b. In case of misdemeanor.

The security of person and property is endangered by a bad offender being at large, as in the case of a felon; but the taking of human life in the name of the law is the punishment inflicted after conviction of the highest grade of felony, and it would ill become the law to justify such a sacrifice to avoid a failure of justice in not arresting one charged with a misdemeanor, when, if taken and convicted, a sentence of fine or imprisonment only could be imposed. *Com. v. Rhoads*, 23 Pa. Super. Ct. 512.

In making an arrest for a misdemeanor, therefore, the officer may exert such physical force as is necessary to effect the arrest by overcoming the resistance he encounters, or to subdue the efforts of the prisoner to escape. *Thomas v. Kinkead*, 55 Ark. 502, 15 L. R. A. 558, 29 Am. St. Rep. 68, 18 S. W. 854; *Smith v. State*, 59 Ark. 132, 43 Am. St. Rep. 20, 26 S. W. 712; *Bowman v. Com.* 96 Ky. 8, 27 S. W. 870; *State v. Dierberger*, 96 Mo. 666, 9 Am. St. Rep. 380, 10 S. W. 168; *State v. McNally*, 87 Mo. 644.

And he is not bound to retreat or give way. *Smith v. State*, 59 Ark. 132, 43 Am. St. Rep. 20, 26 S. W. 712; *Com. v. Rhoads*, 23 Pa. Super. Ct. 512.

And, if he uses no more force than is reasonably necessary to accomplish the arrest, he should be acquitted on a prosecution for the killing of the person sought to be arrested. *State v. Dierberger*, 96 Mo. 666, 9 Am. St. Rep. 380, 10 S. W. 168; *Golden v. State*, 1 S. C. N. S. 292.

And the burden of proof rests with the state, in a prosecution for such killing, to show the absence of such necessity. *State v. Dierberger*, 96 Mo. 666, 9 Am. St. Rep. 380, 10 S. W. 168.

But an officer making an arrest cannot take the life of the accused, or inflict upon him great bodily harm, except to save his own life, or prevent like harm to himself. *Smith v. State*, 59 Ark. 132, 43 Am. St. Rep. 20, 26 S. W. 712; *Thomas v. Kinkead*, 55 Ark. 502, 15 L. R. A. 558, 29 Am. St. Rep. 68, 18 S. W. 854.

An officer, in arresting for a misdemeanor, may oppose force to force and sufficient to overcome it, even to the taking of life, where the offender puts the life of the officer in jeopardy; but he must not use any greater force than is

ant was justified in beating the prisoner in his inebriated condition, and, if so, whether more force was exerted in so doing than was permissible.

2. It is true, as contended by the state, that the points on which the judgment is reversed were made for the first time in the petition for rehearing. In civil causes this alone would prevent reconsideration. But the law is more indulgent in actions involving the liberty of the citizen, and the practice has long prevailed in this court of granting rehearings for the purpose of correcting errors which might reasonably be thought to have vitally affected the result of the trial. Of course, the point must not have been intentionally omitted. If the accused has actually overlooked an error in

the original submission, and it was such as might have misled the jury in reaching their verdict, the court will correct it on rehearing. But for this practice having been adhered to for many years, the writer would be inclined to make no distinction between civil and criminal actions in this respect, and to treat errors which have not impressed counsel sufficiently to be remembered and discussed in the first instance as having been waived.

3. The grand jury, having completed the business then before it, was, on the 5th day of September, 1900, by the court adjourned "until the second day of next term, unless sooner called by the court;" and on the following day, it appearing "that since said adjournment important cases have

reasonably and apparently necessary for his protection. *Head v. Martin*, 85 Ky. 480, 3 S. W. 622; *Dilger v. Com.* 88 Ky. 550, 11 S. W. 651.

This is the rule of *STATE V. PHILLIPS*.

And killing a man who was out at night dressed in white to represent a ghost for the purpose of frightening persons in the neighborhood cannot be excused on the ground that he could not otherwise be taken. *Rex v. Smith*, cited in 3 Russell, Crimes, 6th ed. 132.

A bastardy proceeding, though a civil one, is in the nature of a prosecution for a misdemeanor within the rules of law with reference to the amount of force which may be used in making an arrest, where it proceeds in the name of the commonwealth, and the offender is subject to arrest. *Head v. Martin*, 85 Ky. 480, 3 S. W. 622.

V. Checking flight.

a. In case of felony.

By the common law it is lawful to kill a fleeing felon where he cannot otherwise be taken, flight being tantamount to resistance. *Jackson v. State*, 66 Miss. 89, 14 Am. St. Rep. 542, 5 So. 690; *Rex v. Finnucane*, *Craw. & D. (Ir.)* 1.

And Miss. Code, § 2878, making homicide justifiable when necessarily committed in arresting any felon fleeing from justice, is merely declaratory of the common law, and warrants killing a fleeing felon when he cannot otherwise be taken. *Jackson v. State*, 66 Miss. 89, 14 Am. St. Rep. 542, 5 So. 690.

And generally an officer, in making an arrest in a case of felony, may use such force as is necessary to capture the felon, even to killing him when in flight. *Head v. Martin*, 85 Ky. 480, 3 S. W. 622; *Dilger v. Com.* 88 Ky. 550, 11 S. W. 651; *Thomas v. Kinkead*, 55 Ark. 502, 15 L. R. A. 558, 29 Am. St. Rep. 68, 18 S. W. 854; *Carr v. State*, 43 Ark. 99; *Com. v. Long*, 17 Pa. Super. Ct. 641.

In *Thomas v. Kinkead*, 55 Ark. 502, 15 L. R. A. 558, 29 Am. St. Rep. 68, 18 S. W. 854, *supra*, *State v. Sigman*, 106 N. C. 728, 11 S. E. 520, *infra*, VI., was distinguished upon the ground that the rule there announced seems to be laid down with reference only to cases where a prisoner resists by force the efforts of the officer to prevent him from breaking away, and is killed in the struggle or effort which follows; and 67 L. R. A.

Head v. Martin, 85 Ky. 480, 3 S. W. 622, *infra*, V. b, was distinguished upon the ground that the only ruling there made was that a peace officer, having arrested one accused of a misdemeanor, cannot, when he is fleeing, kill him to prevent his escape.

And a private person is also justified in killing a fleeing felon who cannot otherwise be taken, if he can prove that the person is actually guilty of felony. *Com. v. Long*, 17 Pa. Super. Ct. 641; *Carr v. State*, 43 Ark. 99.

But if the felon may be taken in any case without such severity the killing is at least manslaughter. *Thomas v. Kinkead*, 55 Ark. 502, 15 L. R. A. 558, 29 Am. St. Rep. 68, 18 S. W. 854.

And a person who, suspecting that a larceny has been committed, does not go for a warrant, or to an officer, but takes his gun and goes to the suspected felon's house, and calls him out, and informs him that he has come to look for the stolen property, and shoots him as he runs off, without informing him that he has come to arrest him, or commanding him to surrender, uses unnecessary force, and is guilty of manslaughter at the least. *State v. Bryant*, 65 N. C. 327.

And while an officer attempting to arrest a felon may use all the force necessary to apprehend him, where an attempted arrest is made upon suspicion of a felony without a warrant, the killing of the fleeing man cannot be justified, unless there is proof that the felony was in fact committed. *Com. v. Greer*, 20 Pa. Co. Ct. 535.

And an officer who kills one for whom he has a warrant for felony must satisfy the jury trying him for the homicide that he tried in good faith and with reasonable prudence and caution to make the arrest, and was unable, because of his flight, to secure him, and that he resorted to the means employed only after all other proper means had failed. *Jackson v. State*, 66 Miss. 89, 14 Am. St. Rep. 542, 5 So. 690.

And revenue officers, seeking to arrest a man for violation of the revenue laws, who shot and killed him, are criminally responsible therefor, where he had desisted from his attack upon them, and was fleeing from them at the time. *State v. Port*, 3 Fed. 124.

It has been held, however, that it is the duty of every officer, and the privilege of every private citizen, to prevent the commission of crime, and to arrest the felon when crime has been

arisen," the court ordered said grand jury to return on the 10th day of said month, during the same term, which it did, and subsequently found the indictment against the defendant. He moved the court to set aside the indictment on the grounds (1) that the grand jury was not selected, drawn, summoned, impaneled, or sworn as prescribed by law; and (2) that, although the grand jury, after being discharged, was recalled for the sole purpose of investigating this case, defendant, though held to answer and in custody, was not permitted to appear in said court to challenge said jury. This motion was overruled. It will be observed that the grand jury had not been discharged for the term, but excused from attendance until called by the court to return. The authority of the court to do this is not questioned in argument. Section 5252 of the Code directs that "the grand jury, on completion of its business, shall be discharged." This evidently means for the term of court

at which it is empaneled, and does not limit the authority of the court to excuse the jurors from attendance temporarily, or until required again at the same term. In the more populous counties such has frequently been the practice, and it is not open to just criticism. The alleged irregularity in adjourning the jury and recalling it appears to be the only objection to the panel, and, regardless of whether the defendant was in a situation to raise the point, we think it without merit. That defendant was not given an opportunity to challenge the jurors is not a statutory ground for setting aside an indictment. Code, § 5319; *State v. Baughman*, 111 Iowa, 71, 82 N. W. 452.

Other errors complained of are not such as are likely to arise upon another trial. For those pointed out, *the judgment is reversed*, and the cause remanded for new trial.

committed; and a private person may kill a felon, if necessary, where he resists or flees, whenever the felony is a capital or personal offense, such as murder, or rape; but he has no right to kill a person guilty of a felony of an inferior grade, in which the person is not endangered, such as theft, if he does not resist, but merely attempts to escape by flight. *State v. Bryant*, 65 N. C. 327.

See also *Jackson v. State*, 66 Miss. 89, 14 Am. St. Rep. 542, 5 So. 690, *infra*, IX. e.

b. In case of misdemeanor.

An officer has no right to shoot a person who is merely running away from him without committing any violence, when under arrest, or to avoid arrest for a misdemeanor. *Brown v. Weaver*, 76 Miss. 7, 42 L. R. A. 423, 71 Am. St. Rep. 512, 23 So. 388; *Head v. Martin*, 85 Ky. 480, 3 S. W. 624; *Petrie v. Cartwright*, 114 Ky. 103, 59 L. R. A. 720, 70 S. W. 297; *State v. Coleman* (Mo.) 84 S. W. 978; *Com. v. Greer*, 20 Pa. Co. Ct. 585; *State v. Anderson*, 1 Hill, L. 327; *North Carolina v. Gosnell*, 74 Fed. 734.

In making an arrest for a mere breach of the peace the officer must at least stop short of force which will result in the sacrifice of human life. *Stephens v. Com.* 20 Ky. L. Rep. 544, 47 S. W. 229.

And where a person charged with a misdemeanor flees from an officer, who is intrusted with a warrant, in order to avoid arrest, and the officer kills him, the officer is guilty of manslaughter at least. *State v. Sigman*, 106 N. C. 728, 11 S. E. 520.

And voluntarily to kill a person accused of a misdemeanor for fleeing from arrest is murder, though he cannot be otherwise taken, and though there is a warrant for his apprehension. *Williams v. State*, 44 Ala. 41.

And the killing of a prisoner by an officer and his guard while the prisoner was unarmed and not resisting or attacking them, but simply running away to make his escape from their custody, the acts not having been prompted by express malice, but by a desire to prevent the

prisoner's escape, is murder in the second degree. *Caldwell v. State*, 41 Tex. 86.

Nor can a peace officer acting without a warrant kill a fleeing person who refuses to stop when commanded to do so on suspicion that he is one guilty of felony, where the offense is, in fact, only a misdemeanor. *Petrie v. Cartwright*, 114 Ky. 103, 59 L. R. A. 720, 70 S. W. 297.

In the above case the rule laid down in *State v. Evans*, 161 Mo. 95, 84 Am. St. Rep. 669, 61 S. W. 590, which was a case of the killing of an officer in resisting arrest, that, when a supposed offender fails to stop when ordered to do so by an officer, he may be shot, was criticised, the court saying that the question was not before the court in that case.

And a verdict of guilty of homicide is justified by evidence that a deputy sheriff with a warrant for a person for a misdemeanor shot and killed him while he was fleeing to avoid arrest, and when he had never been in actual custody, and when he was without firearms, and did not physically resist the officer. *Com. v. Rhoads*, 23 Pa. Super. Ct. 512.

So, an officer is not justified in shooting a person whom he sought to arrest, and who had put himself in resistance, where at the time he had abandoned his deadly purpose of resisting to the death, and was attempting to make his escape by moving off. *State v. Garrett*, 60 N. C. (1 Winst. L.) 144, 84 Am. Dec. 359.

And whether a person shot by an officer in an attempt to arrest him was then acting in resistance of the execution of the law to the death, or whether he had abandoned his deadly purpose of resistance and was attempting to make his escape by moving off, is a question for the jury in a prosecution for the killing. *Ibid.*

But whenever a party liable to arrest by his conduct puts in jeopardy the life of anyone attempting to arrest him, he may be killed, and the killing will be excusable. *State v. Anderson*, 1 Hill, L. 327.

And while it is murder as a general rule to kill a party accused of a misdemeanor for fleeing from an arrest though he cannot be otherwise taken, flagrant misdemeanors, as where a dan-

gerous wound has been inflicted, or a riot exists, are an exception to the rule, since in such case the presumption is great that the offense may turn out to be a felony. *Com. v. Max*, 8 Phila. 422.

And where an officer sought to arrest a man who had put himself in resistance to his authority, and afterwards moved away, retaining his gun in his hands, the officer was not bound to risk his life by rushing after him, where he still retained his purpose of resisting and to make a running fight. *State v. Garrett*, 60 N. C. (1 Winst. L.) 144, 84 Am. Dec. 359.

So, a person attempting to arrest a runaway slave has no right to kill him to prevent his escape. *Morton v. Bradley*, 30 Ala. 683; *Brady v. Price*, 19 Tex. 285.

The law does not authorize the killing of a runaway slave, unless the person attempting to take him is in danger from resistance, as by assaulting or striking. *Arthur v. Wells*, 2 Mill, Const. 314.

And a constable, though having a warrant therefor, endeavoring to arrest a slave on a charge of committing misdemeanors, is not justified in killing him when the slave is fleeing from him, his only object being to escape. *Midleton v. Holmes*, 3 Port. (Ala.) 424.

But where a slave is hailed by members of a patrol company on duty, and repeatedly called upon to stop, and is fired upon by them after they have every reason to suppose that he will otherwise effect his escape, and cannot be overtaken by pursuit, they are justified in the act, where it is without a deliberate intention to kill, by La. act 1855, § 65, providing that, if any slave shall be found absent from his usual place of work or residence without some white person accompanying him, and shall refuse to submit himself to examination, any freeholder shall be permitted to arrest him, and, if he shall attempt to make his escape, the freeholder is authorized to make use of arms. *Duperrier v. Dautrive*, 12 La. Ann. 664.

VI. Meeting actual physical resistance.

While it is the duty of every citizen to submit to lawful arrest, there is a broad distinction on the question of the force which may be used in making an arrest, between active resistance and forcible opposition to arrest, and mere avoidance of a lawful warrant by fleeing from it. *Com. v. Rhoads*, 23 Pa. Super. Ct. 512.

If a person sought to be arrested turns upon the officer seeking to arrest him, and resists arrest, the officer is protected in the use of a degree of force that a jury would ordinarily consider excessive, if he is acting in good faith, and is free from malice. *State v. Sigman*, 106 N. C. 728, 11 S. E. 520; *State v. Mahon*, 3 Harr. (Del.) 588; *Com. v. Max*, 8 Phila. 422; *Plasters v. State*, 1 Tex. App. 673.

And where a person sought to be arrested, though for a misdemeanor, puts himself in resistance to the officer and his guard, they are not only authorized, but bound, to use such a degree of force as is necessary to execute the warrant of arrest; and, if they kill him, they are entitled to a verdict of acquittal on the ground that the homicide is justifiable, if no unnecessary violence has been used. *State v. Garrett*, 60 N. C. (1 Winst. L.) 144, 84 Am. Dec. 359; *People v. Brooks*, 131 Cal. 311, 63 Pac. 464; *Lindle v. Com.* 111 Ky. 866, 64 S. W. 986; *State v. Coleman* (Mo.) 84 S. W. 978; *Mesmer v. Com.* 26 Gratt. 976; *Re Riots* 67 L. R. A.

of 1844, 2 Clark (Pa.) 275; *State v. McNally*, 87 Mo. 644; *Com. v. Rhoads*, 23 Pa. Super. Ct. 513; *Plasters v. State*, 1 Tex. App. 673; *North Carolina v. Gosnell*, 74 Fed. 734; *Mack-alley's Case*, 9 Coke, 65a.

And the person seeking to make the arrest may repel force by force, and need not give back; and, if the person making resistance is unavoidably killed in the struggle, the homicide is justifiable. *Clements v. State*, 50 Ala. 117; *Lindle v. Com.* 111 Ky. 866, 64 S. W. 986; *Com. v. Rhoads*, 23 Pa. Super. Ct. 512; *North Carolina v. Gosnell*, 74 Fed. 734.

And though he shoots unnecessarily, he is only guilty of manslaughter in the second degree, under a statute providing that any person who shall unnecessarily kill another while resisting an attempt by such other to commit a felony, or do any other unlawful act, or after such attempt shall have failed, shall be deemed guilty of manslaughter in the second degree. *Mesmer v. Com.* 26 Gratt. 976.

So, where an officer acting under lawful process commanding the arrest of a person is resisted by such person, and is obliged to take his life as in self-defense, his act is justifiable. *United States ex rel. Roberts v. Fayette County Jailer*, 2 Abb. (U. S.) 265, Fed. Cas. No. 15,463.

And an officer who has a person in his custody under arrest, who is attacked by such person and overpowered, and who uses every reasonable means to prevent an escape in vain, and who then shoots and kills the prisoner, commits no crime, the homicide being justifiable. *Com. v. Max*, 8 Phila. 422.

Nor can revenue officers seeking to arrest a man for violation of the revenue laws, who shot and killed him, be held guilty of murder where the deceased received the fatal shot while in ambush, from which he had fired upon the revenue officers, and at or immediately after the time of the discharge by himself and his comrades of their weapons at the revenue officers. *State v. Port*, 3 Fed. 124.

And if a runaway slave resists apprehension, or presents a hostile attitude, his captor is not bound to desist from or abandon the arrest, but may press forward in the prosecution of his purpose, and, after having used all reasonably available means at hand to effect the arrest, may lawfully take the slave's life under circumstances which would render any other homicide justifiable on the ground of self-defense. *Morton v. Bradley*, 30 Ala. 683.

Resistance to an arrest may begin in the use of words which import defiance and indicate a purpose to use violence if necessary, and, after the use of such words, the officer may instantly employ such degree of force as is necessary to reduce the party to submission and accomplish the arrest. *Ramsey v. State*, 92 Ga. 53, 17 S. E. 613.

And where a person taken in a criminal assault upon another defies the authority of the officer, and by threats of violence seeks to intimidate him, the officer is not bound to wait until he is actually assaulted before himself resorting to force; and if it is apparent that such person intends and is able to resist with violence, the officer may at once use such force as he may consider necessary to compel surrender. *Ibid.*

And that a person sought to be arrested pulled away from the officer, and said, let's argue this thing, is admissible in evidence, in a

prosecution against the officer for killing him in making the arrest, as a fact occurring at the time of the killing. *Stephens v. Com.* 20 Ky. L. Rep. 544, 47 S. W. 229.

And the admission in evidence, in a prosecution against an officer for homicide, of a statement of the person shot by him in an attempt to arrest him, that he did not think he was going to shoot, if erroneous, is not material or reversible error. *Ibid.*

But a mere attitude of defiance, or preparation to resist, not amounting to an assault, on the part of the person sought to be arrested, does not justify the officer seeking to arrest him in killing him. *Clements v. State*, 50 Ala. 117.

VII. Preventing escape or rescue.

a. In case of felony.

The general rule is that an officer having custody of a person charged with felony may take his life if it becomes absolutely necessary to do so to prevent his escape. *United States v. Clark*, 31 Fed. 710; *Thomas v. Kinkead*, 55 Ark. 502, 15 L. R. A. 558, 29 Am. St. Rep. 68, 18 S. W. 854; *Conraddy v. People*, 5 Park Crim. Rep. 234.

And where an officer has a person in custody under a lawful arrest, and other persons attempt to rescue him from such custody, the officer, in resisting such attempt, will be protected in the use of force that a jury would ordinarily consider excessive, if he is acting in good faith and without malice. *State v. Rollins*, 113 N. C. 722, 18 S. E. 394.

And where, after a lawful arrest is made, other persons assault the officer for the purpose of a rescue, he has the power to arrest them for such assault, and to use such force as is necessary to make such arrest, even to the extent of killing. *Ibid.*

So, in *Com. v. Megary*, 8 Phila. 607, it was held, on habeas corpus for a release from confinement, that an officer who attempted to arrest a man for larceny, and was beset by a party of men who attempted a rescue, and shot one of them in the height of the assault, only did his duty in the premises; but a discharge was refused on the ground that, where death is the result of even justifiable violence, a jury should pass upon the case.

But officers whose duty it is to make arrests are not ordinarily authorized to use firearms or dangerous weapons; and they are not ordinarily excusable for killing the person sought to be arrested in an attempt to escape, though he is charged with a felony, where with diligence and caution, the prisoner can be otherwise held. *Reneau v. State*, 2 Lea, 720, 31 Am. Rep. 626.

And if an officer had been apprised that his prisoner contemplated an escape, the jury, in a prosecution against the officer for killing the prisoner, is warranted in finding that the killing was not justifiable, where it appears that the prisoner was within the walls of the jail, and he is not shown to have been armed, and his escape could have been prevented by closing the outside door, or by putting him in a cell, or otherwise securing him, and it does not appear that he failed to comply with a request to halt, or that the fatal shot was not fired after he had complied. *Iamma v. State*, 46 Neb. 236, 64 N. W. 956.
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The criminality of the act of an officer in killing a prisoner who sought to escape is the same whether he held the prisoner in custody before or after judgment. *Reneau v. State*, 2 Lea, 720, 31 Am. Rep. 626.

b. In case of misdemeanor.

The force or violence which an officer may lawfully use to prevent the escape of a person arrested for a misdemeanor is no greater than such as might have been rightfully employed to effect his arrest. *Thomas v. Kinkead*, 55 Ark. 502, 15 L. R. A. 558, 29 Am. St. Rep. 68, 18 S. W. 854.

And an officer having in his custody a prisoner accused of a misdemeanor may not take his life if he attempts to break away, though no other means are available to prevent his escape. *Ibid.*; *Smith v. State*, 59 Ark. 132, 43 Am. St. Rep. 20, 26 S. W. 712; *Handley v. State*, 96 Ala. 48, 38 Am. St. Rep. 81, 11 So. 322; *Head v. Martin*, 85 Ky. 480, 3 S. W. 624; *Conraddy v. People*, 5 Park Crim. Rep. 234; *Skidmore v. State*, 2 Tex. App. 20; *United States v. Clark*, 31 Fed. 710; *Forster's Case*, 1 Lewin, C. C. 187.

Where a person is arrested or held in custody for a misdemeanor, and he attempts to escape, it is murder, as a general rule, in the officer to kill him, though he cannot be otherwise overtaken; though it will be only manslaughter if it appears that death is not intended. *Reneau v. State*, 2 Lea, 720, 31 Am. Rep. 626.

And where a person called upon by an officer to assist in arresting a misdemeanant shoots him to prevent an escape, the jury, in a prosecution for the killing, will not be justified in finding him guilty of manslaughter only, or authorized to conclude that he did not entertain the formed design to kill which is necessary in murder; since the law presumes the design from the fact that he intentionally used a deadly weapon with a fatal result. *Handley v. State*, 96 Ala. 48, 38 Am. St. Rep. 81, 11 So. 322.

And an officer who beat a drunken man into insensibility in order to effect his arrest or prevent his escape, where the drunken man was violent in manner and speech, is guilty of manslaughter if death resulted therefrom, where the deceased was unarmed, to the knowledge of the officer, and bystanders were within easy call during the entire transaction, from whom assistance might have been had. *State v. Phillips (Iowa)* 89 N. W. 1092.

And evidence in a prosecution for homicide against a special policeman that the deceased was intoxicated and the policeman put him under arrest, and that deceased tried to get away, when the policeman struck him on the head with his club, whereupon the deceased fell down and sought to avoid the policeman and kicked at him, when he was dealt another blow on the head with the club, and afterwards fell back unconscious and died the next morning, is such that the jury might well find the force applied excessive and unnecessary. *Ibid.*

So, where a police officer, without a warrant, arrests a man who is guilty of no offense, and, in preventing an escape, strikes and kills him, it is sufficient, at least, to warrant a verdict, in a prosecution therefor, of involuntary manslaughter in the commission of an unlawful act. *O'Connor v. State*, 64 Ga. 125, 37 Am. Rep. 58.

And where a collector of the King's duty went to a house to make a demand for money, and, not being paid, distrained a silver cup

found there, and a maid, to prevent carrying it away, stood by the door to prevent his going out, when he took her by the arm and beat her head against the door, whereby her death was caused, he is criminally responsible for the homicide. *Goffe's Case*, 1 Vent. 216.

That a person sought to be arrested for intoxication, who was afterwards killed by the officer, offered to go if he was permitted to do so, however, is irrelevant in a prosecution against the officer for the killing, as not having the slightest bearing on the issue. *State v. Phillips (Iowa)* 89 N. W. 1092.

And in *State v. Sigman*, 106 N. C. 728, 11 S. E. 520, it was held that, after an accused person has been arrested, an officer is justified in using the amount of force necessary to detain him in custody, and to kill the prisoner to prevent escape if necessary, whether he be charged with a felony or a misdemeanor.

VIII. Recapture.

a. Generally.

A sheriff, or any other person acting under and by his authority, has the right to recapture a prisoner escaping from lawful arrest and custody, and has the right to use such force as may be necessary to overcome resistance to his lawful authority in making such rearrest. *James v. State*, 44 Tex. 314.

But when a prisoner charged with a misdemeanor has already escaped, an officer cannot lawfully use any means to recapture him that he would not have been justified in employing in making the first arrest, and if, in the pursuit, he intentionally kills him, it is murder. *State v. Sigman*, 106 N. C. 728, 11 S. E. 520.

And *Paschal's Texas Dig. art. 2215, § 10*, providing that a prisoner under sentence of death or imprisonment in the penitentiary, on attempting to escape from the penitentiary, may be killed by the officer having legal control over him if his escape can be prevented in no other way, applies only to original arrests and the prevention of escape, and not to rearrests after an entire escape, and does not give an officer attempting such rearrest the same authority to kill in order to prevent escape that it gives to an officer having the legal custody of a convict who is attempting to escape. *Wright v. State*, 44 Tex. 645.

b. Of escaped convicts.

The duty of a guard of penitentiary convicts is to keep those placed in his charge in safety and to prevent their escape, and if one of them falls into a river and he shoots him, the homicide is justifiable if the circumstances are such as to lead him, as a reasonable man, honestly to conclude that the convict is trying to escape, and that it is necessary to kill him in order to prevent the escape. *Jackson v. State*, 76 Ga. 473.

And under a statute making it a felony for anyone confined in any jail, upon conviction for any criminal offense, to break jail and escape therefrom, a guard has the right, when a prisoner attempts to escape, to oppose force to force to the extremity of killing the prisoner. *State v. Turlington*, 102 Mo. 642, 15 S. W. 141.

The superintendent of a convict camp, however, is not authorized to arrest an escaped convict by N. C. Code, § 1128, conferring the power to arrest upon a sheriff, coroner, constable, or 67 L. R. A.

other officer of police, or other peace officer intrusted with the care and preservation of the public peace, so as to justify or mitigate a charge of killing a convict in making the arrest. *State v. Stancill*, 128 N. C. 606, 38 S. E. 926.

And *Paschal's Texas Dig. art. 2215, § 10*, providing that a prisoner under sentence of death or imprisonment in the penitentiary, on attempting to escape from the penitentiary, may be killed by the officer having legal control over him, if his escape can be prevented, in no other way, though applying to convicts at labor on a plantation, does not apply to convicts who have entirely escaped from custody; and after one has so entirely escaped a guard will have only such authority to effect a capture as belongs to ordinary peace officers in making arrests, and can only take life in effecting a recapture when it becomes necessary to do so to protect his own life, or save himself from serious bodily harm. *Wright v. State*, 44 Tex. 645.

So, in order to justify the homicide of a convict by a guard, the circumstances must have been such as to enable the jury to find that the guard, as a reasonable man, was impressed at the moment of the killing that the necessity was upon him to kill in order to prevent the convict's escape, and that he did kill with intent solely to discharge his duty and prevent escape. *Jackson v. State*, 76 Ga. 473.

And a superintendent of a convict camp is not justified in shooting an escaped convict after an arrest, where the convict does not know him, or that he is such superintendent, and does not resist arrest, but runs for his life. *State v. Stancill*, 128 N. C. 606, 38 S. E. 926.

So, a guard in charge of a number of penitentiary convicts who were engaged in emptying and filling cans with water from a river, who saw one of them fall into the stream, and, knowing that he was not attempting to escape, but making efforts to return, nevertheless fired upon and killed him, is guilty of murder. *Jackson v. State*, 76 Ga. 473.

And whether the guard halted the convict, or commanded him to stop or return, is a circumstance to be weighed with other circumstances in the case in a prosecution for the killing. *Ibid.*

And in such a case, if it did not appear whether he was attempting to escape, or whether he fell in accidentally and was about to return, a charge should be given, in a prosecution for the killing, on the subject of involuntary manslaughter in the commission of a lawful act without due caution and circumspection. *Ibid.*

IX. Limitation as to force which may be used.

a. General rules.

The amount of force which a person may use in making an arrest is limited to so much as is necessary to effect his object. *Golden v. State*, 1 S. C. N. S. 292; *People v. Brooks*, 131 Cal. 311, 63 Pac. 464; *State v. Phillips*, 119 Iowa, 652, 94 N. W. 229; *Dilger v. Com.* 88 Ky. 550; 11 S. W. 651; *Head v. Martin*, 85 Ky. 480, 3 S. W. 622; *State v. Colt*, 8 Ohio S. & C. P. Dec. 62; *North Carolina v. Gosnell*, 74 Fed. 734.

And persons acting in aid of an officer are only warranted in using the same force. *State v. Colt*, 8 Ohio S. & C. P. Dec. 62.

To excuse the taking of life in making an arrest it must be shown that the killing was necessary to effect the object. *State v. Weston*, 98 Iowa, 125, 67 N. W. 84.

It is a criminal act to take life in making an arrest where the arrest could have been made without it. *Dover v. State*, 109 Ga. 485, 34 S. E. 1030.

Even a felon cannot be killed in an effort to arrest him without criminal responsibility, unless he cannot otherwise be captured. *Williams v. State*, 44 Ala. 41; *State v. Bryant*, 65 N. C. 327; *Lander v. Miles*, 3 Or. 35.

And if he can be taken, or his escape prevented, without killing him, and he is slain, the officer is guilty, at least, of manslaughter. *Lamma v. State*, 46 Neb. 236, 64 N. W. 956.

An officer, or person acting under his authority, has no right to take life in making an arrest, except to defend himself from threatened violence by the person sought to be arrested, and such officer is authorized to use such force only as is necessary to defend himself against the resistance offered. *James v. State*, 44 Tex. 314.

The law does not require an officer, in making an arrest for a misdemeanor or criminal offense committed in his presence, when resistance to arrest is offered, to determine with absolute precision what force is necessary to accomplish his purpose; but it does require that he shall not use any more force than may seem to him to be reasonably necessary for the purpose. *State v. Rose*, 142 Mo. 418, 44 S. W. 329.

And the mere fact that a person seeking to arrest another, and using force in order to do so, was an officer of the police force of the city, and was engaged in the execution of his duty, does not render the use of such force justifiable; it must also appear that the force was necessary, and the necessity is to be determined, not by the officer, but by the jury. *Golden v. State*, 1 S. C. N. S. 292.

And where an officer killed a prisoner in attempting to put him into a cell, and it does not appear that such killing was necessary, or that the officer reasonably believed that it was necessary to effect his purpose, the jury cannot acquit him upon the ground that he was an officer engaged in making an arrest or an imprisonment following an arrest. *State v. Lane*, 158 Mo. 572, 59 S. W. 967.

Nor will proof that an officer in making an arrest did not intend to use unnecessary force excuse the use of such force. *Golden v. State*, 1 S. C. N. S. 292.

And the fact that a person who was beaten to death by an officer in making an arrest or in preventing his escape had an exceedingly thin skull is important for the jury, in a prosecution against the officer for the homicide, to consider in estimating the character and probable effect of the blows delivered, but will not warrant any interference with a finding for manslaughter. *State v. Phillips (Iowa)* 89 N. W. 192.

But while evidence that an officer, who struck a person sought to be arrested several blows upon the head, said, in answer to a bystander's request not to hit him any more, that it was not his intention to do so, is a part of the *res gesta* in a prosecution against the officer for the homicide, striking it out would not be error, since it sheds no light upon the controversy. *Ibid*.

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in checking flight in case of the commission of a felony, see also *Thomas v. Kinkead*, 55 Ark. 502, 15 L. R. A. 558, 29 Am. St. Rep. 68, 18 S. W. 854; *State v. Bryant*, 65 N. C. 327; *Jackson v. State*, 66 Miss. 59, 14 Am. St. Rep. 542, 5 So. 690; *State v. Port*, 3 Fed. 124,—*supra*, V. a; and with reference to such limitation in case of the commission of a misdemeanor, see also *supra*, V. b.

And with reference to such limitation in case of an attempted escape or rescue after arrest see also *supra*, VII. a, b; and with reference to such limitation in case of an attempted recapture after escape from arrest or imprisonment, see also *supra*, VIII. a, b.

b. Self-defense as a test.

The justification of an officer killing a person sought to be arrested by him for a misdemeanor rests solely upon the ground of self-defense. *Com. v. Rhoads*, 23 Pa. Super. Ct. 512; *Com. v. Greer*, 20 Pa. Co. Ct. 535.

And the rule is the same in case of an attempted arrest in a civil action. *Com. v. Greer*, 20 Pa. Co. Ct. 535.

And an officer seeking to make an arrest for a misdemeanor is not justified in taking life, even if the arrest cannot otherwise be effected, except when resistance is so violent as to put the officer in danger of death or great bodily harm. *Com. v. Rhoads*, 23 Pa. Super. Ct. 512; *Plasters v. State*, 1 Tex. App. 673. And see *Smith v. State*, 59 Ark. 132, 43 Am. St. Rep. 20, 26 S. W. 712; *Thomas v. Kinkead*, 55 Ark. 502, 15 L. R. A. 558, 29 Am. St. Rep. 68, 18 S. W. 854,—*supra*, IV. b.

A degree of resistance to arrest for a misdemeanor not amounting in itself to a crime, and only unlawful on account of the obligation of the person sought to be arrested to surrender, will not justify the officer seeking to arrest him in killing him. *Clements v. State*, 50 Ala. 117.

An officer when resisted in lawfully making an arrest is not justified in killing the offender for the purpose of guarding his person from bodily harm, unless the injury threatened is a serious one. *State v. Hickey (N. J. L.)* 57 Atl. 264.

A person appointed to aid a deputy sheriff in arresting and imprisoning a person, who is driven away at the point of a knife by an assistant of the resisting prisoner, however, is not required, in order to free himself from liability for killing such assistant, to fall, or refuse to return, or, having returned, to escape impending danger by flight. *Cockrill v. Com.* 95 Ky. 22, 23 S. W. 659.

And instructions laying down the law of self-defense are not objectionable in a prosecution against an officer for a homicide committed in effecting an arrest where the whole theory of defense was that the killing was necessary, not for the purpose of making the arrest but to prevent the person arrested from killing the officer. *People v. Adams*, 85 Cal. 231, 24 Pac. 629.

And an instruction as to the right of self-defense, where it appeared to the officer, in the exercise of reasonable judgment, that there was no other safe means to avert the real or apparent danger at the hands of the other but to shoot him, is not subject to the objection that it required the officer to avoid the danger, if any, by flight. *Stephens v. Com.* 20 Ky. L. Rep. 544, 47 S. W. 229.

c. When use of deadly weapon is justified.

An officer may not exert force in effecting an arrest for a misdemeanor, or in preventing an escape or rescue from such an arrest, to the extent of employing a deadly weapon, or of taking human life, even though without such force the wrongdoer may escape. *State v. Smith (Iowa)* 101 N. W. 110.

If an officer seeking to arrest a person for a misdemeanor uses his pistol in the pursuit, so as to constitute an assault upon him, and death results, he is criminally responsible whether his purpose is to kill, or merely to stop the other's flight. *State v. Sigman*, 106 N. C. 728, 11 S. E. 520.

But where a warrant of arrest is placed in the hands of an officer, though for a misdemeanor only, and the person sought to be arrested resists the arrest by the use of a deadly weapon, the officer has the right, if he believes, and has reasonable ground to believe, that the other will shoot him if he attempts to arrest him, to use his own weapon, even to the taking of life, if necessary, to enable him to execute the warrant. *Bowman v. Com.* 96 Ky. 8, 27 S. W. 870; *North Carolina v. Gosnell*, 74 Fed. 734.

And an officer having a prisoner in charge may, in case of resistance, use a deadly weapon to defend himself, where, by previous violence, he has been incapacitated from using a less deadly one. *Forster's Case*, 1 Lewin, C. C. 187.

And he may, if he has reasonable ground for apprehending his life to be in danger, or bodily harm, have recourse to a deadly weapon for defense if no other is at hand. *Ibid.*

And though the testimony in a prosecution for homicide warrants the jury in finding a verdict of guilty, it is error to refuse instructions as to self-defense, where there is any evidence supporting the theory of the accused that deceased was killed while trying to draw a pistol to resist an effort upon the part of the accused to arrest him. *Harris v. State*, 72 Miss. 99, 16 So. 360.

So, where two persons made a dangerous attack upon an officer seeking to arrest them, it was the officer's duty to proceed to the last extremity, even to the use of dangerous weapons, to overcome them, though they were somewhat under the influence of liquor. *Com. v. Max*, 8 Phila. 422.

Nor is an officer seeking to make an arrest, who is resisted by the use of dangerous weapons, ever required to afford the resisting offender the opportunity for a fair and equal struggle, but may avail himself of any advantages that arise in the conflict. *North Carolina v. Gosnell*, 74 Fed. 734.

And an officer authorized to arrest a person charged with an offense against the law, who has made public threats against the life of any officer ordered to arrest him, is justified, where such person with a rifle in hand so acts as to lead to the belief that he intends to execute his previous threat, in taking the life of the person sought to be arrested. *United States v. Rice*, 1 Hughes, 560, Fed. Cas. No. 16,153.

And United States deputy marshals seeking to arrest a man under a warrant charging him with murder and conspiracy under the laws of the United States, who shot and killed him in the effort to effect the arrest, are guilty of no offense where he had violently resisted arrest. *67 L. R. A.*

in another matter, and had been rescued by a mob of his friends, and dwelt habitually in woods and swamps with his two sons, all habitually armed with deadly weapons, and had sent threats and messages of defiance to the officers announcing his intention to kill them if they attempted to arrest him, and opened fire upon them with a magazine rifle upon their approach. *Kelly v. Georgia*, 68 Fed. 652.

And duly authorized revenue officers of the United States, in the performance of official duty, searching for illicit distilleries, who discovered traces of such a distillery, and found a man standing not far off observing their movements, who offered to conduct them to a designated house, and went before them for that purpose, and afterwards started to run toward the house, were justified in suspecting his purpose to be to communicate information to the illicit distillers in the neighborhood; and, where he reached the house and procured weapons and attacked the officers, they were justified in resisting his attack by shooting him. *North Carolina v. Kirkpatrick*, 42 Fed. 689.

A rock used in close conflict is a deadly weapon, and, if a person sought to be arrested used a rock, and wounded the officer, and had another rock in his hands, and manifested a purpose to throw it, he was in a condition of deadly resistance which justified the officer in shooting him to prevent an immediate and serious injury. *North Carolina v. Gosnell*, 74 Fed. 734.

Officers making an arrest, however, must take care not to exceed the necessity of the case; and, to warrant the use of a deadly weapon, it ought to appear that the resistance offered either put the officer in great personal danger, or that an escape from actual arrest was intended, and could not otherwise be prevented. *Com. v. Max*, 8 Phila. 422.

And where a much intoxicated man about to be arrested struggles to release himself from the grasp of the officer, and is assisted by another equally intoxicated, the use by the officer of a deadly weapon is not justified. *Ibid.*

And a charge of homicide cannot be defended upon the ground that a justice of the peace had appointed the accused a special policeman to arrest the person killed, and placed a warrant in his hands, which he had lost, where the proof is uncontradicted that deceased was expelled by the direction of the accused from a trading boat and shot without excuse or cause and without informing him that he had a warrant for his arrest, while he was begging for his life. *Angel v. Com.* 14 Ky. L. Rep. 10, 18 S. W. 849.

So, where officers go to arrest a man for a debt, and, after some difference as to terms, he arms himself declaring that he does not design to hurt them, but will not be ill used, and they afterwards kill him with their swords, it is murder, or at least manslaughter, on their part, where, at the time of the killing, he is some distance from his arms, and they are between him and them, and they have no ground to fear any harm from them, and he is entirely in their power. *Rex v. Reason*, 1 Strange, 499.

While the burden of proving the accusation on a charge of murder rests with the prosecution, where the case is one of an officer who uses a deadly weapon against a person fleeing from him the burden of justifying its use rests with him. *People v. McCarthy*, 110 N. Y. 309, 18 N. E. 128.

See also *Reneau v. State*, 2 Lea, 720, 31 Am. Rep. 626, *supra*, VII. a.

d. Appearance as a test of the right of self-defense.

The danger to the person of an officer, or a person acting as such, which will authorize him to act in his self-defense, need not be real, but may be apparent only. *Finney v. Com.* 26 Ky. L. Rep. 785, 82 S. W. 636; *Cockrill v. Com.* 95 Ky. 22, 23 S. W. 659; *Doolin v. Com.* 95 Ky. 29, 23 S. W. 663.

An officer under prosecution for killing a person whom he attempted to arrest for an offense committed in his presence is entitled to have the jury apply the law to the facts, not as they appear to the jury, but as they reasonably appeared to him at the time of the killing. *State v. Rose*, 142 Mo. 418, 44 S. W. 320.

This is the rule of *State v. Phillips*.

And a police officer engaged in making an arrest, who is assaulted by the person sought to be arrested in a way that leads him honestly to believe, and under circumstances which would induce a like belief in a reasonable man, that he is about to receive great bodily harm or lose his life, is not obliged to retreat to save his life, but may stand his ground if necessary, even to the extent of taking human life. *Boyd v. People*, 22 Colo. 496, 45 Pac. 419.

And where a person is called upon by an officer to assist him in making an arrest has grounds to believe as a reasonable man, and does believe, that the person sought to be arrested has unlawfully shot at or mortally wounded the officer in resisting arrest, he not only has the right, but it is his duty, to pursue and arrest such person, and use all necessary means of effecting his arrest, even to the taking of life. *People v. Brooks*, 181 Cal. 311, 63 Pac. 464.

So, where one who was resisting arrest by a constable and his posse was shot and killed by one of them, and on a prosecution for the murder the defense was made that the deceased was seeking to commit a felony on the constable, or at least that the person doing the shooting acted under reasonable fears thereof, it is not necessary to show that the killing was actually necessary to prevent the felony; it is enough that the circumstances were sufficient to excite the fears of a reasonable man that it was the purpose of the deceased to perpetrate a felony, and that he acted under the influence of such fears, and not for revenge. *Adams v. State*, 72 Ga. 85.

And where an officer was armed and pursuing another with intent to arrest him but without intent to kill him, and others shouted, "Shoot him," and the person pursued was also armed, the circumstances are such that it might be that the pursued thought the officer intended to shoot him unlawfully to stop his flight, and the pursuer thought the pursued intended to shoot him to prevent the arrest, so that each would be mistaken as to the purpose of the other; and each might be excusable, on the ground of self-defense, for shooting at the other under the supposition that he was about to be shot at. *Doolin v. Com.* 95 Ky. 29, 23 S. W. 663.

Refusal to instruct the jury, in a prosecution against an officer for killing a person while attempting to arrest him, however, that it is immaterial whether such person was armed 67 L. R. A.

or not, if the officer believed he was armed, is not error unless the circumstances were such as reasonably to warrant such belief. *People v. Adams*, 85 Cal. 281, 24 Pac. 629.

And an instruction, in a prosecution for homicide, confining the right of the accused to kill the deceased to the existence of actual, instead of apparent, danger to his life or person at the hands of the deceased, and ignoring his right to act in defense of his brother, if the latter was in good faith aiding him in making the arrest of the deceased, though erroneous, is not reversible error, where in another instruction the jury were correctly advised upon what state of facts the accused might avail himself of the law of self-defense. *Havens v. Com.* 26 Ky. L. Rep. 706, 82 S. W. 869.

And where, in a prosecution for murder, the defense is set up that accused was a member of the posse of an arresting officer, seeking to arrest the deceased, and that when he killed deceased he was acting under the fear of a reasonable man that his life was in danger, a charge that to justify the killing such fear must have been that of a reasonably courageous man, and not that of a coward,—the fear of a man who wants to do his duty and is trying to do it,—is not sufficient cause for ordering a new trial. *Dover v. State*, 109 Ga. 485, 34 S. E. 1030.

So, where a person attempts to use a pistol, and it is taken from him, and afterwards an officer, in seeking to arrest him, kills him, the failure of the officer to search him when he has a right to do so may be considered by the jury in a prosecution for the killing as bearing upon the probability of his statement that he had not been informed that the other's pistol had been taken from him. *People v. Adams*, 85 Cal. 281, 24 Pac. 629.

And an instruction in such case, that any person making an arrest may take from the person arrested all offensive weapons which he may have about his person, is not subject to the objection that it tended to produce upon the minds of the jury the belief that his failure to search the person killed for arms was a neglect of duty, which would give rise to an inference of guilt. *Ibid.*

Nor is the fact that a person sought to be arrested, who was shot by the officer, was of bad character, admissible in evidence in a prosecution for the killing, for the purpose of showing that the officer was justified in shooting to scare and stop him in order that the arrest might be made. *Com. v. Greer*, 20 Pa. Co. Ct. 535.

In *Conraddy v. People*, 5 Park. Crim. Rep. 234, however, it was held that, to justify a homicide in arresting a felon, there must be an actual necessity for such homicide, and not merely reasonable grounds to suspect that it was necessary.

See also *Re Neagle*, 5 L. R. A. 78, 14 Sawy. 232, 39 Fed. 833, Affirmed in 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658, *supra*, II. b; *Bowman v. Com.* 96 Ky. 8, 27 S. W. 870; *North Carolina v. Gosnell*, 74 Fed. 784,—*supra*, IX. c.

c. Necessity a question for the jury.

The law does not clothe an officer with authority to judge arbitrarily of the necessity of killing a prisoner to secure him, or of killing a person to prevent the rescue of a prisoner; he cannot kill unless there is a necessity for it.

and whether there is such a necessity is a question for the jury in a prosecution for the killing. *State v. Bland*, 97 N. C. 438, 2 S. E. 460; *Williams v. State*, 44 Ala. 41; *Jackson v. State*, 66 Miss. 89, 14 Am. St. Rep. 542, 5 So. 690; *Conraddy v. People*, 5 Park. Crim. Rep. 234; *Lander v. Miles*, 3 Or. 35.

And see *STATE V. PHILLIPS*.

And it is to be determined upon consideration of all the circumstances of the case, a reasonable doubt as to whether the killing was not necessary entitling the officer to an acquittal. *Jackson v. State*, 66 Miss. 89, 14 Am. St. Rep. 542, 5 So. 690.

When such force was used in making an arrest that death was caused, there is no presumption of law that the officer acted in good faith, or without malice or excess of force; the jury must judge of the reasonableness of the force used, the burden resting with the prisoner to show matter of excuse or mitigation. *State v. Rollins*, 113 N. C. 722, 18 S. E. 394.

And a record in a prosecution against an officer for killing a person he had arrested, showing that the prisoner was drunk and had been disarmed, and that the officer was sober and a much more powerful man than the prisoner, and had an assistant with him, and that the prisoner resisted by attempting to elude the officer when he sought to push him into the cell, whereupon the officer struck and killed him, presents a case where the question is one of fact whether or not the death of the prisoner was caused by an unnecessary blow by the officer in compelling obedience. *State v. Lane*, 158 Mo. 572, 59 S. W. 967.

It is proper, however, for the judge, in a prosecution against an officer for homicide in making an arrest, to tell the jury that what would be excessive force in an individual in an ordinary encounter might not be so in an officer resisting an escape or rescue of a prisoner; though the omission to do so is not error when the instruction is not asked for. *State v. Rollins*, 113 N. C. 722, 18 S. E. 394.

And in *State v. McNinch*, 90 N. C. 696, it was held that the amount of force, and the employment of the usual means in making an arrest and detention within the compass of the means ordinarily resorted to for securing one found committing a criminal act, must be left to the discretion and judgment of the officer, when he is engaged in discharging a public and official duty, and is actuated by no ill will; but the case was one of assault, and not of homicide.

See also *State v. Garrett*, 60 N. C. (1 Winst. L.) 144, 84 Am. Dec. 359, *supra*, V. b.

X. Effect of question of legality or propriety of officer's action.

a. General rule as to illegal action.

A peace officer who attempts illegally to make an arrest, and in doing so invades the right of liberty of the person sought to be arrested, cannot plead self-defense in justification of the killing of such person, where the necessity grows out of resistance to such arrest. *Roberson v. State*, 53 Ark. 516, 14 S. W. 902.

Where one engaged in an attempt to make an unlawful arrest, and on account of such arrest is placed in a situation rendering it necessary for him to defend himself against an attack made upon him, superinduced by his wrong, 67 L. R. A.

the law justly limits his right of self-defense, and regulates it according to the magnitude of that wrong. *Carter v. State*, 30 Tex. App. 551, 28 Am. St. Rep. 944, 17 S. W. 1102.

Rules as to good faith and want of malice apply to the question as to the extent of force necessary for an officer to use in order to prevent a rescue and escape where the arrest is legal; they do not validate an illegal arrest. *State v. Rollins*, 113 N. C. 722, 18 S. E. 394.

And one who kills another, or a person mistaken for such other, in an attempt illegally to arrest him, is guilty of a homicide which cannot be of a less degree than manslaughter, though he acts upon a reasonable apprehension of danger; the slayer in such case standing in the attitude of a trespasser, or one who provokes a difficulty, or furnishes an occasion therefor. *Peter v. State*, 23 Tex. App. 684, 5 S. W. 228.

And where a police officer, without warrant, arrested a man who was guilty of no offense, and in preventing an escape killed him, he is at least guilty of involuntary manslaughter in the commission of an unlawful act. *O'Connor v. State*, 64 Ga. 125, 37 Am. Rep. 58.

So, if the wrongful acts and conduct of a person brought on a difficulty in which he killed another, he cannot take shelter behind his character as an officer, and claim that he was acting in his official character in seeking to preserve the peace when he did the deed, or that he killed the person in attempting to arrest him for a breach of the peace, as a defense for the killing. *Johnson v. State*, 58 Ark. 57, 23 S. W. 7.

And that, when a warrant of arrest was given to an officer it was read and explained to him, and that he was informed what to do under it, are inadmissible in evidence in a prosecution against him for killing the person sought to be arrested under it. *Jackson v. State*, 66 Miss. 89, 14 Am. St. Rep. 542, 5 So. 690.

Though the act of an officer seeking to make an arrest was illegal, and though death resulted, however, it is not necessarily murder; and if the intention was, not to take life, or maliciously inflict great bodily harm, but simply to maim the prisoner and thus capture him, it would be manslaughter, and not murder. *Com. v. Max*, 8 Phila. 422.

And a request to charge, in a prosecution against an officer for homicide in making an arrest for an alleged felony, that, if the jury had any doubt about the lawfulness of the means adopted by the defendant to arrest the deceased they should acquit, is properly refused as too indefinite. *People v. Matthews* (Cal.) 58 Pac. 371.

And where an officer had good reason to believe that he had authority to arrest a person for the violation of a town ordinance, committed in his presence, and acted in good faith in making such arrest, and the person sought to be arrested resisted, he had the right to apply force to accomplish it, and, if necessary, to kill such person to save his own life or person from great bodily harm; and such a killing is justifiable where he used no more force than was reasonably necessary to then and there accomplish the arrest, though the person killed was not guilty of either felony or misdemeanor, for the reason that there was, in fact, no ordinance prohibiting the act which he engaged in; and in such case an instruction tending to neutralize the effect of the officer's good faith as a justi-

fication should not be given. *State v. Coleman* (Mo.) 84 S. W. 978.

b. Action without a warrant.

An arrest of, or attempt to arrest, a person without a warrant, made by an officer for a misdemeanor not committed in his presence, is illegal, and the person's resistance to such arrest, or his escape therefrom, constitutes no justification for the taking of his life; and, where the officer kills such person in an effort to overcome his resistance or recapture him, he is guilty of either murder or manslaughter according to the facts and circumstances of the case. *State v. Dietz*, 59 Kan. 576, 53 Pac. 870.

And an officer who, on the plea, that he had heard that a colored man had threatened to kill a negro girl, and that he was in town for the purpose of carrying out his threat, watched near the house of the colored girl, and during a dark night shot and killed a white man, claiming to have mistaken him for such colored man, is guilty of murder if he intended to use the occasion as a pretext on which to kill the colored man; but, if he only intended to arrest the colored man, and was making the attempt illegally without a warrant, the offense might be of no higher grade than manslaughter, and a charge on manslaughter is called for in a prosecution therefor. *Carter v. State*, 30 Tex. App. 551, 28 Am. St. Rep. 944, 17 S. W. 1102.

And an ordinance against persons being on the street after 10 o'clock P. M. without reasonable excuse is not admissible in evidence in a prosecution against a marshal for killing a person in an attempt to arrest him, where the arrest was made for disorderly conduct, and no claim was made that the officer was undertaking to enforce the ordinance. *Davis v. Com.* 25 Ky. L. Rep. 1426, 77 S. W. 1101.

So, N. C. Code, § 1125, making it imperative upon a person summoned by a proper officer to aid in the restoration or preservation of the public peace and prevent a breach of it applies only to present breaches of the public peace, and does not warrant an arrest by a private person after the offense has been committed and the offenders have dispersed and gone away; and when such an arrest is attempted, and the person sought to be arrested resists, as is his right and the other slays him, he is guilty, at least, of manslaughter. *State v. Campbell*, 107 N. C. 948, 12 S. E. 441.

An officer may arrest without warrant for wife beating, however, if he arrives at the scene during the progress or immediately after the beating, being attracted thereto by the noise of the disturbance or the outcry of the woman, and in such case is entitled to use such force as is necessary to overcome resistance. *Ramsey v. State*, 92 Ga. 53, 17 S. E. 613.

And a peace officer has the right, without a warrant, to arrest any person in the night when he has reasonable ground to believe that such person has committed a felony; and an instruction to that effect is correct in a prosecution against him for killing an alleged felon in an attempt to arrest him. *People v. Kilvington*, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 799.

And the rule protecting a person killing a felon, or a person who had given a dangerous wound in an attempt to arrest him when fleeing from justice, is not confined to those who were present so as to have ocular proof of the fact

of the commission of the felony, or to those who first had knowledge of it, but extends to all who joined or aided in the pursuit. *Carr v. State*, 43 Ark. 99.

And, within this rule, a quarrel and fight between two persons are admissible in evidence, in a prosecution against an officer who killed one of them while seeking to arrest him, as bearing upon the question whether or not he had committed a felony, and whether the officer had a right to arrest him without a warrant, and kill him if necessary to effect his arrest. *People v. Adams*, 85 Cal. 231, 24 Pac. 620.

And, upon the trial of an action against a peace officer for shooting one fleeing after having a scuffle with a man who had insulted his wife and sister, evidence as to the insult and the complaint of the wife to the husband is admissible and part of the *res gestæ*, where the shooting and the scuffle all occurred within a short space of time. *Petrie v. Cartwright*, 114 Ky. 103, 59 L. R. A. 720, 70 S. W. 297.

So, if a police officer sees a person running at night pursued by another crying, "Stop, thief," and he refuses to stop on being ordered by the policeman to do so, the policeman has reasonable cause to believe that the person thus fleeing has committed a felony, so as to justify him in shooting over his head for the purpose of frightening him and causing him to stop and permit the officer to arrest him; so that, in case he accidentally kills him in thus shooting, he will be relieved from liability therefor. *People v. Kilvington*, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 799.

And in such case evidence that the pursuer and the pursued had had a quarrel a short time previously, and that the pursuer had threatened the pursued, is inadmissible, in a prosecution against the officer for the homicide, to support the theory of the prosecution that confused wounds upon the face of the deceased had been inflicted by his pursuer, and that deceased was fleeing from him, and not as a criminal, when shot. *People v. Kilvington* (Cal.) 36 Pac. 13.

And evidence that the person shot went to the place where he was shot on lawful business is irrelevant, where the officer who killed him knew nothing of the matter, and did not recognize the deceased at the time of the shooting. *People v. Kilvington*, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 799.

And evidence that two men who had a quarrel and fight made up their differences and became reconciled before an officer attempted to arrest one of them for an alleged felony, is immaterial, and inadmissible in a prosecution against the officer for killing the person sought to be arrested in effecting the arrest, since the only use that could be made of it would be to show that no arrest was necessary. *People v. Adams*, 85 Cal. 231, 24 Pac. 629.

The fact that a party arrested, or sought to be arrested, without a warrant, however, may have been shown to have been justly suspected of a felony, will not justify a homicide on the part of the officer seeking to make the arrest if he had no warrant, unless he brings himself within some of the rules authorizing such arrests without a warrant. *Carter v. State*, 30 Tex. App. 551, 28 Am. St. Rep. 944, 17 S. W. 1102.

To warrant an arrest without a warrant, so that it would not be deemed wrongful in a prosecution for a homicide committed in mak-

ing the arrest, there must be such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain a strong suspicion, that the person sought to be arrested had been guilty of a felony. *People v. Kilvington*, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 799.

And it has been held that, where no process has been issued for the commission of a felony, a homicide in making an arrest therefor can only be justified, even by an officer, by showing the actual commission of a felony, and that there was a positive necessity to take the life of the felon in order to arrest or detain him; it is not sufficient merely to show a belief or apprehension upon the part of the person seeking to make the arrest that a felony had been committed. *Conraddy v. People*, 5 Park. Crim. Rep. 234.

Nor does the mere fact that a person ran upon a public street in the night when pursued by a stranger, and failed to obey a command of the stranger to stop, offer any justification to the stranger, who was an officer in citizen's clothes, in shooting at him, though burglaries had recently been committed in the neighborhood, and the officer was searching for the offender. *People v. McCarthy*, 47 Hun, 491, affirmed in 110 N. Y. 309, 18 N. E. 128.

And a conspiracy for the escape from a chain gang of a person under sentence for a misdemeanor is not a felony, under a statute defining it to be an offense for which the offender, on conviction, shall be liable to be punished by death or imprisonment in the penitentiary; and self-defense cannot be interposed as a justification for the killing by a private person in an effort to arrest the conspirator. *State v. Whittle*, 59 S. C. 297, 37 S. E. 923.

And if a convict took a gun from a guard forcibly for the purpose of making safe his escape, but not feloniously with intent to appropriate the same to his own use, the offense is not robbery, and not a felony in which a killing by a private person in an effort to arrest the culprit could be justified on the ground of self-defense. *Ibid.*

And having a stolen horse in one's possession, and taking it through a county when it was stolen in another county, are not a felony in the former county, within the meaning of Tex. Rev. Code, Crim. Proc. art. 226, providing that a peace officer, or any other person, may, without warrant, arrest any offender when the offense is committed in his presence, or within his view, if the offense is one classed as a felony, or as an offense against the public peace; and evidence of such theft and taking through the county is not admissible in behalf of the defense in a prosecution against one who killed the thief in an attempt to arrest him in the latter county for the theft. *Lacy v. State*, 7 Tex. App. 408.

Private persons may forcibly interfere to suppress a riot or resist rioters, however, although a riot is not necessarily a felony in itself, and, if they cannot otherwise suppress it or defend themselves from the rioters, they may justify a homicide in killing them, since it is their right and duty to aid in preserving the peace. *Pond v. People*, 8 Mich. 150.

And all that is required of a deputy sheriff and persons summoned to assist him in case of an alleged illegal assemblage is that he shall in good faith believe, and have reasonable ground to believe, that the persons assembled

have banded themselves together and gone forth armed for the purpose of alarming, injuring, or intimidating any person or persons; in which case they have a lawful right to disperse and arrest such persons without a warrant, and use such force as is reasonably necessary to effect the purpose; and, if the others resist the arrest, it is lawful, if necessary to make such arrest, to shoot the persons so resisting. *Lindle v. Com.* 111 Ky. 866, 64 S. W. 986.

And declarations made by members of a mine-workers' association as to plans and purposes of the organization with reference to closing up certain mines, and declarations made by them to certain nonunion miners that, if they did not cease work peaceably they would be forced to do so, are admissible in evidence on behalf of the defense, in a prosecution against deputy sheriffs, who killed members of the mine-workers' association in an attempt to break up an alleged illegal assemblage of striking miners assembled for the supposed purpose of closing such mines. *Ibid.*

And so is the fact that certain leaders of a mine-workers' association were armed when coming from the scene of the conflict. *Ibid.*

And a contract between union miners and mine operators in neighboring counties, which furnished a motive upon the part of the miners for closing certain mines, is also admissible. *Ibid.*

And in such case questions as to the relative rights of united mine workers to assemble and march in a peaceable manner, and of the right of the operators of the mines to protect their property from violence and invasion, should not be submitted to the jury. *Ibid.*

In determining the question of the existence of probable cause to warrant an officer in making an arrest, the facts and circumstances presented to him at the time he was required to act are only to be taken into account. *People v. Kilvington*, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 799.

And it is not the province of the jury to decide whether the facts and circumstances were sufficient to constitute probable cause to believe that a felony had been committed so as to warrant the arrest; the question of the probable cause or reasonable ground for suspicion is one of law, unless the evidence out of which it arises is conflicting, in which event it is the duty of the court to instruct the jury what facts, if established, will constitute probable cause, submitting to them only the question as to the existence of such facts. *Ibid.*

See also *O'Connor v. State*, 64 Ga. 125, 37 Am. Rep. 58, *supra*, X. a.

c. Action outside of territorial jurisdiction.

The fact that a person had been deputized by a sheriff to arrest another does not authorize him to do so outside of the sheriff's county, so that such an arrest could be regarded as an official act in a prosecution against him for killing the person arrested or sought to be arrested. *York v. Com.* 82 Ky. 360.

And a copy of an indictment and bench warrant against a person, with indorsements thereon, are not admissible against a person deputized by the sheriff to make an arrest under such warrant, who killed the person sought to be arrested for the homicide, where the arrest was not in the sheriff's county. *Ibid.*

So, a warrant issued by a justice of the peace in one state, authorizing the arrest of a per-

son upon a charge of larceny, gives no authority to arrest such person in another state, and an attempt to arrest such a person thereunder in the latter state is unauthorized and illegal; and, where several persons armed themselves, and went in search of the party sought to be arrested, and found him in the latter state, and presented their loaded guns at him ready to fire, and the gun of one of them was accidentally discharged, killing him, they are guilty of murder in the second degree. *Tarvers v. State*, 90 Tenn. 485, 16 S. W. 1041.

An instruction that a deceased person was liable to arrest by a private person, without a warrant, for such crimes committed in another state as were punishable in that state by imprisonment in the state prison for one year or more, which would include robbery, grand larceny, and assault with intent to murder with a deadly weapon, is proper, however, in a prosecution for the killing of a person sought to be arrested, in which the defense was self-defense, in a lawful attempt to arrest him as a fugitive from such other state for crime, where the statutes of the state so provided. *State v. Whittle*, 50 S. C. 297, 37 S. E. 923.

And refusal to instruct, in a prosecution against an officer for killing a person sought to be arrested, that the officer had the right to exercise the duties of his office outside the corporate limits of his city, if erroneous, is cured by an instruction that he had a right to arrest anyone who was creating a disturbance, that being the act for which the arrest was sought to be made. *State v. Weston*, 98 Iowa, 125, 67 N. W. 84.

d. Negligent action.

An officer seeking to make an arrest may be guilty of a negligent homicide, as well as may any other person; and the question, in a prosecution against an officer for shooting a man whom he saw another pursuing, claiming to have intended to shoot over his head merely for the purpose of stopping his flight, is whether, under the circumstances as they appeared to him, he acted recklessly and with criminal negligence; and testimony as to the reason why the person killed was at the place where he was killed is improperly admitted. *People v. Kilvington* (Cal.) 36 Pac. 13.

In such case the question whether or not his act was one of criminal negligence is one of fact, the determination of which must be left to the sound judgment and discretion of the jury in a prosecution for the killing, and, in the decision of it, the defendant is entitled to the benefit of any reasonable doubt arising upon the evidence. *People v. Kilvington*, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. 790.

To constitute, in law, a crime, there must exist a union or joint operation of act and intent, or criminal negligence; and, where an officer shot a person being pursued by another, intending to shoot over his head, an instruction that an act and evil intent must combine to constitute, in law, a crime, is properly refused, as it entirely eliminates the important factor of criminal negligence. *People v. Kilvington* (Cal.) 36 Pac. 13.

So, the question whether the defendant was cool and clear headed or otherwise, and whether he had been drinking intoxicating drink, is admissible in evidence, either in chief or in rebuttal, in a prosecution for homicide, on the ground that the killing was done by a peace

officer in order to make an arrest. *Stephens v. Com.* 20 Ky. L. Rep. 544, 47 S. W. 220.

One who discharges his gun at a fleeing felon in a careful and heedful manner, however, not for the purpose of killing him, but slightly to injure him and prevent his flight, where he cannot otherwise stop him, is justified in his act, though death results, where it is due to the fact that the felon suddenly and unexpectedly changes his position, so that the wound is delivered in a place not intended. *Com. v. Long*, 17 Pa. Super. Ct. 641; *People v. Matthews* (Cal.) 58 Pac. 371.

e. Malicious action.

Here, as elsewhere, premeditated killing, or killing with malice aforethought, is murder; and the fact that the person doing it is an officer, or that he does it in making or attempting an arrest, is of no effect.

Thus, the fact that a person had committed a felony would not justify an officer in shooting at him with intent to do him grievous bodily harm in an attempt to arrest him, where he did not know of the felony at the time he fired. *Reg. v. Dadson*, 4 Cox, C. C. 358, 2 Den. C. C. 35, 14 Jur. 1051, 3 Car. & K. 148, 20 L. J. Mag. Cas. N. S. 57.

And the rule is the same when the killing was with malice and premeditation, though the officer supposed, whether mistakenly or otherwise, that he had authority to arrest. *State v. Coleman* (Mo.) 84 S. W. 978.

And the killing of a person unnecessarily, wantonly, and wilfully, by a peace officer or any of his posse, is not justified by the fact that the person killed was engaged in the habitual violation of the revenue laws of the United States. *Georgia v. O'Grady*, 3 Woods, 496, Fed. Cas. No. 5,352.

So, officers who killed members of an alleged riotous and unlawful assemblage in an attempt to arrest them cannot rely upon the protection with which the law clothes them, and be excused on the ground of self-defense, where they did not in good faith believe, and have reasonable grounds to believe, that the persons assembled were then going forth for the purpose of alarming, intimidating, disturbing, or injuring any person or persons, and where they were not acting in good faith in what appeared to them to be the discharge of their official duty. *Lindle v. Com.* 111 Ky. 866, 64 S. W. 986.

And evidence in a prosecution for homicide that, after a police officer had emptied his revolver at a person he was seeking to arrest, he called to a bystander, saying, "Help me," and, "Shoot him," who immediately began firing at the person sought to be arrested, who retreated, the other following him and emptying his pistol, after which he got another and continued to pursue and fire at him, voluntarily killing him, amply warrants the jury, in a prosecution for the killing, in finding that he was actuated by a murderous design to kill. *People v. Brooks*, 131 Cal. 311, 63 Pac. 464.

So, evidence of an unprovoked assault with a deadly weapon, and an attempt to use it upon the person attacked, and that it was without justification, and done in aid of another in carrying out a purpose to kill, is sufficient to go to the jury in a prosecution for the subsequent killing, though the blow causing death was inflicted by another, and warrants a verdict of guilty of manslaughter, as against a claim that it was done in a lawful manner in attempting

to arrest the deceased for disturbing the peace. *Havens v. Com.* 26 Ky. L. Rep. 369, 82 S. W. 369.

And evidence that an officer had used harsh terms about a person whom he had killed in an effort to arrest him, and that he had stated that he would not mind killing him, is for the jury to consider in a prosecution against him for the killing, on the question whether or not such person showed deliberate purpose to kill. *North Carolina v. Gosnell*, 74 Fed. 734.

And evidence that officers charged with killing certain members of a mine-workers' association had been employed as guards by certain coal companies previous to their appointment as deputy sheriffs is admissible in a prosecution for the homicide committed while they were employed in an attempt to break up an alleged illegal assemblage of striking miners assembled for the supposed purpose of closing certain mines. *Lindle v. Com.* 111 Ky. 866, 64 S. W. 986.

So, a statement by the defendant in a prosecution for killing to prevent an escape that he had killed or shot five men while guarding convicts is sufficient to warrant a refusal to charge that there was no evidence that he had ever shed any other man's blood, notwithstanding the fact that such statement might have been excluded as irrelevant testimony had objection been made to it. *Handley v. State*, 96 Ala. 48, 38 Am. St. Rep. 81, 11 So. 322.

And where several persons acting under an unauthorized and illegal warrant armed themselves with shotguns and went in search of another, apparently to arrest him under such warrant, but making threats upon the way to kill him, and, upon overtaking him, pointed their loaded guns at him, and one of them shot and killed him, claiming that the gun was discharged accidentally, an instruction in a prosecution for such killing that such act would be murder in the second degree, if erroneous as to the degree of the crime, is without prejudice, where the jury returned a verdict of murder in the first degree, which required that they should be satisfied beyond a reasonable doubt that the killing had been premeditated. *Tarvers v. State*, 90 Tenn. 455, 16 S. W. 1041.

The mere fact that an officer having a warrant for the arrest of a person went out with a predetermination to kill him, however, is not alone sufficient to render him guilty of murder in the first degree, the evil intention and the deed must coexist, and the intention must have prompted the deed. *Clements v. State*, 50 Ala. 117.

So, where there is an affray between an officer and a person sought to be arrested by him, and mutual blows are exchanged, and the officer kills the other while in a heat of passion, it is manslaughter, although the other was originally engaged in an unlawful act. *Forster's Case*, 1 Lewin, C. C. 187.

And if no resistance to an arrest is interposed, or if resistance is discontinued, it is murder or manslaughter to slay the party arrested, according to the circumstances of the case,—murder if the officer had time to cool his passions; and manslaughter if the killing took place in the heat of excitement or passion. *Com. v. Max*, 8 Phila. 422.

f. Notice of character and purpose.

It is the duty of an officer attempting to make an arrest to make known his purpose and the 67 L. R. A.

capacity in which he acts, if they are not already known to the person sought to be arrested, a failure to perform which may render him the aggressor, or the apparent aggressor, so as to warrant resistance by the accused, and so as to deprive the officer of the right to claim to have acted in self-defense in overcoming the resistance, though so forcible as to put him in danger of the loss of life or of serious bodily harm. *Plasters v. State*, 1 Tex. App. 673; *State v. Rollins*, 113 N. C. 722, 18 S. E. 894.

And in such case the person making the arrest and slaying the person arrested is guilty of murder, unless excessive force was used by those resisting, in which case he would be guilty of manslaughter. *State v. Rollins*, 113 N. C. 722, 18 S. E. 894.

So, to justify the killing of a felon by a private person for the purpose of arresting him, the slayer must show, not only that a felony was actually committed, but also that he avowed his object, and that the felon refused to submit. *State v. Roane*, 13 N. C. (2 Dev. L.) 58.

But if the purpose and capacity of the officer are known to the person sought to be arrested when the arrest is attempted, and the arrest is otherwise legal, submission to arrest is a duty, and resistance is unjustifiable, and warrants the use of such force as may be necessary to overcome it. *Plasters v. State*, 1 Tex. App. 673.

And an attempt to arrest a person found violating the law without first notifying him of the charge upon which the attempted arrest is made is not unlawful, so as to be no justification for a killing in effecting the arrest, where both the official character of the person making the arrest, and the charge upon which it was made, are known to the party arrested. *Wolf v. State*, 19 Ohio St. 248.

And an officer known to be such, having legal authority to arrest, is not bound to show or read the warrant before arrest is secured, where resistance is made. *North Carolina v. Gosnell*, 74 Fed. 734; *United States v. Rice*, 1 Hughes, 560, Fed. Cas. No. 16,153.

But if no resistance is offered, in order to warrant the use of such force as may be necessary to effect the arrest the officer should always, upon demand, show his warrant to the party to be arrested, or notify him of the substance of it. *United States v. Rice*, 1 Hughes, 560, Fed. Cas. No. 16,153.

And where an officer plainly announces his purpose to make an arrest for a breach of the peace which has just taken place in his presence or hearing, and all the demonstrations of force which follow the announcement are in line with that purpose, and would indicate to a reasonable man no intention at variance with it, and the person sought to be arrested ought to know that, by submitting, he can instantly terminate all demonstration of force, the case is not one in which such person can have reasonable ground to believe a felony is intended or about to be committed upon him, so as to justify his resistance. *Ramsey v. State*, 92 Ga. 53, 17 S. E. 613.

So, while a person who is not a known officer ought to show his warrant and read it if required, a failure to do so will not make him a trespasser *ab initio* so as to deprive him of the right to overcome the resistance of the other by such force as may be necessary, where the other has notice of the warrant, and is fully aware of

its contents, and has made up his mind to resist its execution at all hazards. *State v. Garrett*, 60 N. C. (1 Winst. L.) 144, 84 Am. Dec. 359.

And the question whether a feeling felon, who was about to reach a place of safety, should have been notified of the cause of arrest by a private person before shooting, is one of fact for the jury under the evidence. *Com. v. Long*, 17 Pa. Super. Ct. 641.

g. Further authority.

The question of an officer's authority to act, and of the propriety of his methods, and as to whether or not they confer a right of resistance upon a person sought to be arrested, and as to their effect upon a resulting homicide, seems to be precisely the same whether the officer killed the person sought to be arrested, or the person sought to be arrested killed the officer. Reference is made for further authority on this question, therefore, to *note* to *Keady v. People*, 66 L. R. A. 353, on the subject of *Homicide in resisting arrest or official action*.

XI. Action by deputy or assistant.

A principal cannot be held to answer criminally for the act of his deputy, unless it was done with his consent or by his command; and where a deputy jailer causes the death of a prisoner by confining him against his will, and keeping him confined in an unwholesome and dangerous room, the deputy, and not the principal jailer, is criminally responsible for the death. *Rex v. Huggins*, 2 Ld. Raym. 1574, 2 Strange, 882.

And a principal cannot delegate to his agent the authority to do an illegal act; and authority, given by the owner of a slave, to kill the slave if he cannot otherwise be taken, is illegal, and imposes no obligation of performance. *Morton v. Bradley*, 30 Ala. 683.

But the owner of a slave, who authorizes an agent to kill him if he cannot otherwise be taken, cannot relieve himself from liability for the killing of the slave by the agent, on the theory that the killing was the act of the agent, and not his act. *Ibid.*

Though, where authority is given by the owner of a slave to an agent to kill the slave if he cannot otherwise be taken, and the agent delegates such authority to a third person, and the third person kills the slave, he is not relieved from liability therefor, on the theory that the owner cannot take advantage of his wrong; since the delegation to the agent of the power to kill the slave carries with it no authority to employ assistants in the work of destruction, or to transfer his immunity from liability to another. *Ibid.*

A duly summoned assistant of an officer, however, is entitled to the same protection of law which is afforded to an officer who has process in his hands; and, where he obeys the orders of his superior officer, and resistance is made to his performance of duty, he may, even in the temporary absence of the officer with process, resort to such extreme measures as may be necessary for self-protection, and the arrest of the offender. *North Carolina v. Gosnell*, 74 Fed. 734.

Though the right of a person called upon by an officer to aid in making an arrest of a misdemeanant, to kill the misdemeanant to prevent an escape, is no greater than that of the 67 L. R. A.

officer. *Handley v. State*, 96 Ala. 48, 38 Am. St. Rep. 81, 11 So. 322.

And the uncommunicated intentions of a constable who had appointed a deputy, that the deputy should not act as such, are immaterial and inadmissible in evidence in a prosecution against the deputy for killing a man in an attempt to arrest him for a breach of the peace. *State v. Dierberger*, 90 Mo. 369, 2 S. W. 286.

And whether or not a justice has power to deputize a private person to serve a warrant, if the person thus deputized acts under the warrant, he should be treated, in a prosecution for killing the person sought to be arrested in the effort to make the arrest, as clothed with the protection thrown around officers *de facto* making arrests. *Harris v. State*, 72 Miss. 99, 16 So. 360.

And Mo. Rev. Stat. § 652, giving every constable power to appoint deputies, for whose conduct he shall be answerable, and providing that the appointment shall be filed in the office of the county clerk, is directory only as to the provision of filing; and a deputy appointed by a constable, who killed a man in an attempt to arrest him for a breach of the peace, is not deprived by this provision of his right to say, in justification of his act, that he was a deputy constable, by the fact that he had failed to file his appointment. *State v. Dierberger*, 90 Mo. 369, 2 S. W. 286, 96 Mo. 666, 9 Am. St. Rep. 380, 10 S. W. 168.

XII. Conclusion.

Officers of the law charged with duties from the performance of which homicide results are not chargeable with criminal responsibility therefor. This rule is particularly applicable to officers charged with the execution of a death sentence. But the killing of a person, though under sentence of death, is murder if done by any other than the person required by law to do it, or if done at any other time, or in any other manner, than that prescribed. And the rule is also applicable to the acts of officers in the performance of any other duties imposed by law, whether civil or military, including the obeying and carrying out of orders of superior officers where that is a duty. The act of a person, whether he be a civil officer, or a military one, or a private soldier, resulting in death, is not criminal where it was done in the performance of his official duty, or in carrying out proper orders of an official superior; and, where he is sought to be held responsible to any tribunal, or in any way other than to his own government, or to his official superior, the courts of the government or jurisdiction for which he acted will procure his discharge by habeas corpus. If the killing was not done in order to enable the officer or soldier to perform his legal duty, however; or if the authority or order under which he acted was illegal, and such that any person of ordinary sense would recognize its illegality,—the slayer is not protected by his official position, or by his authority or orders; and the question whether his act was an official one, or one of aggression, is one of fact for a jury.

The same general rule applies with reference to homicide in effecting an arrest, though its application may be somewhat different. An arrest in a proper case is an official duty. The officer, therefore, is clothed with authority to use such force as may be necessary and proper for effecting his purpose; and, if such force,

exerted properly and in a proper case, results in the death of the person sought to be arrested, the homicide is justifiable. The degree of force which may be used, however, depends upon the differing surrounding circumstances. If the act for which the arrest was sought to be made was a felony, or, at least, if it was a felony dangerous to human life,—and in some instances it has been held that, if the act was dangerous to human life, though a misdemeanor,—the law justifies the officer in killing the culprit if he cannot otherwise be taken; and this rule applies to checking or preventing flight before actual arrest, and to preventing escape or rescue after arrest, and to rearrest after escape, as well as to actual physical resistance to, or an attack upon, the officer. The amount of force must be limited, however, to that necessary, or apparently necessary, to the proper accomplishment of the arrest; and if it can be made without killing, the killing will be at least manslaughter; and the question as to what force is necessary is one of fact for the jury.

With reference to misdemeanors, and perhaps felonies, not affecting the person, the same danger does not result to the public from a failure of justice as in the case of the more dangerous or serious crimes. Greater regard, therefore, is given to the life of the alleged wrongdoer. And, while the officer in making the arrest is permitted to use such force as is necessary to overcome resistance and subdue efforts to escape, he cannot take the life of the alleged culprit, or inflict upon him great bodily harm, except to save his own life, or to prevent like harm to himself. This rule makes it criminal to kill to prevent escape by flight either before or after actual arrest, but re-

quires the officer to press on though he meets with personal resistance, and permits him, in case he does so, and is placed in danger of loss of life or of great bodily harm, to kill the culprit in self-defense. The justification for killing must rest solely upon the ground of self-defense, differing from the ordinary right of self-defense in that the officer must press on and need not flee to the wall, and usually permits the use of deadly weapons only when the officer has reason to suppose that such weapons are about to be used on him; and the question of necessity of killing in self-defense is one for the jury.

If the officer has no right to arrest, however, he is a trespasser, who may be resisted, and cannot justify a killing on the ground of self-defense. And an officer may be held criminally liable as for negligent homicide when he acted negligently, or as for a malicious homicide when he acted with malice, notwithstanding the fact that he acted with due authority; and, though his right to act is complete, he may still render himself a trespasser, and subject to be treated as such, by proceeding without notice to, and in the absence of knowledge of, the person sought to be arrested, of his official character and design.

A principal officer cannot be held criminally liable for a killing by his deputy or assistant in effecting an arrest, unless he expressly and directly directed or authorized it. But a deputy or duly authorized assistant has a right to use the same force, and is entitled to the same protection, and may defend himself to the same extent, as the principal officer under whom he acts.

F. H. B.

MICHIGAN SUPREME COURT.

Mary Jane WARE

v.

Charles W. HALL, *Appt.*

(.....Mich.....)

Merely raising a few vegetables on a vacant lot is not such occupancy as entitles one entirely insolvent, without ability sufficient to earn her own support, and without any prospect of getting money to erect a building thereon, to hold the land indefinitely as a homestead.

(October 26, 1904.)

A PPEAL by defendant from a judgment of the Circuit Court for Berrien County, in Chancery, in a suit to cancel an execution levy upon certain real estate. *Reversed.*

Statement by Grant, J.:

The object of this bill is to cancel an exe-

NOTE.—As to what occupancy is necessary to constitute property a homestead, see also, in this series, *First Nat. Bank v. Hollingsworth*, 6 L. R. A. 92; *Gill v. Gill*, 55 L. R. A. 191; and *Lyons v. Andry*, 55 L. R. A. 724. 67 L. R. A.

cution levy made upon a vacant lot in Benton Harbor, which complainant claims as a homestead. The sole question presented by the record is whether she had taken sufficient steps to establish and maintain this lot as a homestead. She formerly lived in Kalamazoo, where she owned a lot and a small house, in which we may infer (though it does not clearly appear upon the record) that she lived. In September, 1899, she sold that house and lot for \$375, out of which she paid a mortgage upon them for \$250. She then moved to Benton Harbor, where some of her children were living. While living there with her son she purchased the lot in question, for which she paid \$150. She is a widow having four children, all of whom are married. She testified that they contributed a little towards her support. Subsequently she rented a house of the defendant, failed to pay the rent, and he brought suit therefor, obtained a judgment, and levied upon this lot in June, 1903. The lot was vacant when purchased, and was never occupied by her in any other manner or for any other purpose than to raise some vegetables upon it during the summer. It

does not appear that it was fenced. Her son set out two small maple trees for her in front of the lot, but not at her request. She afterwards paid him 40 cents apiece for them. There were also two or three peach trees upon the lot. She had no money with which to build a house, or even to pay her rent. She never made any plans for building, and testified that the reason was that she was too poor.

Mr. Harris S. Whitney, for appellant:

A homestead consists of a certain tract of land "with a dwelling house thereon, with its appurtenances, owned and occupied by any resident of this state."

Mich. Const. art. 16, § 2.

It is the land including the dwelling house and the appurtenances, and constituting a homestead in fact.

Beecher v. Baldy, 7 Mich. 500; *Wisner v. Farnham*, 2 Mich. 472; *Coolidge v. Wells*, 20 Mich. 87.

The law is made to protect actual homes, and not mere possibilities.

Stanton v. Hitchcock, 64 Mich. 320, 8 Am. St. Rep. 821, 31 N. W. 395; *Dewille v. Widoe*, 64 Mich. 596, 8 Am. St. Rep. 852, 31 N. W. 533; *Reske v. Reske*, 51 Mich. 544, 16 N. W. 895; *Mills v. Hobbs*, 76 Mich. 126, 42 N. W. 1084.

Mr. John J. Sterling, for appellee:

Homestead laws are liberally construed and enforced for the benefit of the debtor, and are not merely a privilege conferred, but are, under the Constitution, an absolute right.

Chamberlain v. Lyell, 3 Mich. 458; *Comstock v. Comstock*, 27 Mich. 101; *Barber v. Rorabeck*, 36 Mich. 399; *Bunker v. Paquette*, 37 Mich. 80; *Lozo v. Sutherland*, 38 Mich. 171; *Skiinner v. Shannon*, 44 Mich. 86, 38 Am. Rep. 232, 6 N. W. 108; *Wilson v. Bartholomew*, 45 Mich. 43, 7 N. W. 227; *Bouchard v. Bourassa*, 57 Mich. 10, 23 N. W. 452; *Riggs v. Sterling*, 60 Mich. 643, 1 Am. St. Rep. 554, 27 N. W. 705.

Absence from a homestead for a period of six years will not deprive the owner of the protection of the statute, if, during such absence, he had a continuing intent to return and occupy it.

Kaeding v. Joachimsthal, 98 Mich. 78, 56 N. W. 1101; *Riggs v. Sterling*, 60 Mich. 643, 1 Am. St. Rep. 554, 27 N. W. 705; *Evans v. Grand Rapids, L. & D. R. Co.* 68 Mich. 602, 36 N. W. 687; *Myers v. Weaver*, 101 Mich. 477, 59 N. W. 810.

Where a vacant city lot is all the property owned by complainant, and was bought with the intention of making it a homestead as soon as the owner's means would permit, and the owner has planted shade trees in front of the lot along the street line, 67 L. R. A.

or otherwise attempted to improve it, the same will constitute a homestead in law.

Reske v. Reske, 51 Mich. 541, 47 Am. Rep. 594, 16 N. W. 895; *Dewille v. Widoe*, 64 Mich. 593, 8 Am. St. Rep. 852, 31 N. W. 533; *Mills v. Hobbs*, 76 Mich. 123, 42 N. W. 1084; *Corey v. Waldo*, 126 Mich. 709, 86 N. W. 122.

Grant, J., delivered the opinion of the court:

Where one buys a piece of land with the intention of soon thereafter erecting a building thereon for the sole purpose of a homestead, there is reason in holding that such land comes within the protection of the Constitution as a homestead, and that he will have a reasonable time in which to erect the building. That is not this case. For three years and a half complainant had owned this lot. It could not exist indefinitely as a homestead in her intention alone. Something must be done within a reasonable time towards making it such a homestead. There was no such occupancy as, under any of the decisions cited, has been held to constitute a homestead. From her own testimony there was no immediate or remote prospect that she could erect a house. She testified that her son, who was a carpenter, said that some time when he got able he would erect a house on the lot and give it to her. That was the only prospect she had. The facts were entirely different in the cases relied upon. *Reske v. Reske*, 51 Mich. 541, 47 Am. Rep. 594, 16 N. W. 895; *Dewille v. Widoe*, 64 Mich. 593, 8 Am. St. Rep. 852, 31 N. W. 533; *Mills v. Hobbs*, 76 Mich. 126, 42 N. W. 1084; *Corey v. Waldo*, 126 Mich. 706, 86 N. W. 122.

Corey v. Waldo comes nearest to sustaining the plaintiff's contention. But in that case the defendant and his wife were "proceeding as rapidly as circumstances would permit" to convert a homestead, which had been condemned by the city of Detroit for the purpose of opening a street, into another homestead composed of the lot which had been levied upon. Mr. Waldo was able to erect buildings thereon as a homestead, and we held that the reasonable time for him to carry that intention into effect by the occupancy which the Constitution and law require had not expired. Here the naked question is, Can one utterly insolvent, without any ability to earn money sufficient even to support herself, without any prospect of getting money to erect a building thereon, hold land indefinitely as a homestead? To so hold would be in direct opposition to the language of the Constitution and the law, which require ownership and occupancy combined. In all the cases cited, except pos-

sibly *Corey v. Waldo*, there were some acts of occupancy. Intention without occupancy cannot create a homestead, for the Constitution requires occupancy as well as intention. There must be some acts which, coupled

with the intention, constitute the necessary occupancy.

Decree reversed and bill dismissed.

The other Justices concur.

NEW MEXICO SUPREME COURT.

Re ESTATE OF Menna TEOPFER, Deceased.

Mary TEOPFER, *Appt.*,

v.

Henry KAEUFER.

(.....N. M.....)

- *1. In this territory wills may be revoked, not only by a written instrument, as provided in § 1953, Comp. Laws 1897, but also in certain causes by operation of law.
2. The marriage of a testator, whether or not it is followed by the birth of a child, revokes an antenuptial will.

(September 13, 1904.)

APPEAL by the legatee from a judgment of the District Court for Bernalillo County setting aside the will of Menna Teopfer, deceased, and granting letters of administration to Henry F. Kaeufer. *Affirmed.*

Statement by **MILLS**, Ch. J.:

One Menna Teopfer, then an unmarried woman, made a will on the 11th day of July, 1900, by which she devised all of her property to her sister Mary, and to the children of her said sister, should such sister die before her. On April 8, 1901, she married Henry F. Kaeufer, and on June 13, 1902, she died, leaving surviving her husband. Deceased never had any children as the result of her marriage. Her property remained in her name at her death, and the will had never been revoked by any written instrument. On September 2, 1902, the will was duly filed in the probate court of Bernalillo county by the surviving husband, and at the same time he filed his petition asking that letters of administration be issued to him, on the grounds that the marriage of Menna Teopfer to him, subsequent to the making of the will, revoked the will,

and that therefore the deceased died intestate. The application of the surviving husband was opposed by Mary Teopfer. The evidence of the subscribing witnesses to the will was taken by deposition, and was, in substance, that Menna Teopfer duly signed the will, and that they affixed their names to the same as witnesses in her presence and in the presence of each other; and the judge of probate approved the will, from which Henry F. Kaeufer, appellee herein, prayed an appeal to the district court of the county of Bernalillo, which appeal was granted, bond was given, and the clerk of the probate court certified "a full, true, and complete transcript of the proceedings and all matters relating to the estate of Menna Teopfer, deceased, now on record or on file" in his office, to the district court of the second judicial district. On February 6, 1903, a stipulation was filed in the district court, stating the facts on which the contest of the will should be submitted to the court. Issue of citations was waived, and Mary Teopfer and the minor heirs (her children) entered their appearance by their attorneys. The case came up for argument on the record and stipulation of facts on February 6, 1903, and was continued to give the attorney for Mary Teopfer additional time in which to submit authorities to the court. On February 12, 1903, a motion was made to strike the stipulation from the files of the court, and set it aside, on the ground that it had been signed improvidently, which motion was denied. Motion was then made to strike out certain portion of the record, which was also overruled. On the same day motion to dismiss the appeal was also filed and overruled, and on February 20, 1903, a final judgment was entered in said cause, decreeing that the will of Menna Teopfer was not "eligible to probate" and denying the probate thereof. To this judgment the attorney for Mary Teopfer excepted, and appealed to this court.

*Headnotes by **MILLS**, Ch. J.

NOTE.—As to revocation of a will by marriage, see also cases in *notes* to *Riggs v. Palmer*, 5 L. R. A. 346, and *Davis v. Fogle*, 7 L. R. A. 485; also the later cases in this series of *Ellis v. Darden*, 11 L. R. A. 51; *Roane v. Hollingshead*, 17 L. R. A. 592; *Re Comassi*, 67 L. R. A.

28 L. R. A. 414; *Re Heulett*, 34 L. R. A. 384; *Ingersoll v. Hopkins*, 40 L. R. A. 191; *Hudnall v. Ham*, 48 L. R. A. 557; *Glascott v. Bragg*, 50 L. R. A. 258; and *Re Kelly*, 56 L. R. A. 754.

Mr. S. B. Gillett, for appellant:

A will in New Mexico is not revoked by marriage. Comp. Laws 1897, § 1953, provides the manner in which a will may be revoked.

Hoitt v. Hoitt, 63 N. H. 475, 56 Am. Rep. 530, 3 Atl. 604; *Kelly v. Stevenson*, 85 Minn. 247, 56 L. R. A. 754, 89 Am. St. Rep. 545, 88 N. W. 739; *Ward's Will*, 70 Wis. 251, 5 Am. St. Rep. 174, 35 N. W. 731; *Noyes v. Southworth*, 55 Mich. 173, 54 Am. Rep. 359, 20 N. W. 891; *Fellows v. Allen*, 60 N. H. 439, 49 Am. Rep. 328; *Re Emery*, 81 Me. 275, 17 Atl. 68; *Morton v. Onion*, 45 Vt. 145; *Re Tuller*, 79 Ill. 99, 22 Am. Rep. 164; *Webb v. Jones*, 36 N. J. Eq. 163; *Colcord v. Conroy*, 40 Fla. 97, 23 So. 561.

If she could have made a will in the same language after her marriage, it would be idle and utterly fruitless for her to have made another will after marriage. The law does not operate to destroy and restore the same thing by the same breath.

Roane v. Hollingshead, 76 Md. 369, 17 L. R. A. 592, 35 Am. St. Rep. 438, 25 Atl. 307; *Noyes v. Southworth*, 55 Mich. 173, 54 Am. Rep. 359, 20 N. W. 891; *Ward's Will*, 70 Wis. 251, 5 Am. St. Rep. 174, 35 N. W. 731; *Kelly v. Stevenson*, 85 Minn. 247, 56 L. R. A. 754, 89 Am. St. Rep. 545, 88 N. W. 739; *Morey v. Sohler*, 63 N. H. 507, 56 Am. Rep. 538, 3 Atl. 636; *Re Emery*, 81 Me. 275, 17 Atl. 68.

Mr. John H. Stingle, for appellee:

Since the removal of disabilities of coverture the will of a man and of a woman stand on the same footing.

Re Tuller, 79 Ill. 99, 22 Am. Rep. 166; *Noyes v. Southworth*, 55 Mich. 173, 54 Am. Rep. 359, 20 N. W. 891; *Brown v. Scherrer*, 5 Colo. App. 255, 38 Pac. 427.

In New Mexico, in the event of there being no children, the husband or the wife is the sole heir of the other.

Laws 1901, chap. 62, § 9.

Statutes prescribing the method of express revocation do not exclude revocation by implication or inference of law by various circumstances not within the provisions of the statute.

Fallon v. Chidester, 46 Iowa, 590, 26 Am. Rep. 164; *Beach, Wills*, § 62; *Garrett v. Dabney*, 27 Miss. 335.

Legislation inclines to extend the rule of revocation.

Schouler, Wills, 2d ed. § 424; 1 *Jarman, Wills*, 5th Am. ed. by Bigelow, 122, note.

A will is revoked *pro tanto* to let in after-born children.

1 *Woerner, Am. Law of Administration*, 2d ed. § 55; 1 *Jarman, Wills, Randolph & T.'s ed.* p. 272, and note; *N. M. Laws 1901*, chap. 81, § 39.

A woman's will is revoked by her marriage.

riage, notwithstanding the statutes have given her testamentary capacity.

Swan v. Hammond, 138 Mass. 45, 52 Am. Rep. 255; *Brown v. Clark*, 77 N. Y. 369; *Blodgett v. Moore*, 141 Mass. 75, 5 N. E. 470; *Ward's Will*, 70 Wis. 251, 5 Am. St. Rep. 174, 35 N. W. 731.

In those jurisdictions where the husband and wife are heir to each other, marriage works such a change in the conditions and circumstances of a testator as to revoke a will made prior to marriage. The tacit condition is annexed to such a will that it shall not take effect upon the happening of such a contingency.

Tiedeman, Real Prop. § 888; *Tyler v. Tyler*, 19 Ill. 151; *American Board v. Nelson*, 72 Ill. 564; *Re Tuller*, 79 Ill. 99, 22 Am. Rep. 166; *Morgan v. Ireland*, 1 Idaho, 786; *Brown v. Scherrer*, 5 Colo. App. 255, 38 Pac. 427, Affirmed in 21 Colo. 481, 42 Pac. 668; *Colcord v. Conroy*, 40 Fla. 97, 23 So. 561; *Byrd v. Surles*, 77 N. C. 435; *Schouler, Wills*, § 424; *Garrett v. Dabney*, 27 Miss. 336; 1 *Redf. Wills*, p. 281; 1 *Jarman, Wills*, p. 279; *Walker v. Hall*, 34 Pa. 483; *Stokes v. O'Fallon*, 2 Mo. 32; *Beach, Wills*, § 63; *Re Kaufman*, 131 N. Y. 620, 15 L. R. A. 292, 30 N. E. 242.

Mills, Ch. J., delivered the opinion of the court:

Of the seven assignments of error only the sixth and seventh will need any considerable discussion by us, as the others can readily be disposed of.

The first and fifth assignments will be considered as one. The first alleges that the transcript of record from the probate court, filed in the district court, contained no copy of the will of Menna Teopfer, and the fifth alleges that the court erred in declaring said will not "eligible to probate, because said will was not before the court. Our examination of the transcript of record shows that the will was certified by the clerk of the probate court to the district court. A copy of the will is found on pages 10 and 11 of the transcript, and it is nowhere claimed that that is not an exact copy of the original on file in the probate court. The stipulation which is filed in this case shows what the will was, and admits that it was made and executed by the deceased, and that it was filed in the probate court of Bernalillo county. This stipulation or agreed statements of facts is neither the pleadings nor the issues. It is simply the proofs upon which the cause was tried by the district court. *Territory v. Sante Fé P. R. Co.* 10 N. M. 415, 62 Pac. 985.

The second alleged error is that the appeal from the probate to the district court was not taken as required by law, and that

the court should have sustained the motion to dismiss the appeal. Section 2014 of the Compiled Laws of 1897, providing for appeals from probate courts, was amended by § 40, chap. 81, p. 158, Laws 1901; but this amended section expressly provides that it "shall not affect any proceeding or proceedings now provided by law for the review in the district court of any decision of any probate court upon the approval or disapproval of any last will or testament." Consequently § 2014, Comp. Laws 1897, is still in force so far as appeals in matters relative to the allowance or disallowance of the probate of a will is concerned, and that section provides that in all matters relative to wills any party aggrieved by the decision of the probate court shall have the right to appeal to the district court in the manner provided by law within three months; and § 929, Comp. Laws 1897 provides that "appeals from the judgment of the probate court shall be allowed to the district court in the same manner and subject to the same restriction as in case of appeals from the district court to the supreme court." This seems to have been done in this case, for an appeal was prayed for and granted, bond was given, and the entire record was sent up, and the whole matter was before the district court for a trial *de novo*. There was no error in overruling the motion to dismiss.

The third error assigned is that the court erred in refusing to strike out certain parts of the record in regard to the issuance of letters of administration to Henry F. Kaeufer, because that was no part of the record in the matter of the will of Menna Teopfer. We do not consider this point as well taken; nor do we see, even if the learned judge below had allowed it, that it would have made any difference in the decision he arrived at in this case. In his petition opposing the allowance of the probate of the will the appellee herein asked that letters of administration be issued to him; but the probate court, so far as appears from the record before us, never did issue letters of administration to Henry F. Kaeufer, but, on the contrary, approved the will and continued the application for the issuing of the letters of administration asked for, to which continuance the attorney for Kaeufer then and there excepted. The district court never acted on the matter of the issuing of these letters of administration, as no appeal was taken from the action of the probate judge, nor could any have been taken, as no final decision was made by the probate judge.

The next assignment is that the court committed error in refusing to set aside the stipulation between counsel. There was no

error in the refusal of the judge of the district court to set aside the stipulation of facts, on which stipulation the case was tried before him. The grounds set up in the motion asking the court to set aside the stipulation are not in our opinion sufficient to have warranted the district court in so doing. After hearing the case argued, and after having attentively listened to counsel, we are of the opinion that the stipulation very fairly states the facts of the case, and from an examination of the record and the facts as set out in the briefs of the attorneys who tried the case we believe that the evidence, if it had been heard by the court, would have proved substantially all of the facts as they are set out in the stipulation. The most that can be said is that possibly the attorney for the appellants acted hastily in signing the stipulation. If it had appeared that appellant had really been hurt by it, we believe that the trial judge would have set it aside, or have allowed other evidence to have been produced on the hearing before him.

The sixth and seventh assignments are really the important ones in this case, and are the ones on which appellant relies. They are that the court erred in deciding that marriage revokes a will in New Mexico, and that the decree of the trial court in declaring the will not eligible to probate is contrary to law. These points raise a question which is entirely new in our jurisprudence, it never having been passed upon by the supreme court of this territory, and we have therefore considered it with especial care, having carefully examined the authorities presented by the several attorneys who argued the case before us, as well as many others which were not cited in their briefs. It will be remembered that the deceased made her will on July 11, 1900; that in April, 1901, she married Henry F. Kaeufer, appellee herein; and that on June 13, 1902, she died, leaving surviving her husband, but no children. Appellant contends that because this territory has a statute concerning the revocation of wills (Comp. Laws 1897, § 1953), which provides that a will may be revoked by a testator by an instrument in writing, executed and attested in the same manner as is required by law for the execution and attestation of a will, or by making a subsequent valid will, a will can be revoked by no other means. If a person desires to revoke a will theretofore made, the revocation must be made in the manner set out in the statute; but it is idle to claim that wills cannot also be revoked by operation of law. "There are two kinds of revocation of wills,—one by the act of the party, the other by operation of law. This section [referring to the Iowa statute, Code

1851, § 1288] prescribes the manner of revocation of the first character. Wills that have never been revoked by the testator may not be enforced by the law; that is, they will be treated as revoked." *Fallon v. Chidester*, 46 Iowa, 590, 28 Am. Rep. 164; *Beach*, Wills, § 62; *Garrett v. Dabney*, 27 Miss. 335. The point that a will may be revoked by the operation of law is too well settled by the authorities and text-books to need any further citation of authorities.

It is well settled at common law that the marriage of a *feme sole* revoked her will. *Forse and Hemblings Case*, 4 Coke, 60b. In the case of a man it was equally well settled that marriage alone did not revoke his will, but that marriage and birth of a child did. 1 Jarman, Wills, 122; *Warner v. Beach*, 4 Gray, 162. The reason why the common law held that the will of a *feme sole* was revoked by her marriage was that marriage took away her testamentary capacity and the ambulatory character of her antenuptial will. The reason for this common-law rule is ably discussed in *Brown v. Scherrer*, 5 Colo. App. 255, 38 Pac. 427. The common-law rule has been changed by statute in most of the states of the Union, so that married persons can now dispose of their property by will, subject only to such limitations as the statutes of the several states impose. By our laws (Laws 1901, chap. 62, § 9, p. 114, and §§ 2033, 1904, Comp. Laws 1897), if a husband or wife die, leaving no will and no children, the survivor shall inherit all of the property of the deceased; and by § 7, chap. 62, p. 113, Laws 1901, all disabilities of coverture are removed, and the wills of both men and women stand on exactly the same footing. The laws of this territory also provide that a will made during coverture is revoked *pro tanto* to let in children born after it was executed (Laws 1901, chap. 81, § 39, p. 157); and the reason of this is that a new heir has come into existence since the will was executed.

All of the states, so far as we have been able to discover, which hold that the marriage of a woman does not set aside a will made before such marriage, make such holding on the ground that the law amply provides for the survivor; but in those jurisdictions where the husband and wife are heir to each other, in the event of no children being born, the rule is generally held to be that marriage works such a change in the condition and circumstances of the testator as to revoke a will made prior to such marriage. It is presumed that the intent of the testator was that such a will should not take effect upon the happening of such a contingency. We do not think that the mere marriage of a woman would set aside

her will, but it is the coming of a new heir; for, under the laws of this territory, by marriage not only does a man or woman get a wife or husband, but also an heir. We think that, under the laws of this territory, by which the surviving spouse is the heir to the other in the event of no children being born of the marriage and no valid will being made during coverture, the common law is so altered that on marriage the antenuptial will of a husband would be set aside, as well as that of his wife, and that both of them are now on the same footing. Marriage and the coming in of an heir to all the property work such a natural change in the testator's condition that it is not to be expected that the devise was made in view of such changed conditions.

The supreme court of Colorado says: "Under the English statute of primogeniture, the lands went to the male heirs in absolute succession, and ordinarily without power on the part of the deviser to change the right of succession. It is thus apparent that, in the acceptance of this rule of the ecclesiastical law, the English common-law judges went to the limit essential to the absolute adoption of the principle. In other words, they certainly decided that, wherever an heir who could inherit land sprung into being, it should be held to revoke the will, since it was not to be presumed that the will was executed in the contemplation of such a changed condition. This broad basis seems not to have been always considered by the American courts when they have attempted to restate and reapply existing law to new and novel conditions. In the conclusion at which we arrive we are not, however, without the support of cases in this country. *Garrett v. Dabney*, 27 Miss. 335; *Tyler v. Tyler*, 19 Ill. 151; *Morgan v. Ireland*, 1 Idaho, 786; *vide Tiedeman*, Real Prop. § 888; *Svan v. Hammond*, 138 Mass. 45, 52 Am. Rep. 255." *Brown v. Scherrer*, 5 Colo. App. 255, 38 Pac. 429. The law of Colorado is very similar to ours, in that it provides that when a person dies intestate, without children, but leaving either husband or wife, the surviving spouse shall inherit the entire property; and they also confer upon married women the right to make wills bequeathing their property; and that state holds that a wife by law is the absolute heir of the husband's estate, so that she is put into precisely the same position that the male heir occupied under the English law of primogeniture, with reference to the inheritance of lands, with the exception that, while the English heir took all of the lands devised, in Colorado the wife holds this position only with reference to half of the estate. Our laws place husband and wife on the same footing as the laws of Colorado.

Both are heirs to each other in the event that they leave no children, or will made during coverture, and even if the deceased leaves a will, such will can only dispose of one half of the acquets or community property. "The English law rests on the firm foundation that the birth of an heir who can inherit lands shall be held operative to destroy a will, because it is not to be conceived that the testator has devised his estate in view of such an extraordinary alteration in his condition. The same principle and the same rule can be urged with like force in our own legislation, as stated by the English cases, and in those which have followed the law which they announce. It is a strained conception to assume that a man who has made a will while unmarried has made it in contemplation of his assumption of the marriage relation. There is no force in the suggestion that, because the woman becomes an heir by virtue of the statute, she does not come within the beneficent provisions of the rule as declared at the common law. It was by the law only

that the male heir succeeded to the testator's lands and took his inheritance." *Brown v. Scherrer*, 5 Colo. App. 255, 38 Pac. 429.

It seems to us that in this territory this reasoning is equally applicable, whether the surviving spouse be a man or woman. By the marriage not only a husband or wife, but a new heir capable of inheriting all of the property, comes into existence; and in accordance with what we think is the spirit and reasoning of the doctrine, and the purpose and meaning of our laws, we hold that the marriage of a testator, whether or not it be followed by the birth of an heir, is operative to revoke any antenuptial will. There being no error in the judgment given by the court below, *the same is therefore affirmed.*

Parker, McFie, and Pope, JJ., concur.

Baker, J., having tried this case below, and **Mann, J.,** not having heard the argument, did not participate in this decision.

OREGON SUPREME COURT.

P. L. FRAZIER et al., Appts.,
v.
WESTERN UNION TELEGRAPH COMPANY, Respnt.

(.....Or.....)

1. To entitle the sendee to sue for failure promptly to transmit and deliver a telegram, the telegraph company must know, or be chargeable with notice, that the message is for his benefit.
2. A message addressed to a firm who are not known by the telegraph company to be brokers, directing them to see a certain person and take his last offer, does not disclose that it is for the benefit of the addressee, so as to give them a right of action for failure promptly to deliver it, where the telegraph company is not otherwise notified that it is intended for their benefit.

(October 17, 1904.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Marion County

NOTE.—For other cases in this series as to right of sendee of telegram to maintain action for damages because of mistake therein, or delay or failure to deliver, see *Western U. Teleg. Co. v. Adams*, 6 L. R. A. 844; *International Ocean Teleg. Co. v. Saunders*, 21 L. R. A. 810; *Western U. Teleg. Co. v. Wood*, 21 L. R. A. 706; *Mentzer v. Western U. Teleg. Co.* 28 L. R. A. 72; *Ferferro v. Western U. Teleg. Co.* 35 L. R. A. 548; and *McPeck v. Western U. Teleg. Co.* 43 L. R. A. 214. 67 L. R. A.

in favor of defendant in an action brought to recover for failure promptly to transmit and deliver a telegram. *Affirmed.*

Statement by **Bean, J.:**

The plaintiffs are real-estate brokers. Some time prior to February 18, 1903, two farms were listed with them for sale, designated in the record as the "Shepard" and "Schutte" farms, under an agreement with the owners that plaintiffs were to receive \$100 commission on the former and \$200 on the latter if they effected a sale. About that time they had a customer in the person of one E. P. Weir, who, after examining the property and entering into some negotiations with the owners, started for California, informing the plaintiffs that he would advise them if he concluded to take the property. On reaching Ashland he wrote, signed, and delivered to the agent of the defendant at that place for transmission to the plaintiffs the following despatch:

Ashland, Ore., Feb. 18, '03.

To Frazier & Long,

Salem, Ore.

See Shepard. Take his last offer. Wire me at Frisco.

E. P. Weir.

The message was sent to the agent of the defendant at Salem, who received it about 1:20 in the afternoon of the day it bears

date. It was not delivered to the plaintiffs, however, until some five days thereafter, by reason of which delay they claim they have lost their commission on the sale of the property referred to, and therefore bring this action against the company to recover the amount of such commission as damages for its negligence in not promptly delivering the message. The plaintiffs were nonsuited, and appeal.

Messrs. Bonham & Martin, for appellants:

Appellants' claim for damages in this case was not too remote and uncertain.

2 Sedgw. Damages, 8th ed. §§ 881, 882, 891, 892; 1 Sutherland, Damages, 2d ed. § 45; *Blagen v. Thompson*, 23 Or. 239, 18 L. R. A. 315, 31 Pac. 647; *Wisner v. Barber*, 10 Or. 342; 5 Am. & Eng. Enc. Law, pp. 5-10; *Western U. Telegr. Co. v. Scirole*, 105 Ind. 227, 2 N. E. 604; *Shearm. & Redf. Neg.* §§ 739, 740, 745; *Chapman v. Western U. Telegr. Co.* 90 Ky. 265, 13 S. W. 880; *Postal Telegr. Cable Co. v. Lathrop*, 131 Ill. 575, 7 L. R. A. 474, 19 Am. St. Rep. 55, 23 N. E. 583; *Western U. Telegr. Co. v. Cornwell*, 2 Colo. App. 491, 31 Pac. 393; *Baldwin v. Western U. Telegr. Co.* 93 Ga. 692, 44 Am. St. Rep. 194, 21 S. E. 212.

The law does not require that a telegraph company should be apprised of the details as to the purpose of the message. If the message, as delivered, discloses its importance as a business communication in general terms, that is all that is required of the sender.

Sutherland, Damages, 2d ed. §§ 960, 970; *Brooks v. Western U. Telegr. Co.* 26 Utah, 147, 72 Pac. 499; 25 Am. & Eng. Enc. Law, p. 845.

The question whether a message is on its face such as to disclose the nature of the business and notify the defendant that its prompt delivery is necessary, is purely a question of fact, and should be submitted to the jury.

Pope v. Western U. Telegr. Co. 14 Ill. App. 531; *Western U. Telegr. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894.

Messrs. George G. Bingham and C. A. Dolph, for respondent:

There having been no contractual relation between the appellant and respondent, there can be no recovery for a breach of contract.

Postal Telegr. Cable Co. v. Ford, 117 Ala. 672, 23 So. 684; *Western U. Telegr. Co. v. Wood*, 21 L. R. A. 706, 6 C. C. A. 432, 13 U. S. App. 317, 57 Fed. 471.

Recoverable damages must be certain in their nature, and in respect to the cause from which they proceed.

Wisner v. Barber, 10 Or. 342; *Blagen v.* 47 L. R. A.

Thompson, 23 Or. 239, 18 L. R. A. 315, 31 Pac. 647.

The damages claimed are too remote. They are not the approximate consequence of the nondelivery of the message.

Beatty Lumber Co. v. Western U. Telegr. Co. 52 W. Va. 410, 44 S. E. 309; *Postal Telegr. Cable Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. 252; *Western U. Telegr. Co. v. Cooper*, 71 Tex. 507, 1 L. R. A. 728, 10 Am. St. Rep. 772, 9 S. W. 598.

Where the company is to be held for more than nominal damages, it should have notice from the face of the message, or otherwise, of its importance.

Postal Telegr. Cable Co. v. Barwise, 11 Colo. App. 328, 53 Pac. 252; *Gulf, O. & N. F. R. Co. v. Loonie*, 82 Tex. 323, 27 Am. St. Rep. 891, 18 S. W. 221.

Beam, J., delivered the opinion of the court:

Several questions were discussed at the argument, but it is only necessary to notice the contention that the plaintiffs are not entitled to maintain an action against the defendant for negligence in delivering the message addressed to them, because they were not parties or privies to the contract between Weir and the company for its transmission, nor was the company advised by the terms of the message or otherwise that they were the parties for whose benefit such contract was made.

In England the doctrine is settled that the addressee of a telegraphic message cannot sue the company for error or negligence in its transmission or delivery, because the obligation of the company springs entirely from the contract between it and the sender, and the addressee is not a party or privy thereto. *Playford v. United Kingdom Electric Telegr. Co.* L. R. 4 Q. B. 706. This doctrine, however, does not prevail generally in this country, and the weight of authority is that the addressee of a message may sue the telegraph company in his own name, and recover such damages as he may have sustained by reason of its negligence, when the message was intended for his benefit, and the company had knowledge of that fact. 2 *Shearm. & Redf. Neg.* 5th ed. § 543; *Gray, Communication by Telegraph*, § 65; *Thompson, Electricity*, § 427; *Joyce, Electric Law*, § 1008; 21 *Enc. Pl. & Pr.* p. 509. A telegraph company is not a common carrier in the sense that it is an insurer against mistakes in the transmission of messages or delay in their prompt delivery, but it is an instrument of commerce and a public-service corporation. It therefore owes the duty to those for whose benefit it undertakes to transmit and deliver messages to transmit and deliver them without unrea-

sonable delay. For a violation of this duty, or for a negligent performance thereof, it is responsible to the party for whose benefit the contract was made, whether it be the sender or the addressee. 27 Am. & Eng. Enc. Law, 2d ed. p. 1024; Thompson, Electricity, § 427; *Postal Teleg. Cable Co. v. Barwise*, 11 Colo. App. 328, 53 Pac. 252; *Webbe v. Western U. Teleg. Co.* 169 Ill. 610, 61 Am. St. Rep. 207, 48 N. E. 670; *McPeck v. Western U. Teleg. Co.* 107 Iowa, 356, 43 L. R. A. 214, 70 Am. St. Rep. 205, 78 N. W. 63. But the right of an addressee to recover is necessarily grounded upon the contract between the company and the sender, whether the action be in form technically for a breach of contract or one sounding in tort. Without the contract under which the message was forwarded as a foundation for the cause of action, no recovery whatever could be had. In order for the addressee to sue, it is essential, therefore, that it appear that he was to be benefited by the contract for sending the message, and that fact was known to the company when it received the message for transmission, either from its language or otherwise. The addressee can maintain an action only on the theory that he was the party intended to be benefited by the contract between the sender and the company, and that he is injured by a failure to perform such contract. Messrs. Shearman & Redfield say that the right of an addressee of a telegraphic message to sue for the negligence of the company, either in its transmission or delivery, rests on the principle that, where two persons make a contract for the benefit of a third person, such third person may sue upon it. 2 Shearm. & Redf. Neg. 5th ed. § 543. Under this doctrine the right of an addressee to sue does not exist unless the sender of the message and the company, at the time the contract for its transmission was made, understood that it was for the benefit of such person. Mr. Gray, in his work on Communication by Telegraph, says: "It may be hazarded that the right of the person to whom a message is directed to sue as beneficiary for a breach of the contract to communicate that message—a contract to which he is not a party—will, where it is admitted at all, be restricted to the comparatively small class of cases in which the person who employs a telegraph company to communicate a message does so solely to benefit the person to whom the message is directed; for, where the person who employs a telegraph company to communicate a message does so to benefit himself, there is no ground for the interpretation that he intends to part with his right of action for a breach of the contract." Gray, Communication by Telegraph, § 67. Mr. Crosswell says: "To give 67 L. R. A.

the addressee the benefit of this rule, it must appear, either from the language of the message, or the circumstances under which it is sent, and which are known to the telegraph company, that the message is sent for the benefit of the addressee." Crosswell, Electricity, § 457. The supreme court of Texas (*Western U. Teleg. Co. v. Adams*, 75 Tex. 531, 6 L. R. A. 844, 16 Am. St. Rep. 920, 12 S. W. 857), in discussing this question says: "We think the question as to who may maintain a suit for damages for the breach of contract does not depend upon the payment of the fee, nor upon the question whether the sender had been previously constituted an agent for that purpose by the party to whom the despatch is sent, but who in fact was to be served, and who is damaged. If it was intended to serve the receiver, and he accepts the act, we are unable to see why the telegraph company should be excused from the consequences of its neglect to discharge its own duty by reason, alone, of its ignorance of the relations that may exist between the sender and the receiver of the message. In *Western U. Teleg. Co. v. Wood*, 21 L. R. A. 706, 6 C. C. A. 432, 13 U. S. App. 317, 57 Fed. 471, and *Butner v. Western U. Teleg. Co.* 2 Okla. 234, 4 Inters. Com. Rep. 770, 37 Pac. 1087, it is held that a person to whom a telegraphic message is directed cannot recover against the company for a failure to deliver when he is not a party to the contract under which it was sent, and when the company is not informed, either by the terms of the message or otherwise, that the contract was for his benefit. The liability of a telegraph company for damages resulting from error in the transmission or failure to deliver a message promptly is limited to such as may fairly be considered according to the usual course of things to have arisen from the breach of the contract actually made between it and the sender, and which both parties must reasonably have understood and contemplated, when making the contract, would be likely to result from its breach. It is accordingly quite generally held that, in an action for a failure to transmit correctly or deliver promptly a cipher or unintelligible despatch, when the company is not informed of its nature, or the importance or extent of the business to which it relates, the measure of damages is merely the sum paid for sending it. 27 Am. & Eng. Enc. Law, 2d ed. p. 1062; *Primrose v. Western U. Teleg. Co.* 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098. This is on the theory that the measure of the company's responsibility depends upon the nature and character of the contract, its knowledge of special circumstances and of the purpose of the despatch which it

agrees to transmit and deliver. In a word, the measure of its responsibility is determined by the contract which it makes with the sender of the message. Now, if the proper criterion by which to determine the measure of responsibility of the company in the matter of damages is the contract between it and the sender, it would seem clear that, upon the same principle, the person or persons to whom it is to be liable must be ascertained from the same source, and that it is liable only to such persons as it may have expressly agreed to serve, or who are the beneficiaries of the contract made with it; and such we believe to be the decisions.

An exhaustive examination of the cases holding that the addressee of a telegraphic message may sue the company for negligence discloses that in all of them the company knew or was chargeable with knowledge that the message was for his benefit. No case has come under our observation where the addressee was permitted to sue under any other circumstances. On the contrary, those already cited show that he has been denied relief where the contract was not for his benefit. In the present case the message sent by Weir to the plaintiffs does not disclose that they were the parties

intended to be benefited by the contract between him and the company for its transmission and delivery, or that they had any interest whatever in the subject-matter, nor was the company otherwise advised of that fact. The message is a mere direction to Weir to the plaintiffs to perform some act for him, and the company could not have understood from it that it was intended for the benefit of the plaintiffs, or that they would be injured by its nondelivery. If the message had been directed to them as real-estate brokers, or if the company, at the time it received and agreed to transmit it, knew that they were engaged in that business, or if the message had simply advised them that Weir would take the Shepard farm at the price named, without more, the facts might possibly bring the case within the doctrine of some of the decisions holding that an addressee may sue the company for negligence in not delivering a message. The message in question, however, is not of that character. It indicates on its face that it was sent for the benefit of Weir, and therefore it cannot be held that the contract between Weir and the company for its transmission was made for the benefit of the plaintiffs.

The judgment will be affirmed.

RHODE ISLAND SUPREME COURT.

STATE of Rhode Island

v.

Charles J. QUIGLEY.

(.....R. I.....)

1. **The exclusion of general evidence as to the past life of one accused of murder and the condition of his father, offered as a foundation for the inference that he was suffering from delirium tremens at the time of the homicide, is not error if evidence is subsequently admitted showing his condition and habits within a reasonable time of the commission of the crime.**
2. **One on trial for the commission of a crime cannot require the judge to single out for particular comment in its instructions to the jury certain facts or evidence to which his attention is called.**
3. **The burden of proving insanity as a defense to a criminal prosecution is upon the accused; and it is not sufficient merely to raise a reasonable doubt as to sanity, but the evidence upon that point must preponderate in his favor, or be sufficient to satisfy the jury of the fact.**

NOTE.—For presumption and burden of proof as to sanity or insanity of accused person, see also *State v. Scott*, 38 L. R. A. 721, and *note*; *Ryder v. State*, 38 L. R. A. 721; and *Maas v. Oklahoma*, 53 L. R. A. 814.
67 L. R. A.

4. **A new trial cannot be granted in a criminal case for newly discovered evidence to rebut the testimony of one of the state's medical witnesses, who testified that he vaccinated accused and observed his condition on a certain day, by showing that the witness was mistaken, where the accused and his counsel knew before the trial ended that there was no evidence of recent vaccination of the accused, and had access to the prison records to determine the medical treatment of him.**

(March 21, 1904.)

APPPLICATION by defendant for a new trial after being convicted of murder.
Denied.

The facts are stated in the opinion.

Messrs. Thomas F. Cooney, James A. Cahill, and James H. Higgins, for defendant:

The accused in a criminal prosecution, who alleges insanity from alcoholism as a defense, is entitled to have all the facts and circumstances bearing upon the condition of his mind fairly submitted to the jury, which must determine as to his responsibility.

2 *Clevenger, Med. Jur.* p. 715; 6 *Lawson, Criminal Defenses*, 630.

Delirium tremens is insanity.

3 *Rice, Crim. Ev.* p. 666, (b).

Evidence of hereditary insanity in the father of this defendant was admissible.

16 Am. & Eng. Enc. Law, 2d ed. p. 613; 3 Bucknill & T. Psychological Medicine, p. 14, cited in 3 Witthaus & Becker, Med. Jur. pp. 208, 209; 1 Clevenger, Med. Jur. p. 526, § 11; *State v. Windsor*, 5 Harr. (Del.) 512; *Bradley v. State*, 31 Ind. 402; *State v. Felter*, 25 Iowa, 67; *Basster v. Abbott*, 7 Gray, 71; *Prentiss v. Bates*, 93 Mich. 234, 17 L. R. A. 494, 53 N. W. 153; 2 Hamilton, Legal Medicine, p. 57; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Smith v. Kramer*, 1 Am. Law Reg. 353; *Com. v. Andrews*, Wharton & Stille, Med. Jur. § 375; *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Cole's Trial*, 7 Abb. Pr. N. S. 330; Buswell, Insanity, p. 249, § 235; 1 Crim. Law Mag. p. 446; *Jones v. People*, 23 Colo. 276, 47 Pac. 275; *Porter v. State*, 135 Ala. 51, 33 So. 694; *Murphy v. Com.* 92 Ky. 485, 18 S. W. 163; *Kniloch's Trial*, 25 How. St. Tr. 891-997.

When the proof in a criminal case is equal, the scale is turned not against the defendant by the presumption of sanity, but is turned in his favor by the presumption of innocence. The presumption of innocence is regarded as perhaps the most powerful in the law relating to presumptions.

Best, Ev. Chamberlayne's ed. p. 334; *Rea v. Twynning*, 2 Barn. & Ald. 386; *McArthur v. State*, 59 Ark. 431, 27 S. W. 628; *State v. McDaniel*, 84 N. C. 803; *State ex rel. Phelan v. Walsh*, 62 Conn. 260, 17 L. R. A. 364, 25 Atl. 1; 22 Am. & Eng. Enc. Law, 2d ed. p. 1236; *Persons v. State*, 90 Tenn. 291, 16 S. W. 726; *State v. Lee*, 69 Conn. 186, 37 Atl. 75.

Where the presumptions are of equal weight they, of course, neutralize each other.

22 Am. & Eng. Enc. Law, 2d ed. p. 1237.

The essential elements must be proved beyond all reasonable doubt by the government. This includes the fact of sanity, and the party whose duty it is to prove that fact must introduce positive and express evidence showing the fact to exist.

Foster v. Berry, 14 R. I. 601; *Com. v. Bradford*, 9 Met. 268; *Atlas Bank v. Doyle*, 9 R. I. 76, 11 Am. Rep. 219, 98 Am. Dec. 368; *State v. Beswick*, 13 R. I. 211, 43 Am. Rep. 26; Cooley, Const. Lim. § 355; *Dove v. State*, 3 Heisk. 348; *Davis v. United States*, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353.

There can be no criminal intent when the mental condition of the party accused is such that he is incapable of forming one.

People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

The prosecution takes upon itself the burden of establishing, not only the killing, but also the malicious intent in every case. The defense of insanity denies positively the

capacity to have any malice in its legal sense.

Sanity is an essential part of the case of the state. If there is a reasonable doubt of sanity on the proof offered, the jury must bring in a verdict of not guilty.

State v. Schweitzer, 57 Conn. 532, 6 L. R. A. 125, 18 Atl. 787; *Walker v. People*, 88 N. Y. 81; *Brotherton v. People*, 75 N. Y. 159; *People v. Nino*, 149 N. Y. 317, 43 N. E. 853; *Com. v. York*, 9 Met. 93, 43 Am. Dec. 373; *Com. v. Heath*, 11 Gray, 303; *Com. v. Pomeroy*, 117 Mass. 143; Wharton, Homicide, 2d ed. p. 753; *Ortwein v. Com.* 76 Pa. 414, 18 Am. Rep. 420; *Com. v. Wireback*, 190 Pa. 138, 70 Am. St. Rep. 625, 42 Atl. 542; *Scott v. Wood*, 81 Cal. 398, 22 Pac. 871; *People v. Bushon*, 80 Cal. 160, 22 Pac. 127, 549; *People v. Travers*, 88 Cal. 233, 26 Pac. 88.

An insane person is irresponsible for crime of any sort or degree.

16 Am. & Eng. Enc. Law, 2d ed. p. 622. 2 Thompson, Trials, pp. 1878, 1879, § 2524; Clark, Crim. Proc. pp. 540, 541.

Evidence of insanity sufficient to cause irresponsibility requires an acquittal, and cannot have the effect of reducing the decree of murder.

16 Am. & Eng. Enc. Law, 2d ed. p. 621; *Com. v. Hollinger*, 190 Pa. 155, 42 Atl. 548; *Com. v. Wireback*, 190 Pa. 138, 70 Am. St. Rep. 625, 42 Atl. 542; *Burt v. State*, 38 Tex. Crim. Rep. 438, 39 L. R. A. 305, 330, 40 S. W. 1000, 43 S. W. 344; *Davis v. United States*, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353; *Hotema v. United States*, 186 U. S. 413, 46 L. ed. 1225, 22 Sup. Ct. Rep. 895; *State v. Bartlett*, 43 N. H. 224, 80 Am. Dec. 154; *People v. McCann*, 16 N. Y. 69, 69 Am. Dec. 642; *Com. v. York*, 9 Met. 93, 43 Am. Dec. 373; *Com. v. Pomeroy*, 117 Mass. 143; Wharton, Homicide, 2d ed. 753, Appx. *et seq.*; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *State v. Crawford*, 11 Kan. 32; *State v. Lee*, 69 Conn. 200, 37 Atl. 75.

A reasonable doubt of a person's sanity is sufficient to prevent a conviction.

1 Bennett & H. Lead. Crim. Cas. pp. 295, 299, 302, 304, 306; *Davis v. United States*, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353; *Hotema v. United States*, 186 U. S. 413, 46 L. ed. 1225, 22 Sup. Ct. Rep. 895; *Guiteau's Case*, 10 Fed. 161; Thayer, Cases on Ev. p. 48, note 3; Best, Ev. Chamberlayne's ed. part 2, p. 301, note B; Bishop, New Crim. Law, chap. 26, pp. 162, 287; 3 Greenl. Ev. 15th ed. p. 9, note 3; McKelvey, Ev. pp. 79, 80, § 50; 1 McClain, Crim. Law, pp. 139, 174, 175.

If the prisoner was insane he was not an accountable being.

State v. Marler, 2 Ala. 43, 36 Am. Dec. 398; *Ogletree v. State*, 28 Ala. 693; *Boswell*

v. *State*, 63 Ala. 307, 35 Am. Rep. 20; *Perry v. State*, 87 Ala. 30, 6 So. 425; *Maxwell v. State*, 89 Ala. 150, 7 So. 824; *Ward v. State*, 96 Ala. 100, 11 So. 217; *Burger v. State*, 83 Ala. 36, 3 So. 319; *Pate v. State*, 94 Ala. 14, 10 So. 665; *Albritton v. State*, 94 Ala. 76, 10 So. 426; *Pellum v. State*, 89 Ala. 28, 8 So. 83; *Oasat v. State*, 40 Ark. 511; *Blankenship v. State*, 55 Ark. 244, 18 S. W. 54; *Hill v. People*, 1 Colo. 436; *Kelly v. People*, 17 Colo. 130, 29 Pac. 805; *Kent v. People*, 8 Colo. 563, 9 Pac. 852; *Jones v. People*, 23 Colo. 276, 47 Pac. 275; *State v. Johnson*, 40 Conn. 136; *Pease v. Cole*, 53 Conn. 53, 55 Am. Rep. 53, 22 Atl. 681; *State v. Lee*, 69 Conn. 186, 37 Atl. 79; *State v. Schwoetzer*, 57 Conn. 532, 6 L. R. A. 125, 18 Atl. 787; *State v. Reidell*, 9 Houst. (Del.) 470, 14 Atl. 550; *State v. Kavanaugh* (Del.) 53 Atl. 335; *State v. Taylor*, Houst. Crim. Rep. (Del.) 454; *Hodge v. State*, 26 Fla. 11, 7 So. 593; *Armstrong v. State*, 30 Fla. 170, 17 L. R. A. 484, 11 So. 618; *Davis v. State*, 44 Fla. 32, 32 So. 822; *Long v. State*, 38 Ga. 491; *Ryder v. State*, 100 Ga. 528, 38 L. R. A. 721, 62 Am. St. Rep. 334, 28 S. E. 246; *People v. Walter*, 1 Idaho. 386; *State v. Hamilton*, 57 Iowa. 596, 11 N. W. 5; *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231; *Chase v. People*, 40 Ill. 353; *Langdon v. People*, 133 Ill. 382, 24 N. E. 874; *Dunn v. People*, 109 Ill. 635; *Dacey v. People*, 116 Ill. 555, 6 N. E. 165; *Montag v. People*, 141 Ill. 75, 30 N. E. 337; *Lilly v. People*, 148 Ill. 467, 36 N. E. 95; *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Grubb v. State*, 117 Ind. 277, 20 N. E. 257, 725; *Plummer v. State*, 135 Ind. 308, 34 N. E. 968; *Stevens v. State*, 31 Ind. 491, 99 Am. Dec. 634; *Plake v. State*, 121 Ind. 433, 16 Am. St. Rep. 408, 23 N. E. 273; *State v. Crawford*, 11 Kan. 32; *State v. Elliott*, 10 Kan. App. 69, 61 Pac. 981; *State v. Grinstead*, 10 Kan. App. 74, 61 Pac. 976; *State v. Mahn*, 25 Kan. 182; *State v. Nixon*, 32 Kan. 205, 4 Pac. 159; *State v. Hendricks*, 32 Kan. 559, 4 Pac. 1050; *State v. Mowry*, 37 Kan. 369, 15 Pac. 282; *State v. Yarroworough*, 39 Kan. 581, 18 Pac. 474; *State v. Gould*, 40 Kan. 258, 19 Pac. 739; *Graham v. Com.* 16 B. Mon. 587; *Parris v. Com.* 14 Bush, 369; *State v. Lawrence*, 57 Me. 574; *State v. McDonald*, 65 Me. 465; *Small v. Clewley*, 62 Me. 155, 16 Am. Rep. 40; *Bourne v. Ward*, 51 Me. 191; *Woodcock v. Calais*, 68 Me. 244; *Tarbox v. Eastern S. B. Co.* 50 Me. 345; *Market & F. Nat. Bank v. Sargent*, 85 Me. 349, 35 Am. St. Rep. 376, 27 Atl. 192; *Frechette v. Goulet*, 8 Can. S. C. 169; *Hamilton v. Davis*, 2 U. C. Q. B. 137; 1 Greenl. Ev. 15th ed. p. 78; *Baltimore & R. Co. v. Shipley*, 39 Md. 251; *Jones v. Jones*, 48 Md. 391, 30 Am. Rep. 466; *Spencer v. State*, 69 Md. 28, 13 Atl. 809; *Com. v. McKie*, 1 Gray, 61, 61 Am. Dec. 410; *Com. v. Eddy*, 7 Gray, 583; *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458; *Com. v. York*, 9 Met. 125, 43 Am. Dec. 373; *Com. v. Heath*, 11 Gray, 303; *Com. v. Tukey*, 8 Cush. 1; *Jaquith v. Rogers*, 179 Mass. 192, 60 N. E. 486; *Powers v. Russell*, 13 Pick. 69; *Delano v. Bartlett*, 6 Cush. 364; *Central Bridge Corp. v. Butler*, 2 Gray, 130; *Nichols v. Munsel*, 115 Mass. 567; *Willett v. Rich*, 142 Mass. 356, 56 Am. Rep. 684, 7 N. E. 776; *Broult v. Hanson*, 158 Mass. 17, 32 N. E. 900; *Com. v. Lahy*, 8 Gray, 460; *Com. v. Kimball*, 24 Pick. 366; *Wilder v. Cowles*, 100 Mass. 487; *Crowninshield v. Crowninshield*, 2 Gray, 529; *Griffin v. Boston & A. R. Co.* 148 Mass. 143, 1 L. R. A. 608, 12 Am. St. Rep. 526, 19 N. E. 166; *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *State v. Howell*, 100 Mo. 628, 14 S. W. 4; *Wright v. People*, 4 Neb. 407; *Ballard v. State*, 19 Neb. 609, 28 N. W. 271; *Snider v. State*, 56 Neb. 309, 76 N. W. 574; *Knights v. State*, 58 Neb. 225, 76 Am. St. Rep. 78, 78 N. W. 508; *State v. Lewis*, 20 Nev. 333, 22 Pac. 241; *State v. McCluer*, 5 Nev. 132; *State v. Bartlett*, 43 N. H. 224, 80 Am. Dec. 154; *State v. Spencer*, 21 N. J. L. 196; *Graves v. State*, 45 N. J. L. 203; *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642; *Brotherton v. People*, 75 N. Y. 159; *People v. Nino*, 149 N. Y. 317, 43 N. E. 853; *Walker v. People*, 88 N. Y. 8; *O'Connell v. People*, 87 N. Y. 377, 41 Am. Rep. 379; *People v. Riordan*, 117 N. Y. 71, 22 N. E. 455; *People v. Downs*, 123 N. Y. 558, 25 N. E. 988; *State v. Vann*, 82 N. C. 631; *State v. Davis*, 109 N. C. 780, 14 S. E. 55; *State v. Starling*, 51 N. C. (6 Jones, L.) 366; *Faulkner v. Territory*, 6 N. M. 465, 30 Pac. 905; *Loeffner v. State*, 10 Ohio St. 598; *Judge v. Narragansett Electric Lighting Co.* 21 R. I. 128, 42 Atl. 507; *Cassidy v. Angell*, 12 R. I. 447, 34 Am. Rep. 690; *State v. Yokum*, 11 S. D. 544, 79 N. W. 835; *Dove v. State*, 3 Heisk. 348; *Stuart v. State*, 1 Baxt. 178; *King v. State*, 91 Tenn. 619, 20 S. W. 169; *United States v. Sickles*, 2 Hayw. & H. 319; *People v. Tracy*, 1 Utah, 343; *State v. Meyer*, 58 Vt. 457, 3 Atl. 195; *State v. Cross*, 42 W. Va. 253, 24 S. E. 996; *Revoir v. State*, 82 Wis. 295, 52 N. W. 84; *Gustavson v. State*, 10 Wyo. 300, 68 Pac. 1006.

Mr. Charles F. Stearns, Attorney General, for the State.

Douglas, J., delivered the opinion of the court:

The defendant, on January 30, 1903, was found guilty of the murder of Abraham A. Camac, October 4, 1902. He now prays for a new trial, alleging: (1) That the verdict

is against the law; (2) that the verdict is against the evidence; (3) that the presiding justice erred in excluding certain testimony offered by the defendant; (4) that the presiding justice erred in his instructions to the jury; (5) that the presiding justice erred in refusing to instruct the jury as requested by the defendant; (6) that he has discovered new and material evidence, which could not, by the exercise of due and reasonable diligence on his part, have been procured for use at the first trial.

The verdict, in our judgment, is right in law and fact. The undisputed facts are that the defendant had known one Ellen L. Howard for thirteen or fourteen years, and had become engaged to marry her; that on September 25, 1902, she was married to Abraham A. Camac; that Quigley was informed of this by letter from Mrs. Howard, Mrs. Camac's mother; that within a day or two after he received this letter he went from Canton, Massachusetts, where he lived, to Pawtucket, as he himself said, to kill the man who had married his girl. He arrived at Pawtucket Wednesday or Thursday, October 1st or 2d, and bought a revolver on Friday, October 3d. While under the influence of liquor he showed the revolver to the bartender in Rock's saloon; told him that he came from Massachusetts; that he was stopping at Rumford, and that there was a man and woman there whom he was going to shoot. In the evening of Friday, the 3d, he was discovered in the back yard of Camac's house. The barking of the dog attracted the attention of the people in the house, some of whom went to the door, and, in response to his request to see Abraham Camac, Abraham, with others, went out to see him. Quigley heard Mrs. Camac's voice in the doorway, and reproached her for marrying. Camac told Quigley that he had seen a letter in which Quigley had threatened to blow out his (Camac's) brains if he ever saw him. After some further conversation Quigley said he wished Mr. and Mrs. Camac good luck, and left the place. The next afternoon (Saturday) Quigley went to Rock's saloon, and after he had been there a short time Camac entered the saloon. At 10 minutes past 2 Quigley went out of the side room in which he was sitting, followed Camac to the bar, and without the exchange of any words fired three shots at Camac, wounding him in the left hip and also in the back. Camac died the next morning of these wounds. After the shooting Quigley left the saloon, and ran slowly towards the center of the city, and within a short time thereafter he was arrested. When the officer arrested him he said he was going to give himself up. All the witnesses agreed that Quigley was sober at the 67 L. R. A.

time of the shooting. The testimony also showed that Quigley was a man who was accustomed to steady drinking. After his arrest Quigley told Officer Flynn, who arrested him, that he was sorry that he did not shoot both Camac and the girl, that he shot Camac because he had married the girl, and that he had bought the revolver a few days before the shooting. Flynn testified that Quigley was sober at the time he arrested him, and that he was calm and cool. Thomas F. Vance, a lawyer, and the coroner of Pawtucket, saw Quigley at half past 3 that afternoon, and was with him for an hour or more. Mr. Vance testified that Quigley appeared to be all right, that he looked pale, and that he had apparently been drinking a very limited number of glasses of beer. The same afternoon Quigley was taken to Camac's house, and confronted with him. He was very reluctant to go until he was told that the police would protect him. While he was there Camac's father attempted to assault him, and he was thoroughly frightened, and his alarm continued until he was away from the house. Camac, realizing that he was mortally wounded, fully identified Quigley as the person who had shot him. While on the street between the Camac house and the police station, Quigley's picture was taken by a newspaper man, and he told Mr. Vance that he supposed his picture would be in the Journal and Bulletin, and said something about being the boy murderer. Captain Vananda, of the Pawtucket police, saw Quigley soon after the shooting. He testified that he was very nervous, but that he was quite sober; that he guessed the man had been drinking. At the station Quigley wanted to tell his story to the officer, and told the officer that if he knew the story—the other side of it—that he would not blame him (i. e., Quigley). Chief of police Rice saw Quigley about 3 p. m. on October 4th, Saturday, and Quigley said to him that he shot Camac because he married the girl he was going with. Rice testified that Quigley looked pale, but that he could not say that he was under the influence of liquor. He looked like a man who had been on a drunk, but he showed no indications of delirium tremens then; that he remained in the station until Monday morning, and while there showed no indication of delirium tremens to nonprofessional observers. None of these facts were controverted.

The accused, through his counsel, sets up the defense of insanity of a temporary character, to wit, delirium tremens; alleging that this incapacity existed at the time of the homicide, but had passed away soon after. There was no pretense that the accused had ever suffered from anything in

the nature of permanent aberration of mind. To support this defense several witnesses appeared, who had known the accused from one to twelve years, and their testimony was to the effect that the accused was accustomed to drink to excess, and on some occasions had shown symptoms which to them indicated delirium tremens. One medical expert—Dr. Ford—made examinations of the accused at various times, at the request of his counsel, and declared it to be his opinion that the accused had delirium tremens or alcoholic insanity on October 4th in an aborted form. He first examined Quigley on Sunday evening, October 5th, and thinks he was then suffering from delusions of persecution. He did not have the typical symptoms of delirium tremens. When asked, "What kind of symptoms did he suffer from?" he answered, "I think they were aborted." He judged from circumstances that the delusions had lasted a week. In cross-examination it appeared that the doctor thought the accused was suffering from a delusion because the accused told him that he was afraid Mr. Camac might shoot him, and he likewise thought this delusion had lasted a week because Quigley told him so. In describing Quigley's disease, he says, "I think it more on the type of abortive delirium tremens than it was of the typical kind." He says, further: "There was no delirium, as far as I could find out. I have no reason to believe that he had active hallucinations and delusions." The state, in rebuttal, called, amongst other witnesses, Dr. Keene, who is in charge of the State Insane Asylum, who explained that the symptoms of true delirium tremens are visible and apparent to an ordinary, unprofessional observer, consisting of physical tremor and mental hallucinations which the patient cannot help giving evidence of. Omitting all other evidence for the state on that issue, we see no ground upon which the jury could have founded even a reasonable doubt that the homicide was the deliberate premeditated act of the accused, and that in committing it he possessed and exhibited intelligence and malice. As the jury had heard the evidence which described the attempt of Mr. Camac, the father, to seize a gun for the purpose of shooting Quigley when he was brought to his house to see Camac, the son, as he lay dying, they were quite justified in attributing the fear of Camac, which the accused showed in the presence of the doctor, to a rational appreciation of the situation, and in considering his emotion as the remorse which a sane person would feel after the commission of a heinous crime. Indeed, it is not now urged by the counsel for the accused that the verdict was against the evidence under 67 L. R. A.

the law as charged by the court. The only exception to the rejection of evidence offered by the accused was taken because the court would not permit him to introduce testimony covering the whole of the defendant's previous life, and also to show the condition of his father, as a foundation for an inference that the defendant had delirium tremens at the time of the homicide. The precise question to which objection was sustained was addressed to a witness who said he had known Quigley about eighteen years, and was: "Now, will you kindly tell the jury, in your own way, just what sort of man in Canton Mr. Quigley appeared to be?" In support of the inquiry defendant's counsel referred to *Shailer v. Bumstead*, 99 Mass. 112, where the court says: "If, therefore, the statement or declaration offered has a tendency to prove a condition not in its nature temporary and transient, then . . . [it] is admissible. Its weight will depend upon its significance and proximity." The court, after considerable discussion, said that "evidence that the accused suffered from delirium tremens ten or fifteen years ago or somebody in his family suffered in that way," was too remote; and again referring to the fact, as shown by authorities submitted by defendant's counsel, that delirium tremens is a temporary and transient condition, the court said: "You may show what his condition was, or anything not too remote; anything, say, close to this time about his drinking, his habits, and whether he had recently been in the habit of doing it, and then his leaving Canton and coming here; and all that you may show for the purpose of convincing those twelve men there of the mental condition of this man, and as to whether or not he did know or didn't know what he was doing at the time he did it; and further than that, of course, I cannot see my way at present, but you can save that point if you desire. Mr. Cooney: Under the circumstances, I desire to save that point if you will permit. (Exception noted by Mr. Cooney.)" It would be sufficient to say of this exception in a civil case that it could not be entertained because it does not apply to any specific testimony or raise any specific question of law; and in this case, if we consider the question which was attempted to be raised, we cannot sustain the exception. The court, in effect, told the counsel that he must keep within reasonable limits in proving past conditions as a basis of inference with regard to the present. The evidence which was afterwards offered on this point and admitted was all that could have been reasonably considered as bearing even remotely upon the question. Witnesses were allowed to testify to Quigley's condition and habits

for periods of from one to twelve years, and his father's habits were detailed also without objection. This exception is untenable.

The objection to the charge and the exceptions taken to the refusal of the court to charge as requested by counsel for the accused raised two questions. The fifth, sixth, and seventh requests were that the presiding justice should call the attention of the jury particularly to certain portions of the testimony, and should suggest to them certain inferences of fact to be drawn from them. While our statute (Gen. Laws 1896, chap. 223, § 13) gives the judge who is presiding at a jury trial great latitude in his comments on the evidence, only requiring that he shall not materially misstate it, it does not impose upon him as a duty anything more than to give instruction in the law. It must be left to the discretion of the judge in every case to discuss the evidence and analyze it as bearing upon the issues of fact which the jury are to determine, or to confine himself only to a statement of the legal propositions which are applicable to those issues, leaving the jury to find the facts and apply these principles for themselves. Some cases require one mode of treatment and others the other. But it can never be insisted by a party that a certain class of facts or evidence should be singled out by the judge for particular comment, as was here requested, and the court very properly refused to do as it was asked. The jury had already been told by the judge that they were to consider and weigh all the evidence in the case, and that was all that the accused or the state was entitled to demand.

The second request, so far as it involved a question of law, had already been charged.

The other question is of greater importance, and requires very careful consideration. The court charged that upon the issue of insanity the burden of proof is upon the accused, and that the rule of evidence upon this issue is that it shall be proved by a fair preponderance of evidence. The first, third, and fourth requests, which were refused, were based upon the proposition that upon the question of sanity or insanity of the accused the burden is upon the state to prove sanity beyond a reasonable doubt. The question was settled in England in 1843 by the answer of the judges to questions propounded by the House of Lords, suggested by the *Case of Daniel M'Naghten*, reported in 10 Clark & F. 200. In that case the law was said to be that, if the accused was conscious that the act was one which he ought not to do, and if the act was at the same time contrary to law, he is punishable. In all cases of this kind the jurors ought to be told that every man is

presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crime, until the contrary be proved to their satisfaction; and that to establish a defense on the ground of insanity it must be clearly proved that at the time of committing the act the party was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong. We are not now concerned with the definition of insanity here given, which has been criticised as not entirely accurate. In the case at bar the rule of evidence only is at issue. The question has arisen in almost every state of the Union and in the courts of the United States, and between the decisions of these courts there is a hopeless conflict. The decisions up to 1882 were collected in an article by Henry Wade Rogers in the *Central Law Journal*, vol. 14, p. 2. The writer cites, as supporting the view that the burden is upon the accused, the courts of Alabama, Arkansas, California, Connecticut, Delaware, Georgia, Iowa, Kentucky, Maine, Massachusetts, Minnesota, Missouri, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, and Virginia. To the contrary are cited Illinois, Indiana, Kansas, Michigan, Mississippi, and New Hampshire, while New York is called uncertain. From the report of the trial of Henry K. Goodwin, published in 1887 by the attorney general of Massachusetts, by authority of law, it appears that the courts of that state have abandoned the English rule. Judge Allen, who presided, distinctly charged the jury that if, upon the whole evidence, they had a reasonable doubt of the defendant's sanity, they should acquit him. Georgia has also changed its view. *Ryder v. State*, 100 Ga. 528, 38 L. R. A. 721, 62 Am. St. Rep. 334, 28 S. E. 246; Maryland (*Spencer v. State*, 69 Md. 28, 13 Atl. 809) and New Mexico (*Faulkner v. Territory*, 6 N. M. 465, 30 Pac. 905), where the question has come up for the first time, have adopted the same rule. To the supporters of the English rule named above may be added Nevada (*State v. Lewis*, 20 Nev. 333, 22 Pac. 241); South Dakota (*State v. Yokum*, 11 S. D. 544, 79 N. W. 835); and Utah (*People v. Dillon*, 8 Utah, 92, 30 Pac. 150). The case of *State v. Scott*, 49 La. Ann. 253, 36 L. R. A. 721, 21 So. 271, reviews the law up to that date, and adopts the English rule. The notes to this case present fully all the American cases to that time, and justify the conclusion of the court that the great weight of authority, including both decisions of courts and conclusions of the text writers, supports its decision.

Perhaps the most weighty authority to

the contrary is *Davis v. United States*, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353, which adopts the view apparently originated by Mr. Bishop (2 Bishop, Crim. Proc. § 673), where it is thus stated: "To the writer of these volumes the true doctrine seems to be the following: 'Sanity,' as observed by a learned judge (Wright, J., in *Walter v. People*, 32 N. Y. 147, 164), 'is presumed to be the normal state of the human mind, and it is never incumbent upon the prosecutor to give affirmative evidence that such state exists in a particular case.' But suppose this normal state is denied to have existed in the particular instance. Then, if evidence is produced in support of such denial, the jury must judge of it and its effect on the main issue of guilty or not guilty; and if, considering all the evidence, and considering the presumption that what a man does is sanely done, and sufficing the evidence and the presumption to work together in their minds, they entertain a reasonable doubt whether the prisoner did the act in a sane state of mind, they are to acquit." In *Davis v. United States* the court holds that the burden is upon the prosecution to establish sanity as an ingredient of the crime; and hence, when the presumption of sanity becomes silent on the introduction of evidence against it, proof of sanity beyond a reasonable doubt must be made before the jury can convict. It would be a fruitless task to review in detail the cases where the question has been considered, for they are divided into two classes, which follow substantially the same two divergent lines of reasoning. The English rule implies that the question of guilt and the question of insanity raise two distinct issues, and that, while both may be involved in the final verdict, the burden of proof upon each issue lies upon different parties. The most complete and forcible statement of the argument in support of this rule which we have found is contained in the opinion of Judge Danforth in *State v. Lawrence*, 57 Me. 574, 581. The American rule, so called, holds that in a criminal case there is but one issue, and that the burden throughout is upon the prosecution to prove, not only the criminal act, but the capacity of the accused to commit it beyond a reasonable doubt.

We think the first of these positions is the more logical. Sanity is not an ingredient of crime. It is a condition precedent of all intelligent action, as well benevolent as nefarious. It is a quality of the actor, not an element of the act. It is incumbent upon the prosecution to show the commission of the act, and from this showing and its circumstances to sustain the inferences of malice and such emotions as the partic-

ular crime may include. But sanity is not one of these inferences. It is a pre-existing fact which may be taken for granted as implied by law and general experience. We do not infer sanity from the criminal act as we do malice and premeditation. Sanity is a premise, not a conclusion.

It is argued that criminal intent, malice, and premeditation are facts to be proved by the prosecutor; that these cannot exist in an insane mind; hence sanity must be proved by the prosecutor. But these are facts of mental condition and action, and they can only be proved by inference from material facts, circumstances, and acts. It is incumbent, therefore, upon the prosecution to prove such material facts, circumstances, and acts as would compel the inference of guilt in a sane person, and this is the limit of his burden. In murder the prosecution must establish the act, and, either by inference or additional evidence, malice and premeditation. If these ingredients of the crime cannot exist without sanity, sanity is presumed. All the ingredients of the crime must be proved, and as to these we agree the burden never shifts; but as to sanity it never attaches to the prosecutor. The plea of not guilty by itself does not put the sanity of the accused in issue. He must raise the question otherwise, as all agree, if not by special plea at least by introducing evidence, and this is confession and avoidance. Confession and avoidance are an admission that the accused performed the act charged and a denial that the act was criminal. They are not, as the arguments of several courts assume, an admission that a crime was committed, and the tender of an excuse for committing it. The defense of insanity admits the act, but not the crime; just as the pleas of self-defense or of a license do. Upon both these defenses we have held the burden to be upon the accused. *State v. Ballou*, 20 R. I. 607, 40 Atl. 861; *State v. Beswick*, 13 R. I. 211, 43 Am. Rep. 26.

The defendant's counsel argue that because, when a defendant relies upon an alibi, this defense is established by sufficient evidence to create a reasonable doubt of his presence at the crime, therefore it should be held that when the defense of insanity is set up it will be sustained by sufficient evidence to create a reasonable doubt of the sanity of the defendant. This argument is specious. It is part of the state's case to show that the accused was present and did the act complained of. An alibi is merely a circumstantial denial of the state's case. The issue is not a new one, and the burden of proof and the rule for weighing evidence remain the same. But, physical presence being proved, mental presence is inferred

without proof. Setting up a mental alibi introduces a new issue; one not ordinarily involved in the issue of guilty or not guilty; an issue not concerning the crime as a crime, but the accused as an actor. Presence or absence of body at a given place at a given time is a physical fact, always depending upon evidence. Sanity of a human being is an assumed fact, never depending upon evidence until it is disputed.

Another error which it seems to us is committed by those who adopt the American rule is in mistaking the scope of presumptions of law. There are two well-settled presumptions involved in this question, both disputable: First. That every man is presumed to be innocent of crime. This presumption vanishes when the mind is convinced by evidence that the accused did commit the crime. Second. Every man is supposed to be a responsible, free agent, capable of knowing right from wrong, and able to choose between them. This presumption vanishes when the mind is convinced that the accused was insane at the time under consideration. Now, the theory we are considering supposes these two presumptions to be summoned as witnesses, and to be weighed against each other, and it is said by some of these cases that the presumption of innocence outweighs the presumption of sanity. A moment's reflection will show that the contrary is the case, for, as there are many more persons who commit crime than there are who are criminally irresponsible, when a given person commits a criminal act, in the absence of further knowledge, we consider him guilty, not insane. Lawson, Presumptive Ev. 458. But, properly speaking, presumptions do not clash together. They are assumptions of the truth of certain facts in the absence of evidence. The normal office of a disputable presumption of law is to fix the burden of proof, not to modify the acceptance of evidence when resort is had to evidence. "When conflicting evidence on the point covered by the presumption of law is actually gone into, the presumption of law is *functus officio* as a presumption of law." Best, Ev. 276, note 2. The burden of proof on any issue is always contrary to the presumption. One who disputes the presumption must take the burden. "If, to procure an acquittal, he relies upon insanity, he assumes the burden of proof as to that matter. He makes insanity an affirmative issue upon his part, because it is an allegation of fact in opposition to a presumption of law." *People v. Walter*, 1 Idaho, 386, 391. He invites a resort to evidence, and must supply the evidence. This is involved in Mr. Wharton's statement: "Hence it may be stated as a test admitting of universal application that, whether

the proposition be affirmative or negative, the party against whom judgment would be given as to a particular issue, supposing no proof to be offered on either side, has on him, whether he be plaintiff or defendant, the burden of proof, which he must satisfactorily sustain." Wharton, Ev. § 357. In civil cases this is the only function of a disputable presumption of law. In criminal cases the presumption of innocence goes further, and imposes a rule for weighing evidence, and it extends its protection to the accused until this rule of evidence is satisfied. In this capacity it does not assume the place of a witness, but rather that of an advocate. It does not contradict the evidence, but insists that it shall be weighed by the prescribed standard. When the evidence works conviction beyond a reasonable doubt, the presumption of innocence withdraws its protection. Coupled with the presumption of sanity, there is no such arbitrary rule of weighing evidence.

It was held by some early cases in this country that this defense must be proved by the accused beyond a reasonable doubt; but the very general concurrence of those courts which hold the accused to proof of the fact only requires that the evidence should be sufficient to satisfy, or that it should preponderate in his favor. The more stringent rule upon the main issue was adopted out of favor to the accused, and it would seem inconsistent, while deeming him worthy of favor on one issue, to impose a greater burden than simple proof upon him on the other. We may condense these views as follows: Homicide, unexplained, is murder at common law. *Com. v. York*, Bennett & H. Lead. Crim. Cas. 504; *Com. v. Webster*, 5 Cush. 320, 52 Am. Dec. 711; Wharton, Crim. Ev. § 738. The definition of murder includes several elements, all of which, except the act of killing, are inferable from the act itself. The presumption of innocence is a presumption that the accused did not commit the act which the law calls a crime. Evidence convincing beyond a reasonable doubt that he did commit the act is proof that he committed the crime. The presumption of innocence has been overcome when the criminal act is proved. Involved in this conclusion, amongst other things, is the presumption, which is an inference of fact from general experience, that the accused was sane when he committed the criminal act. This presumption continues after the presumption of innocence has been overcome. Evidence is required to overcome it, and the accused must furnish this evidence. If the evidence on this point simply balances, and so produces no probative effect on the mind, the presumption of sanity survives, and the judgment that the man is

guilty remains unshaken. Sanity is a condition which does not require proof until its existence is denied. When the well-established but absolutely arbitrary rule is announced that all facts constituting the crime must be proved beyond a reasonable doubt, it cannot logically be held to include a fact which is not required to be proved at all. Insanity is not a normal condition, but a positive disease; and positive proof may reasonably be required to establish it as a fact to be regarded in making up a judgment on any question where it is relevant. We cannot doubt that this is the view of the issue which is implied by our statute law (Gen. Laws 1896, chap. 82, § 22), which provides: "Whenever, upon the trial of any person upon an indictment, the accused shall set up in defense thereto his insanity, the jury, if they acquit such person upon such ground, shall state that they have so acquitted him," etc. This statute requires the defense of insanity to be set up by the accused, and requires the jury to find specially upon that issue. Under this provision the rules of evidence are as essentially fixed as if a special plea of insanity were required. The statute is silent as to how this defense shall be set up, and so it need not be presented in writing, but may be advanced verbally by counsel as the plea of not guilty is by the accused, or by the court on his behalf, if he stands mute, when arraigned. Having set up this special defense, it is incumbent upon him to prove it by evidence; and if the jury, after weighing the evidence for and against the assertion, are not convinced of its truth by a fair preponderance of the evidence, it cannot avail him. The statute does not contemplate that the jury shall acquit on the ground that they doubt the sanity of the accused, but on the ground of his actual insanity. And the finding of the jury is made sufficient ground for the court in its discretion, and without further investigation, to certify the case to the governor that the insane person may be confined.

Statutes of similar tenor have received this construction in Massachusetts (*Com. v. Eddy*, 7 Gray, 583); in Minnesota (*Bonfanti v. State*, 2 Minn. 123, Gil. 99); in Louisiana (*State v. Scott*, 49 La. Ann. 253, 36 L. R. A. 721, 740, 21 So. 271); in Pennsylvania (*Ortwein v. Com.* 76 Pa. 414, 18 Am. Rep. 67 L. R. A.

420); in Maine (*State v. Lawrence*, 57 Me. 574, 581). It has been held within the power of the general assembly, under the Constitution, to provide that the burden of proving an excuse or license to do an act which is generally criminal shall be upon the accused. *State v. Beswick*, 13 R. I. 211, 43 Am. Rep. 26, approved in *State v. Higgins*, 13 R. I. 330, 43 Am. Rep. 26, note, and *State v. Mellor*, 13 R. I. 666. These decisions are as applicable to the defense of insanity as to the defense of license. In Oregon the English rule is enacted by statute. Bellinger & C. Anno. Codes & Statutes, § 1393.

The last ground urged for granting a new trial is based upon the contention that one of the medical witnesses called by the state in rebuttal was mistaken in saying that he observed the condition of the accused on the 7th day of October. The witness testifies that he vaccinated the accused and several others on that day, and during the operation, which occupied a very short time, took notice of his condition. The substance of his testimony is that the witness did not note any abnormal symptoms in the accused. Counsel now ask to have a new trial, that they may present evidence that the accused was not vaccinated on the 7th day of October. One of the affidavits to support this prayer divulges the fact that immediately after this testimony was given a recess was taken, during which counsel and his expert medical witness examined both arms of the accused, and found no trace of a recent vaccination. Not only the accused, therefore, who was perfectly sane when he was tried, but his counsel, knew the alleged fact in time to have shown the arm to the jury, and, in view of it, to have cross-examined the witness. By bringing the matter to the attention of the court he could have procured the record of medical treatment of the accused at the jail, which he has since obtained. We fail to see any merit in this allegation.

In view of the overwhelming preponderance of the whole evidence that the accused was guilty of wilful murder, we cannot assign to the error, if it was one, any appreciable influence on the minds of the jury.

The petition for new trial is denied, and the case will be remanded to the Common Pleas Division for sentence.

SOUTH DAKOTA SUPREME COURT.

STATE of South Dakota *ex rel.* Robert M.
HOWELLS

v.

H. A. METCALF.

(.....S. D.....)

1. The claim of a candidate for office to have his name printed in the regular party column where all the candidates in the column can be voted for at once by a mark at the head of the column, presents a question of substantial right.
2. An organized political party cannot have at the same time on the official ballot more than one candidate for the same county office.
3. The supreme court has jurisdiction to control by mandamus the action of the county auditor in determining the names to be placed on an official ballot, where there is not sufficient time to enable the county judge to whom the statute gives jurisdiction to act, and have his action reviewed on appeal prior to the election.
4. That faction of a county convention which assembles at the place designated by the chairman and a majority of the county committee, organizes, and proceeds to nominate candidates, must be regarded as the regular representative of the party, in the absence of anything which justifies delegates in refusing to attend at the place selected.
5. The desire to prevent bloodshed is not a sufficient excuse to justify delegates to a convention of a prominent political party in refusing to attend the meeting organized by the central committee.
6. Delegates are not justified in refusing to attend the convention organized by the central committee of a political party because there are contesting delegations, and the central committee is favorable to the opposing faction.
7. The names of candidates nominated by a convention erroneously claiming to represent a political party, in opposition to the regular convention, of that party, should be excluded from the official ballot.
8. That the law does not require the official ballots to be printed and in possession of the proper officer until ten days before election does not, prior to that time, deprive the court of jurisdiction of a controversy to settle the names which shall be placed upon the ballot.

(September 21, 1904.)

NOTE.—For questions as to the regularity of a political convention by which nominations are made, when there is a dispute as to the right to place them on the official ballot, see also, in this series, *Shields v. Jacob*, 13 L. R. A. 760; *Phelps v. Piper*, 33 L. R. A. 53; *Sims v. Daniels*, 35 L. R. A. 140; *McDonald v. Hinton*, 35 L. R. A. 152; and *Stephenson v. Election Comrs.* 42 L. R. A. 214.
67 L. R. A.

APPPLICATION for a writ of mandamus to compel the auditor of Roberts County to place the names of certain candidates for office upon the official ballot. *Granted.*

The facts are stated in the opinion.

Messrs. Horner & Stewart, for plaintiff:

Where the county auditor refuses to receive and file certificates of nomination of county officers made by the political party entitled to a column upon the official ballot, this refusal involves the right of a citizen to vote for nominees of the political party of his faith, the exercise of the elective franchise, and indirectly involves the election of every candidate in that column upon the official ballot; and the supreme court has jurisdiction to issue an original writ of mandamus in such case.

State ex rel. Fosser v. Lavik, 9 N. D. 461, 83 N. W. 914.

The functions of a county auditor are ministerial, and not judicial.

State ex rel. Plain v. Falley, 8 N. D. 90, 76 N. W. 996; *State ex rel. Fosser v. Lavik*, 9 N. D. 461, 83 N. W. 914.

The relator has the necessary interest to maintain this action.

State ex rel. Dakota Hail Asso. v. Carey, 2 N. D. 36, 49 N. W. 164; *State ex rel. Adkins v. Lien*, 9 S. D. 297, 68 N. W. 748; *State ex rel. Plain v. Falley*, 8 N. D. 90, 76 N. W. 996.

If improper nominations have been filed any citizen interested may apply to a court of competent jurisdiction, where all the facts can be speedily and certainly investigated; and if any other nominations other than those prescribed by law have been filed, the officer may be enjoined from placing the same upon the official ballot.

State ex rel. Wolfe v. Falley, 9 N. D. 450, 83 N. W. 860.

There cannot be two nominees by one party for one office that is filled by one person; hence one of such certificates cannot contain the regular party nomination.

The court will refuse to go into the procedure of a convention, and will limit the inquiry as to whether or not an assembly is a political convention organized as the law requires.

S. D. Rev. Code P. C. 1892, 1915; *State ex rel. Wolfe v. Falley*, 9 N. D. 450, 83 N. W. 860; *State ex rel. Bloomfield v. Weir*, 5 Wash. 82, 31 Pac. 417; *State ex rel. Fosser v. Lavik*, 9 N. D. 461, 83 N. W. 914; *McDonald v. Hinton*, 114 Cal. 484, 35 L. R. A. 152, 46 Pac. 870.

Where the convention divides and two conventions are held, and nominations are

made and filed, the nominees of each convention claiming to be the regular party nominees, the court will, upon proper application, determine which are the regular nominees.

State ex rel. Wolfe v. Falley, 9 N. D. 450, 83 N. W. 862.

The inquiry of the court should be limited to ascertaining which of the conventions from which the nominating certificates come is the regular one, and should not extend to an examination of the political methods and tactics further than is necessary to ascertain the identity of the regular party convention.

State ex rel. Gramold v. Porter, 11 N. D. 309, 91 N. W. 944; *Re Fairchild*, 151 N. Y. 359, 45 N. E. 943; *Phillips v. Gallagher*, 73 Minn. 528, 42 L. R. A. 222, 76 N. W. 285; *Moody v. Trimble*, 109 Ky. 139, 50 L. R. A. 810, 58 S. W. 504; *Davis v. Hambrick*, 109 Ky. 276, 51 L. R. A. 671, 58 S. W. 779.

Action of the state convention in seating delegates from a county convention, and in refusing to seat opposing delegates, is conclusive upon the court.

State ex rel. Buttz v. Liudahl, 11 N. D. 320, 91 N. W. 950.

Mr. J. J. Batterton also for plaintiff. *Messrs. Frank McNulty and Campbell & Taylor* for defendant.

Haney, J., delivered the opinion of the court:

On March 22, 1904, the regularly constituted central committee of the Republican party in Roberts county issued a call for a delegate convention to meet in Sisseton, at 1 o'clock P. M., on April 5, 1904, for the purpose of selecting 28 delegates to the state convention, 28 delegates to the judicial convention, and to place in nomination candidates for the following legislative and county officers: One senator, 3 representatives, treasurer, sheriff, register of deeds, auditor, state's attorney, county judge, clerk of the courts, superintendent of schools, corner surveyor, 3 county justices, and 3 constables. The call was properly published. It recommended that precinct caucuses be held April 2d or at such time as might be fixed by the member of the county committee residing in the precinct, and at the place where the preceding spring election was held. It stated that "credentials should be handed to the chairman or secretary of the committee before the opening of the convention." At the time designated in the call numerous persons claiming to be delegates to the convention provided for therein appeared at Sisseton. Some of these persons repaired to the place selected by a majority of the county central committee, were called to order by the chairman of that

committee, and, having organized in the usual manner, proceeded to transact the business mentioned in the call. At the same time the other persons present in Sisseton, claiming to be delegates, assembled in another place, were called to order by a member of the county central committee, and, having organized in the usual manner, proceeded to transact the business mentioned in the call. The first-mentioned assembly so organized was presided over by Mr. Howard Babcock, and will be hereafter termed the "Babcock convention." The other assembly so organized was presided over by Mr. A. M. Houck, and will be hereafter termed the "Houck convention." In due time the nominations for legislative and county offices, made by each of these conventions, were certified in proper form by the respective officers of such conventions as nominees of the Republican party in Roberts county, and each of these certificates of nomination was received and filed by the defendant as auditor. Subsequently the relator and his associate candidates, who were nominated by the Babcock convention, demanded of the defendant that their names be printed on the ballots to be used in Roberts county at the coming general election, in the Republican party column, and that the names of the persons nominated by the Houck convention be excluded from such ballots. This demand having been refused, the relator has applied to this court, upon notice, for a peremptory writ of mandamus commanding the defendant to comply with such demand.

The writ of mandamus may be issued by this court to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. Rev. Code Civ. Proc. § 764. The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It must be issued upon affidavit, upon the application of the party beneficially interested. Id. § 765. It is an official duty of the auditor, which the statute specially enjoins, "to provide printed ballots for every election in which the voters of the entire county participate." All official ballots are to be white in color, of good quality of printing paper, and to contain the name of every candidate whose nomination has been certified by the Secretary of State or filed with the county auditor in the manner provided by law; but the name of no candidate shall appear more than once on the ballot for the same office. "The names of candidates for each office shall be arranged in large type under the designation of the party or principle for which said nomina-

tion is made, so that all the names of candidates of each party shall be in a separate column, and each party ticket shall be printed side by side on the ballot with names of candidates for each office directly opposite each other; and the names of all independent candidates shall occupy a column separate from regular party tickets. There shall be a circle printed at the head of each ticket on the ballot; also a circle at the left of the name of each candidate on the ballot, and no other circle shall appear on the ballot." Rev. Pol. Code, §§ 1886, 1892. Where, as in this state, the voter may express his choice for all the candidates in a party ticket by merely making a cross in the circle over the head of a party column (Id. § 1914), the practical advantage of having a candidate's name printed in a party column, is apparent, and whether it shall be so printed presents a question of substantial right. At the coming general election in this state the Republican column will embrace the names of candidates for presidential electors, congressmen, judges, and state officers. It can embrace the names of only one set of county candidates. In counties where only one set of Republican county candidates have been nominated in the manner provided by law, the duty of the auditor to print their names in the Republican column will be clear and unquestioned. In the county of Roberts, however, there are two certificates of nomination on file in the auditor's office, each regular on its face, each containing a set of county candidates, and each purporting to have been nominated by the Republican party.

When the legislation under consideration was enacted the existence of organized political parties, governed by generally recognized rules, and perpetuated by well-known methods, was disclosed by the current history of the country. Hence, where the word "party" occurs in the statute relating to nominations, it should be construed to mean a number of persons united in opinion and organized in the manner usual to the then existing political parties. Mindful of this definition, it seems to us to be self-evident that a party—that is, an organized political party—cannot have, at the same time, more than one candidate for the same county office. The acts of an organized political party, with respect to the selection of candidates for public office, must be regarded as the acts of the electors constituting such organization, and the statute expressly declares that no person shall join in nominating "more than one person for any place to be filled." Rev. Pol. Code, § 1903. Whenever an elector joins, through a convention or by petition, in nominating a candidate other than the one nominated by the party

organization, he by that act ceases to be a member of the organization with respect to such nomination, and the candidate he has joined in nominating cannot be regarded as representing the organization. A convention, within the meaning of the statute relating to nominations, "is an organized assembly of delegates or electors representing a political party or principle." Such a convention "may nominate candidates for public offices to be filled by any public election within this state." All nominations made by such convention are required to be certified in a prescribed manner, the certificate of nomination to "designate in not more than five words the party or principle which such convention represents;" and if the certificate relates to county officers it shall be filed with the county auditor. Id. §§ 1899, 1900, 1901. Then, as the auditor is required to print only such names as have been certified or filed "in the manner provided by law," and only one set of county candidates can be in the Republican column, someone must decide which, if either, of the conventions held in Roberts county, represents the Republican party. Such a controversy as has here arisen may not have been anticipated by the legislature. It did, however, provide for the correction of errors on the part of the auditor, and thus clearly indicated that his decision respecting such a controversy should not be regarded as final. The statute reads as follows: "Whenever it shall appear by affidavit that an error has occurred in . . . the printing of the sample or official ballots, the judge of the county court shall, upon application of any voter, by an order, require the county auditor or other public official or board charged with the duty of preparing ballots, to correct such error or show cause at such time and place as under the circumstances he may deem necessary, why such error should not be corrected." Id. § 1889. Having thus clothed the county judge with power to review the auditor's action, it is clear the legislature did not intend to preclude interested parties from invoking the aid of the courts in enforcing their legal rights with respect to the preparation of ballots; and, as an application to the county judge in the present case would not have afforded an adequate remedy, because of the delay incident to any proper procedure for bringing his decision here for review, this court undoubtedly has authority to control the auditor's action by means of a peremptory writ of mandamus.

Whenever the legislature, in its wisdom, sees fit to regulate nominations and the printing of ballots by statutory enactments, the duty of interpreting such enactments devolves upon the courts, and they should

not attempt to escape responsibility or avoid disagreeable consequences by assuming that no judicial questions are involved. The auditor's duties and the candidate's rights respecting the preparation of ballots having been defined by statute in this state, the performance of such duties and the protection of such rights no longer present merely political questions, but must be dealt with as are other legal duties and other legal rights. So we are compelled to conclude that it is the duty of this court in this proceeding to determine which, if either, of these sets of candidates is entitled to be recognized as representing the Republican party in Roberts county.

Where a custom or usage is of such notoriety and obtains so extensively as to be a matter of general knowledge and common information, judicial notice is taken thereof by the courts. 17 Am. & Eng. Enc. Law, p. 945. There are such customs and usages governing the creation and existence of all organized political parties in this country. A party having been organized by the meeting of electors or delegates, its organization is perpetuated by the appointment of a committee, which is clothed with authority to act for its members until they are again assembled and otherwise direct. The existence and authority of such committees are recognized by our statutes, which provide that, where any person nominated dies or declines before the ballots are printed, the vacancy thus or otherwise caused may be (if the original nomination was made by a party convention which delegated to a committee the power to fill vacancies) filled by such committee. Rev. Pol. Code, § 1908. Therefore, from the adjournment of one convention until the temporary organization of another, the national, state, or county committee, as the case may be, represents and is alone authorized to act for the organization which appointed it. Such a committee existed in Roberts county. Its regularity is unquestioned. Its authority to fix the time and select the place of holding a convention for the nomination of county officers must be conceded, because the claims of each faction rest on the validity of the call issued by such committee. As is not unusual, the call named the city, but not any particular building, in which the convention would be held. A majority of the committee concurred in the selection of the opera house, and it is not suggested that anyone claiming to be a delegate did not know that such place had been so selected.

These facts concerning the organization of the Babcock convention are established by the pleadings: At the time fixed and in the place selected by the county committee, its chairman, with the concurrence of a major-

ity of the committee, called the persons there assembled to order. The call was read by the secretary of the committee, and thereupon a temporary chairman, secretary, and the usual committees were selected. The report of the committee on credentials having been adopted without objection or protest from anyone present, a permanent organization was effected, and the convention proceeded to transact the business for which it was convened. Defendant admits in his answer that none of the delegates composing the Houck convention sought admission to the other, and alleges that none of the delegates attending the Babcock convention sought admission to or attended the Houck convention. It needs no argument to show that the Babcock convention, thus called and organized, was regular, and should be so regarded, in the absence of anything which justified a majority of the whole number of delegates in refusing to attend at the place selected by the committee. The reasons assigned for such refusal are thus stated in defendant's answer: "That, on account of the fact that a majority of said [central] committee were thus interested [as candidates] in the result of the convention in said county, and were so violently and bitterly opposed to the portion of said party whose convention was presided over by said A. M. Houck, and on account of the Babcock faction having already instituted groundless contests and causing to be elected contesting delegations in said 19 different voting precincts in said county, thus preventing the delegates from said contested precincts from participating in the organization of said convention, and as no place for the holding of said convention was designated in the call, the said Houck faction determined, for said reasons, and for the further reason that an unseemly riot and possibly bloodshed would thereby be averted, to hold said Republican convention in a public hall on Main street in Sisseton." So it appears that the Houck faction remained away from the regular meeting place (1) for fear of bloodshed, (2) because there were numerous contesting delegations, and (3) because the central committee favored the opposing faction.

The first reason can hardly be taken seriously. It affirmatively appears that none of the Houck delegates entered or attempted to enter the opera house, and nothing is disclosed which would warrant the inference that they would have been excluded, had they attempted to do so. Surely it should not be presumed that such gentlemen as are usually chosen for delegates to Republican conventions in Roberts county necessarily resort to bloodshed when they disagree concerning the selection of delegates to a state

convention. The law wisely presumes, in absence of evidence to the contrary, that no person intends to commit crime or to do any wrongful act, and we trust the time will never come in this state when the conduct of delegates to political conventions must be viewed in any other light.

The other two reasons are equally, though perhaps less palpably, untenable. They rest on the assumption that, if all the persons claiming to be delegates had assembled in the opera house, an erroneous decision would necessarily have been rendered regarding who were entitled to seats in the convention. Doubtless the decisions of conventions concerning credentials are frequently erroneous, and occasionally arbitrary and unjustifiable. Even the judgments of judicial tribunals are sometimes so regarded, especially by unsuccessful litigants. But all this does not justify the presumption that any tribunal will decide erroneously, in the absence of substantial grounds for anticipating such a result. When a man is sued, he must appear and defend, or judgment will be taken against him by default. If he believes the court or judge is prejudiced, or otherwise disqualified, he must appear and preserve his rights by timely objections, provided, of course, the tribunal has jurisdiction of the matter involved. In the case at bar the persons claiming to be delegates were duly notified to appear at the opera house for the purpose of organizing the convention. When the hour of meeting arrived, it was, we think, the right and duty of the chairman of the central committee, or some other person authorized by that committee, to call the assembly to order. The next step would be the selection of a temporary chairman. If different persons arose for the purpose of nominating such officer, someone would necessarily have to decide which of those persons was entitled to recognition, and, if a division or roll call were demanded, someone would necessarily have to decide who were entitled to vote. It being a convention of an organized party, and the central committee being the only body authorized to act for the organization at that moment, we think it would be entirely proper for such committee, following the practice of the national committee, to determine who should participate in the temporary organization by having prepared a temporary or *prima facie* roll of delegates. Then, when a temporary organization was effected, it would be for the convention itself to determine the qualification of its own members. Such a temporary roll of those deemed to have a *prima facie* right to seats is prepared in advance of the meeting of Congress and of the state legislature, the former and each branch of the latter being, of course, the conclusive

judge of the qualification of its own members when organized. But whether this procedure be adopted, or the other, which confides all questions relative to both temporary and permanent organization to the delegates present, it was clearly incumbent upon all who claimed to be delegates to at least appear and demand recognition, whether or not they delivered their credentials to the committee. In the absence of such a demand they are clearly precluded from assuming that their rights would have been ignored by the convention, even if they were disregarded by the committee. Having refrained from attending at the proper time and place, they are in precisely the same position as if no delegates had been selected in the precincts they claimed to represent, in which case the convention would be at liberty to seat electors residing therein, as did the Houck convention, with respect to several precincts from which no one appeared claiming to have been chosen at any caucus or otherwise. Therefore, upon the undisputed facts, we conclude that the Babcock convention was regular; and, as the party could hold but one convention for the same purpose, it alone must be regarded as representing the Republican party in Roberts county.

It appears from the record in this proceeding that the same conclusion was reached by the Republican state convention and the Republican judicial convention in the fifth judicial circuit, to each of which each of these rival county conventions sent delegates demanding recognition as the regular Republican organization. It is, however, unnecessary in the view we have taken to consider whether the decision of the highest tribunal within the party organization in this state concerning the issue here presented should be deemed conclusive, and we express no opinion as to that contention, which has the support of well-reasoned cases in other jurisdictions. Nor do we now determine to what extent an investigation of the facts leading up to and involved in the organization of a convention should be pursued, where the regularity of such convention is put in issue. No opinion is expressed concerning the methods of either faction in regard to the conduct of caucuses or initiation of contests. We merely decide upon undisputed facts that the Babcock convention is regular, because those who alone could attack its regularity waived their right to do so by failing without any valid excuse to assert their claims at the proper time and place.

Under the provisions of the statute heretofore cited, only the names of such candidates as are nominated in the manner provided by law can be printed on the ballots. Nor can the name of any candidate be written

thereon whose nomination has not been properly certified. *Chamberlain v. Wood*, 15 S. D. 216, 56 L. R. A. 187, 91 Am. St. Rep. 674, 88 N. W. 109. Only "an organized assembly of delegates or electors representing a political party or principle" can file such certificate of nomination as we are considering, and the certificate must designate the party represented. If the Houck assembly did not represent the Republican party, and we have shown that it did not, what party did it represent? Its certificate of nomination reads thus: "This is to certify that on the 5th day of April, 1904, a convention of delegates of the Republican party in and for the said county of Roberts and state of South Dakota was duly assembled at Sisseton, in said county; that upon the organization of said convention A. M. Houck was elected chairman and J. A. Le Lacheur secretary; whereupon said convention proceeded to nominate the following named persons, whose residence and business address is stated opposite each name, for the office designated, respectively: . . ." No new party was organized. No principle was designated in its certificate. If it was not the Republican county convention, it had no existence as a convention within the meaning of the statute. By its certificate of nomination it authorized and directed the auditor to print the names of its candidates in the Republican party column. It authorized the doing of nothing else, and, having ceased to exist without conferring power on anyone to change its certificate, the same becomes wholly inoperative. It is not a case of mistake in drafting a certificate, which might be amended by those who signed it. The instrument accurately expresses the intent and purpose of the assembly which caused it to be filed. Its invalidity is a matter of substance, not of form. It is without force or effect, because the assembly was without power to act for the Republican party. Briefly stated, the situation is simply this: The Republican party in Roberts county did not nominate the Houck candidates. The Houck certificate does not authorize the auditor to print their names under any other party designation. Therefore it is his duty to exclude their names from the ballots. No other conclusion can be drawn from the plain and unmistakable language of the statute. Moreover, to print the names of candidates not nominated by the Republican party at any place on the ballots, under the designation of that party, would be precisely such a misrepresentation and deception as the Australian ballot system is designed to prevent. Of course, the view we have taken does not deprive the requisite number of electors from placing the names of the per-

sons nominated by the Houck assembly on the ballots as independent candidates by petition.

Statutes regulating the methods of nominating candidates, and providing for the use of secret ballots to be officially prepared and furnished at public expense, have been enacted in nearly all the states. The decisions which involve the interpretation of such enactments are numerous. While designed to effect the same general objects and similar in many features, these statutes are by no means identical in terms. Hence the law in any particular jurisdiction can be accurately determined only by reference to the language employed in expressing the legislative will. As such language differs in different states, and equally enlightened minds disagree concerning the meaning of the same language, there has necessarily arisen much apparent conflict in the case law on these subjects. The proceeding at bar must be governed by the laws of this state. Being satisfied that our own law has been correctly interpreted and properly applied, we might, with confidence and propriety, rest this decision alone on the reasons already stated. However, as the views herein expressed have the support of abundant authority, a few leading cases will be reviewed and others cited.

In North Dakota, where the statutes on these subjects are probably more nearly the same as here than in any other state, it is held that when two nominations, purporting to be by the same political party for the same office, are filed with the secretary of state, it is his duty to refuse to certify to the proper county auditors the names contained in both nominations, the law requiring him, however, to certify the name of the regular party nominee; and, if he refuses so to do, he may be coerced by mandamus. *State ex rel. Wolfe v. Falley*, 9 N. D. 450, 83 N. W. 860. In this case, after defining its own powers and duties, the court proceeded to determine which was the regular candidate according to the customs and usages which govern political organizations. The following excerpts from the opinion are pertinent and convincing: "It requires no argument to show that one political party cannot hold two separate conventions at the same time, and nominate two different persons to fill one office. If two nominations for the same office by the same party are filed, one or the other must be spurious. Both may be spurious, but both cannot be genuine. It is perfectly clear, from § 502, Rev. Codes, that the legislature never intended that one party should have more than one candidate for any one office. The section declares: 'No certificate shall contain the name of more than one candidate

for each office to be filled.' Section 504 requires the secretary of state to certify to the proper county auditors 'the name and postoffice address of each person nominated for such office as specified in the certificates of nomination filed with him.' But certificates can be filed with him only in pursuance of nominations made by a convention representing a party or a principle. Such is the clear purpose of the law. Section 497a to 512, inclusive. But one party can make but one nomination for one office. Hence he can properly certify but one nomination by the same party. This is made clear by the provisions of § 491, which permits a voter to vote for the entire party ticket by marking a cross in the square following the party named. This the voter could not do if there could be two candidates for one office under the same party heading. From this it follows that it is the duty of the secretary of state to certify the genuine party nominee. See the case of *State ex rel. Bloomfield v. Weir*, 5 Wash. 82, 31 Pac. 417. It becomes necessary, then, that there should be a final determination as to who is the real party nominee. . . . But who shall decide this question? . . . Where only one certificate of nomination, purporting to be the nomination of a certain named party for a certain named office, is filed with the secretary, it becomes as to him the party nomination, and he cannot question it. But it is self-evident that this cannot be true where two certificates are filed, each purporting to be the nomination of the same party for the same office. It is an uncontrovertible fact that there cannot be two nominees by one party for one office that is filled by one person. Hence one of such certificates, at least, cannot contain the regular party nomination. It requires no judicial investigation to determine that fact. It is patent and conclusive. He cannot certify both names, because both cannot go on the same party ticket. He is in duty bound to refuse to certify both. Perhaps he may properly refuse to certify either, as we understand he did in this case, but certain it is he must refuse one. . . . Indeed, under our statute, which gives the certifying officer no judicial powers, and which requires party nominations to be filed with the secretary of state, and which contemplates that no nominations shall be filed with him except those made by political parties, it becomes absolutely necessary that the courts should pass upon the regularity of such nominations; otherwise, the door for fraud and deception must stand wide open, and no power exist anywhere to close it. Perhaps we were not justified in taking any space to demonstrate that this court had the power, and it is its duty, to act in this

matter." The nature and scope of the inquiry in this class of cases is thus defined in *State ex rel. Granvold v. Porter*, 11 N. D. 309, 91 N. W. 944: "In determining which of two sets of nominees of a split political convention are entitled to have their names placed upon the official ballot as the party nominees, the inquiry of the court should be limited to ascertaining which of the conventions from which the nominating certificates emanate is the regular one, and should not extend to an examination of political methods and tactics further than is necessary to ascertain the identity of the regular party convention."

It was held in *State ex rel. Sturdevant v. Allen*, 43 Neb. 651, 62 N. W. 35, that, where two factions of a political party nominate candidates and certify such nominations to the secretary of state in due form of law, the latter will not inquire into the regularity of the convention held by either faction, but will certify to the several county clerks the names of the candidates nominated by each; such practice being in harmony with the rule which requires courts, in case of doubt, to adopt that construction which affords the citizen the greater liberty in casting his ballot. The doctrine thus stated was, however, modified in a later case, where the court says: "Although the courts will not decide which of two rival conventions is the regular convention of the party when both were called and held in accordance with the precedents and usages of the party, and each claiming in good faith to represent the party, since that is not a subject of judicial inquiry, yet the courts, in a proper case, will determine whether nominations were in fact made by a *de facto* convention of the party, even though to do so may lead to an investigation of political methods." *State ex rel. Rose v. Piper*, 50 Neb. 42, 69 N. W. 384. In a still later case the same court decided that a nomination made by 4 out of 28 members of a county committee chosen by a political party is invalid, where previous notice of the time and place of the meeting had not been given to the other members. *State ex rel. Whedon v. Smith*, 57 Neb. 41, 77 N. W. 384. And in another case the supreme court of Nebraska concedes that "where the ballot law requires the names of candidates of political parties to be arranged and printed on the official ballot in a separate group, and it is made the duty of the election officer, in arranging the ballot, to place the ticket of the party having the greatest number of votes at the last preceding election first on the ballot, and that the position of other tickets should be controlled relatively by the same rule, it is obvious that under such a law it is necessary to decide between rival factions of the same

party, in order to determine the position of the tickets upon the ballot." *State ex rel. Dahlman v. Piper*, 50 Neb. 25, 69 N. W. 378.

In Michigan, where *State ex rel. Sturdevant v. Allen*, 43 Neb. 651, 62 N. W. 35, seems to have been once approved, the supreme court uses this language: "The reluctance of the courts to enter upon an inquiry, or to permit an inquiry by the election commissioners, into the question of fact as to which of two contending factions truly represents a political party, has been manifested in various cases. *State ex rel. Sturdevant v. Allen*, 43 Neb. 651, 62 N. W. 35; *Phelps v. Piper*, 48 Neb. 724, 33 L. R. A. 53, 67 N. W. 755; *Shields v. Jacob*, 88 Mich. 164, 13 L. R. A. 760, 50 N. W. 105. In *Shields v. Jacob* it was held that the court would not undertake to determine which of two rival conventions resulting from a split in a regularly called convention should be treated as the regular convention of the party, and a mandamus was issued requiring the election commissioners to give to both tickets a place upon the ballot. At the time that decision was rendered, however, the provision requiring that the ticket of the party having the greatest number of votes within the county at the last preceding election should be placed first upon the ballot, and that the position of other tickets should be governed relatively by the same rule, was not a part of the statute, and it was not necessary to determine which of these tickets should be placed first on the ballot. Under the law as it now exists, such an investigation seems necessary, and it would seem that the commissioners did determine the question, and place the Shelby ticket second on the ballot." *Baker v. Election Comrs.* 110 Mich. 635, 68 N. W. 752.

The following cases may be cited as sustaining the view taken in *State ex rel. Sturdevant v. Allen*, 43 Neb. 651, 62 N. W. 35; *People ex rel. Eaton v. District Court*, 18 Colo. 26, 31 Pac. 339; *Sims v. Daniels*, 57 Kan. 552, 35 L. R. A. 146, 46 Pac. 952; *State ex rel. Gillis v. Johnson*, 18 Mont. 556, 46 Pac. 440. In *People ex rel. Eaton v. District Court* two rival state tickets were involved, and no allusion is made to what position either should have on the ballots. *Sims v. Daniels* has to do with county candidates, but no question concerning the position of their names is discussed; the decision merely relating to what may be determined by the officer charged with the duty of considering objections to nominations under statutory provisions essentially different from any in this state. *State v. Johnson* relates to rival state tickets having different designations, with no reference to the position of either on the ballots. In a later case the supreme court of Montana 67 L. R. A.

holds that a party convention of a single county, which is one of two or more counties composing a judicial district, has no authority to place in nomination a candidate for the office of district judge; that being a state office, the legal nomination to which can only be made by a convention representing all the voters of the party in the several counties in the district. The court employs this language: "A candidate certified as nominated by electors is not nominated by a political party. He is simply a candidate of those individual electors who have joined in nominating him, and he is only entitled to be placed upon the ballot as such a candidate. . . . The certificate to the secretary of state emanating from a convention or primary meeting must be signed by the officials of the convention. The certificate of nomination by electors must be signed by the electors only. The certificate emanating from the officers of a convention clearly must designate the principle or party represented by the convention. By means of this designation in the convention certificate the secretary of state specifies the description of the person nominated, including his party designation. But the law, except, perhaps, in cases presenting unusual conditions, does not authorize electors who may make a nomination by petition to make their nominees the nominees of an organized political party whose name they may select, provided such party is authorized to make a nomination by convention or primary meeting held for the purpose of making nominations. The secretary of state, therefore, cannot certify a candidate so nominated by electors as the candidate of a political party; for clearly he is not such a candidate, and has no place in a group of candidates certified as nominated by a regular political party convention or organization, under the name of the party making such nominations. We find authority for these views in the cases of *Atkeson v. Lay*, 115 Mo. 538, 22 S. W. 481, and *Phillips v. Curtis*, 4 Idaho, 193, 38 Pac. 405. We conclude, under the facts of this case, that the Republican conventions of the district have not nominated Judge Reeves as their candidate; and it being our opinion that the attempts to make him the candidate of such parties by petition are invalid, and as the court is not requested to regard him as an independent or electors' candidate, it necessarily follows that the demurrer must be sustained, and the writ of injunction prayed for will be made permanent; and it is so ordered." *State ex rel. Woody v. Rotwitt*, 18 Mont. 502, 46 Pac. 370.

In no case, so far as our research has extended, where the right of the candidate to have his name printed in the party column

was considered, has any court declined to enforce such right, though its enforcement involved a determination of the regularity of his nomination, except in Michigan, where the question was left to the decision of the election commissioners (*Stephenson v. Election Comrs.* 118 Mich. 396, 42 L. R. A. 214, 74 Am. St. Rep. 402, 76 N. W. 914); a disposal of the matter which does not seem to be consistent with the views expressed by the same court in *Baker v. Election Comrs.* 110 Mich. 635, 68 N. W. 752. Whenever the right of the candidate to have his name printed in the regular party column exists, and such right is contested, someone must necessarily decide the contest. As we have shown, even in jurisdictions where the doctrine of *State ex rel. Sturdevant v. Allen*, 43 Neb. 651, 62 N. W. 35, prevails; the courts have not hesitated to determine the question of regularity when its solution merely involved undisputed facts and generally recognized rules relating to the organization of political parties. We do nothing more than that in the present proceeding. In difficult cases it may be convenient, but is it logical, to say that, because two factions of a political party have attempted to nominate candidates, each claiming to represent the party organization, the names of both sets of nominees should be printed on the ballots, so that the electors may decide between them? Is not the proposition predicated upon a misconception of the real issue involved? It is for the party to nominate; for the people to elect. The question is not, Who shall be chosen to any particular public office? That is for the voters of all political parties to determine at the polls. It is simply, Who shall represent the organization as its nominees? and certainly the determination of that question should be controlled by the action of the party itself; otherwise, party nominations are impossible. To what extent, if at all, the rights of organized political parties should be recognized and regulated by law, is a matter of public policy, to be determined by the legislative department; a matter which does not concern this court. Its duty is done when it gives effect to the legislative will as expressed in statutes which do not conflict with any provision of the Federal or state Constitution.

It appears from statements of counsel 67 L. R. A.

that the Babcock candidate for register of deeds has died since this proceeding was commenced. The Babcock convention delegated authority to its central committee to fill vacancies. If any doubt exists as to the form of such committee's certificate relative to the office of register of deeds, another can be filed setting forth the original candidate's death as the cause of the vacancy. Therefore this feature of the controversy demands no further attention.

It is contended that, whereas, sample and official ballots are not required to be printed and in possession of the auditor more than ten days before the day of election (Rev. Pol. Code, § 1886), defendant has until that time to decide how the ballots shall be prepared, and that this court is without authority to issue its writ before the ballots are in fact prepared. This is untenable. Had the relator delayed his demand until ten days before the day of election, his rights and those of his associates might have been lost, or the county put to the useless expense of printing erroneous ballots. Having made his demand, concerning which no doubt exists in this case, if the auditor did not express a willingness to comply therewith, it was proper to institute this proceeding, when, if defendant intended to comply with the demand, he might have disclosed such intention and have avoided any judgment for disbursements. But, having answered and contested the relator's right, he cannot be heard to say that he would or might have complied with the relator's demand.

It follows that the relator is entitled to a *peremptory writ of mandamus* commanding the defendant to print the names of the Babcock candidates in the regular Republican column on all ballots to be used at the coming general election in Roberts county, and to exclude the names of the Houck candidates therefrom, unless, within the period prescribed by statute, they shall be hereafter nominated as independent candidates by petition. He is also entitled to recover his taxable disbursements, but no statutory costs. *Kirby v. Circuit Court*, 10 S. D. 196, 72 N. W. 461; *Re Kirby*, 10 S. D. 416, 73 N. W. 908.

Let judgment be entered accordingly.

TENNESSEE SUPREME COURT.

ALABAMA GREAT SOUTHERN RAIL-
ROAD COMPANY, *Plff. in Err.*,

L. BALDWIN.

(.....Tenn.....)

A railroad conductor in signaling the engineer to back the engine for the purpose of effecting a coupling acts in his capacity as representative of the master, and not as a fellow servant of the brakeman, who is attempting to prepare the cars for the coupling; so that the master will be liable in case he acts negligently to the injury of the brakeman, although the engineer would have obeyed the signal had it been given by the brakeman himself.

(October 12, 1904.)

ERROR to the Circuit Court for Hamilton County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. *Affirmed.*

The facts are stated in the opinion.

Messrs. Shepherd & Frierson, for plaintiff in error:

The duty of the master is discharged when he exercises care with a view to selecting competent and suitable servants, and among the risks which the employee assumes, upon entering into the service, is that of injury arising from the negligence of those engaged with him in a common employment.

Illinois C. R. Co. v. Bolton, 99 Tenn. 276, 41 S. W. 442; *Buswell*, Personal Injuries, § 217; *Hussey v. Cogger*, 112 N. Y. 614, 3 L. R. A. 559, 8 Am. St. Rep. 787, 20 N. E. 556; *Taylor v. Evansville & T. H. R. Co.* 121 Ind. 124, 6 L. R. A. 584, 16 Am. St. Rep. 372, 22 N. E. 876; *Quinn v. New Jersey Lighterage Co.* 23 Fed. 363; *Gann v. Nashville, C. & St. L. R. Co.* 101 Tenn. 383, 70 Am. St. Rep. 687, 47 S. W. 493; *Allen v. Goodwin*, 92 Tenn. 385, 21 S. W. 760.

The question is not one of rank. If the superintendent was acting at the time in the capacity of a fellow servant, and his neg-

ligence caused the injury, the master is not liable.

Stockmeyer v. Reed, 55 Fed. 259, 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186; *St. Louis, A. & T. R. Co. v. Torrey*, 58 Ark. 217, 24 S. W. 244; *Nall v. Louisville, N. A. & C. R. Co.* 129 Ind. 264, 28 N. E. 183, 611; *Hankins v. New York L. E. & W. R. Co.* 142 N. Y. 416, 25 L. R. A. 396, 40 Am. St. Rep. 616, 37 N. E. 466; *Ross v. Walker*, 139 Pa. 42, 23 Am. St. Rep. 160, 21 Atl. 157, 159; *Harrison v. Detroit, L. & N. R. Co.* 79 Mich. 409, 7 L. R. A. 623, 19 Am. St. Rep. 180, 44 N. W. 1034; *Texas & P. R. Co. v. Reed*, 88 Tex. 439, 31 S. W. 1058; *Sweeney v. Gulf, C. & S. F. R. Co.* 84 Tex. 433, 31 Am. St. Rep. 71, 19 S. W. 555; 47 Cent. L. J. 130; *Bailey*, Personal Injuries Relating to Master & Servant, §§ 1834, 1972, 2154, 2176, 2535; *National Fertilizer Co. v. Travis*, 102 Tenn. 16, 49 S. W. 832; *Gann v. Nashville, C. & St. L. R. Co.* 101 Tenn. 380, 70 Am. St. Rep. 687, 47 S. W. 493; *Knox v. Southern R. Co.* 101 Tenn. 375, 47 S. W. 491; *Chattanooga Electric R. Co. v. Lawson*, 101 Tenn. 406, 47 S. W. 489; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Allen v. Goodwin*, 92 Tenn. 385, 21 S. W. 760.

Messrs. Smith & Carswell, for defendant in error:

The conductor has entire control and management of the train to which he is assigned. In no proper sense of the terms is he a fellow servant with the firemen, the brakemen, the porters, and the engineers.

Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 25 L. ed. 787, 5 Sup. Ct. Rep. 184; *Illinois C. R. Co. v. Spence*, 93 Tenn. 173, 42 Am. St. Rep. 907, 23 S. W. 211.

It is hard to conceive of any act of a conductor in charge of a train which could be of more official character than that of ordering the train to move.

2 Labatt, Mast. & S. § 541; *Hoke v. St. Louis, K. & N. R. Co.* 88 Mo. 360; *Spencer v. Brooks*, 97 Ga. 681, 25 S. E. 480; *Devine v. Boston & A. R. Co.* 159 Mass. 348, 34 N. E. 539; *Patton v. Western North Carolina R. Co.* 96 N. C. 455, 1 S. E. 863; *Miller v.*

NOTE.—As to when conductor is deemed to be a co-servant of other railway employees, see also, in this series, *Jackson v. Norfolk & W. R. Co.* 46 L. R. A. 337, and *note*; *Grattis v. Kansas City, P. & G. R. Co.* 48 L. R. A. 399; and *Howe v. Northern P. R. Co.* 60 L. R. A. 949.

For vice principalship considered with reference to the superior rank of a negligent servant, see also *Stevens v. Chamberlin*, 51 L. R. A. 513, and *note*; *Norton Bros. v. Nadebok*, 54 L. R. A. 842; *Southern P. Co. v. Schoer*, 57 L. R. A. 707; *Canney v. Walkeine*, 58 L. R. A.

R. A. 33; and *Illinois Southern R. Co. v. Marshall*, 66 L. R. A. 297.

For vice principalship as determined with respect to the character of the act which caused the injury, see *Lafayette Bridge Co. v. Olsen*, 54 L. R. A. 33, and *note*; *Wellston Coal Co. v. Smith*, 55 L. R. A. 99; *Swift & Co. v. Bielse*, 57 L. R. A. 147; *Kelly v. New Haven S. B. Co.* 57 L. R. A. 494; *Sroufe v. Moran Bros.* 58 L. R. A. 313; *Knutter v. New York & N. J. Teleph. Co.* 58 L. R. A. 808; *Sams v. St. Louis & M. River R. Co.* 61 L. R. A. 475; and *Southern Indiana R. Co. v. Harrell*, 63 L. R. A. 461.

Missouri P. R. Co. 109 Mo. 350, 32 Am. St. Rep. 673, 19 S. W. 58; *Gann v. Nashville, C. & St. L. R. Co.* 101 Tenn. 385, 70 Am. St. Rep. 687, 47 S. W. 493; *Walker v. Gillett*, 59 Kan. 214, 52 Pac. 442; *Purcell v. Southern R. Co.* 119 N. C. 728, 26 S. E. 161; *Shadd v. Georgia, C. & N. R. Co.* 116 N. C. 968, 21 S. E. 554; *Richmond & D. R. Co. v. Williams*, 86 Va. 165, 19 Am. St. Rep. 876, 9 S. E. 990; *Cole Bros. v. Wood*, 11 Ind. App. 37, 36 N. E. 1074; *Clark v. Hughes*, 51 Neb. 780, 71 N. W. 776.

Shields, J., delivered the opinion of the court:

The defendant in error, L. Baldwin, a brakeman in the employ of the plaintiff in error, while attempting to make a coupling in the operation of one of its trains, through the negligence of Edgar Fuller, conductor in charge of the train, in prematurely signaling the engineer to back his engine and a car attached for the purpose of making a coupling, had his arm caught between the bumpers of the cars to be coupled, and crushed, and brought this suit to recover the damages sustained by him, and recovered judgment.

The contention of the plaintiff in error is that Edgar Fuller, when he signaled the engineer, was not acting in his official capacity as conductor, but as a fellow servant of the defendant in error, and that it is not responsible for the negligence of which he was guilty while so acting.

There is no controversy as to how the injury was sustained. The conductor and his crew were engaged in making up a freight train, and were attempting to couple a car attached to the engine to one on the side track; both of the cars being equipped with automatic couplers. The first effort failed and another was being made when the injury was inflicted. The declaration correctly states the facts in relation to the last effort to make the coupling in these words:

"Plaintiff in the discharge of his duty thereupon went in between said cars which were then standing still, one coupled to the engine, and proceeded to adjust the said couplings by opening the 'knuckle' thereof, and to otherwise set the two drawheads so that the two cars might be properly coupled. While the plaintiff was standing in between the two said cars, entirely out of sight of the engine, and while he was endeavoring to adjust the said couplings in a proper manner, acting in a careful manner, and in the proper discharge of his duties, the defendant's conductor, Edgar Fuller, then and there the immediate superior of plaintiff, carelessly, negligently, and wrongfully signaled to the engineer to shove up the car which was attached to the engine

upon and against the car to which it was to be coupled, although the said conductor knew, or by the exercise of ordinary care should have known, that the plaintiff had not adjusted said drawheads and was not ready for said coupling to be made. The engineer, upon receiving said signal from the said conductor, thereupon pushed on said car, as it was his duty to do in response to said signal, and the plaintiff's hand and arm was then and there caught in between the drawheads, deadwoods, bumpers, or ends of said two cars, and was crushed and mangled in and between said drawheads."

It also appears in evidence that the defendant in error could have given the signal to the engineer to back the engine and car, or to another brakeman to be repeated to the engineer, or to the conductor, for that purpose, and the engineer would have obeyed it. In other words, the order to the engineer to move his train backward or forward in making a coupling does not necessarily have to be given by the conductor, but may be given by a brakeman making the coupling; but the conductor may take immediate charge and direction of the matter, and give all necessary signals and orders, which Conductor Fuller did on this occasion.

The conductor of a train is the superior in authority and grade in every train crew, and has charge of the train and its operations, and all the other members of the crew are under his control and subject to his orders, which they must obey, regardless of whether they concur in the necessity or propriety of them. He is the representative of the company, and is vested with all of its authority over the train and its crew in the work being done, and charged with all the duties and responsibilities, which the company owes to its employees, engaged in this perhaps the most hazardous of all industrial pursuits, chief of which is the duty to carefully and skilfully superintend the movements of its cars and trains for the prevention of accidents, upon the proper discharge of which the safety of the employees is so greatly dependent. He is a vice principal of the company, and it is liable for his negligence when acting in his official capacity. *Illinois C. R. Co. v. Spence*, 93 Tenn. 181, 182, 42 Am. St. Rep. 907, 23 S. W. 211; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184.

This is conceded by the plaintiff in error to be the general rule, but it insists that a vice principal may act in a dual capacity,—that is, he may lay aside his official or representative character, and engage in the common service with the employees who are under him and subject to his orders; and when he does so he is a fellow servant only, and any negligence of which he may be

guilty while so acting is personal, and that of a fellow servant, for which the employer is not liable; and that in this case the order or signal to the engineer to move his engine backward, being one which could have been given by a brakeman, was of this character. The cases of *Allen v. Goodwin*, 92 Tenn. 386, 21 S. W. 760; *Illinois C. R. Co. v. Bolton*, 99 Tenn. 274, 41 S. W. 442; and *Gann v. Nashville, C. & St. L. R. Co.* 101 Tenn. 380, 70 Am. St. Rep. 687, 47 S. W. 493, are cited to sustain this contention.

The rule in this state, as held in these cases, unquestionably is that a vice principal may at times lay aside his official character and engage in the common service of the other servants of the employer over which he has control, and that his acts and negligence, while thus engaged, are those of a fellow servant, for which the employer is not ordinarily responsible; but he cannot act in both capacities at the same time, and, in order to exonerate the employer, the service or act in performance of which he is engaged must be strictly that of a fellow servant, and not one which it is his duty to do, or which he may do, as a superior or vice principal. The cases in which the doctrine has been applied by this court are where the vice principal was, at the time the injury was inflicted through his negligence, engaged solely in the work or service of a common employee. In all those above cited, the vice principal was performing manual labor along with the other employees. In *Allen v. Goodwin* the negligence complained of was that of a foreman, working upon a building in a position above the plaintiff, in dropping a piece of pipe upon him.

In *Illinois C. R. Co. v. Bolton* a section boss negligently injured one of the section men under him while he was personally assisting him in lifting and unloading some heavy timbers; and in *Gann v. Nashville, C. & St. L. R. Co.* the action was sought to be maintained on account of the negligence of the section boss in operating the brake upon a hand car, which was the work of the section men under him, whereby the car was thrown from the track and one of the men injured.

In none of these cases, or any other to which we have been cited, was the injury the result of a negligent order or direction given by a superior servant.

The vice principal cannot act in the capacity of superior and fellow servant at one and the same time, and, if the act is one which he could do in either capacity, it will be held to have been done in the capacity in which it is his special duty to act; but the nature of the act may also be considered in determining the character 67 L. R. A.

in which he was acting. The giving of orders, and a signal, is as much an order as if spoken, is essentially the province of the master or his representative, and when given by them to a servant, or one under their control, it will be presumed to be made in the capacity of master, and must be obeyed.

The fact that the engineer would have obeyed the signal, if given by the brakeman, is immaterial, since the order was in fact given by his superior in the line of his authority, and he had no discretion but to obey it. There seems to be no conflict in the authorities upon this subject. In the late work of Mr. Labatt on Master and Servant [vol. 2, § 541] it is said: "The logical consequence, if not the actual effect, of some decisions referred to in § 544, *supra*, is to absolve the master even from the results of complying with the negligent order of a vice principal, where such order relates merely to the details of the work. But there is an overwhelming weight of authority to sustain the doctrine that the liability to which the master is declared to be subject, wherever 'the negligent act is the direct result of the exercise of power conferred by the master, in the performance of a duty devolving by law upon him,' is predicable in the case of orders issued in respect to the work, whatever may be the precise object to which those orders may have relation. It is, in fact, difficult to see what more indisputable example there can be of an 'exercise of authority' than the giving of such orders, and, for the purpose of affecting the master with liability in this instance, it is obviously quite immaterial whether the delinquent employee be a mere superior servant or a general or departmental manager. According to the great majority of the cases, therefore, all that is necessary to fix liability upon the master is that the negligent order which caused the injury should be proved to be incident to the performance of the duties of his position. The order may be a negligent one because the servant is directed to use dangerously defective appliances, or to work in an abnormally dangerous place, or to do work in a dangerous manner, or to do something which, under the circumstances, will render the place of work abnormally dangerous for a fellow servant." The author cites numerous cases, which, so far as we have access to them, seem to fully sustain the text.

In the case of *Hoke v. St. Louis, K. & N. R. Co.* 88 Mo. 360, it is said: "Where a roadmaster of a railroad, having general superintendence of its track, while engaged in superintending and directing the removal of a wrecked train, but not in the manual work of removing a wreck, gives a wrong

signal to the engineer of a train assisting in removing the wreck, whereby a laborer engaged in the work of removal is injured, the railroad is liable therefor . . . The roadmaster was not a fellow servant of the one injured in the transaction in which the injury was received, but represented the company therein as vice principal, or *alter ego*, and his negligence in the matter, causing the injury, was that of the company. . . . In the case at bar, as has been seen, Tracy, whose negligence and carelessness in giving signals to the engineer occasioned the injury in question, was not at the time engaged or assisting in the manual work of removing said wreck from the roadbed and track of defendant, or in loading said wrecked car upon said wrecking train, . . . but was engaged as such in superintending, directing, and controlling said laborers, including plaintiff, in said work, and in that particular was in the line of his duty;" and the road was liable.

And in a recent case decided by the supreme court of Georgia, where the facts were almost the same as those in the case at bar, it was held: "It was complained that the trial judge, in his charge to the jury, erred in assuming that the conductor was the *alter ego* of the defendants on the occasion in question, thereby excluding the theory of the defendants that they were fellow servants, and that the company was, therefore, not liable for any injury resulting from the negligence of the conductor. Ordinarily the conductor of a train has control of its movements, and brakemen connected with the train are, while engaged in coupling cars to the train at stations, subject to his orders and under his control; and he is not, when directing the movements of the train and giving orders to the brakeman and engineer in connection therewith, a fellow servant of such employees, within the meaning of the rule as to fellow servants, but is a vice principal of the master. See *Mills v. East Tennessee, V. & G. R. Co.* 87 Ga. 105, 13 S. E. 205; *Prather v. Richmond & D. R. Co.* 80 Ga. 436, 12 Am. St.

Rep. 263, 9 S. E. 530, and cases cited." *Spencer v. Brooks*, 97 Ga. 681, 25 S. E. 480.

The supreme court of Massachusetts, in the case of *Devine v. Boston & A. R. Co.* 159 Mass. 351, 34 N. E. 539, where the plaintiff was injured by the negligence of the conductor in improperly signaling the engineer to move back some cars, said: "He [the conductor] gave the stop motion, as he himself testified, to the first three cars that were detached from the train. He also testified that he gave the kick motion for the two that struck the bunting post; but he does not seem to remember whether he gave the stop motion for them that morning or not. Nobody appears to remember who gave the stop motion that morning for these two cars. It appears from the testimony of the engineer and conductor that the stop motion was usually given by the conductor. It also appears from the testimony of the conductor that, when the two cars were kicked onto the stub track, he stood at the switch. It is not unreasonable to suppose that that was a place from which the stop motion could be easily given. It is said that the switchman sometimes gave the motion, but naturally he would not give it with the conductor at the switch." And the road was held liable for the negligent signal, although, as seen, the switchman also had authority to give the signal.

The same rule has been announced and applied in the cases of *Walker v. Gillett*, 59 Kan. 214, 52 Pac. 442; *Purcell v. Southern R. Co.* 119 N. C. 728-738, 26 S. E. 161; *Richmond & D. R. Co. v. Williams*, 86 Va. 165, 19 Am. St. Rep. 876, 9 S. E. 990; *Cole Bros. v. Wood*, 11 Ind. App. 37, 36 N. E. 1074; and *Clark v. Hughes*, 51 Neb. 780, 71 N. W. 776.

We are therefore of the opinion that there is evidence of negligence upon the part of the railroad company to sustain this verdict, and the assignment of error to the contrary, and under which this question is made, is overruled, and the judgment of the Circuit Court affirmed.

MISSOURI SUPREME COURT.

STATE of Missouri, *Respt.*,

v.

O. MONTGOMERY, Alias Frank Gale,
Appt. .

(181 Mo. 19.)

1. The ownership of money in a cash

NOTE.—Robbery by taking from one person property belonging to another.

I. Introduction, 343.

II. In general, 344.

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drawer, of which a clerk has possession with the right to make change therefrom and place receipts from sales therein, may be laid in such clerk as against one who, in the absence of the proprietor, by exhibiting a deadly weapon, compels the clerk to permit him to take the money from the drawer, although the clerk claims no

III. Taking from wife or servant, 346.

IV. Conclusion, 351.

I. Introduction.

Robbery at common law is defined as the

personal interest in the money, and is not held accountable for its loss, where the statutes permit an indictment for robbery for taking money from the clerk or agent.

2. Failure to verify an information for robbery is waived if no objection is made on that ground.

(February 1, 1904.)

A PPEAL by defendant from a judgment of the Criminal Court for Jackson County convicting him of robbery. *Affirmed.*

The facts are stated in the opinion.

Messrs. A. C. Durham and L. E. Durham for appellant.

Messrs. Edward C. Crow, Attorney General, and **Bruce Barnett** for respondent.

felonious taking of money or goods of any value from the person of another or in his presence, against his will, by violence or putting him in fear. 2 East, P. C. 707; 1 Hale, P. C. 532; 1 Hawk. P. C. 147; 4 Bl. Com. 241. This definition has been followed by most of the statutes, and, even where the language has been varied sufficiently to sustain, by a literal interpretation, a narrower definition of the offense, it has usually been held that it could not be presumed that the legislature intended to change the nature of the crime as understood at common law. It is necessary, to constitute the crime, that the property taken should be that of some person other than he who takes it, but it is not necessary that it should be the property of the person from whom taken.

II. In general.

In *Stegar v. State*, 39 Ga. 583, 99 Am. Dec. 472, it is held that a person in the actual possession of money has such a qualified ownership in it as is necessary to constitute the offense of robbery in any person who wrongfully, fraudulently, and violently takes it from his person by force or intimidation without his consent. In this case on an indictment for robbery a motion was made in arrest of judgment on the ground that the indictment alleged that the money was the property of a certain woman, and was taken from her daughter without the latter's consent, and that there was no allegation that it was done without the consent of the mother, who was charged to be the owner. The court said that this might have been a good objection to the bill of indictment on special demurrer, but that they were not prepared to say it was good in arrest of judgment; adding that the possession, if legal, constituted the necessary ownership, though there might be a question whether the ownership in the daughter was sufficiently alleged.

That the felonious taking of a pistol in the possession of a person from his person or immediate presence and against his will, accomplished by means of force or fear, constitutes robbery, whether the pistol was his property or that of another, is held in *People v. Anderson*, 80 Cal. 205, 22 Pac. 139. It was contended in this case that the defendant should have been acquitted because of a variance between the allegations of the information which laid the property in the pistol in the person robbed, and the proof at the trial, which showed it to

Gantt, P. J., delivered the opinion of the court:

The defendant was convicted in the criminal court of Jackson county of robbery in the first degree, and sentenced to ten years' imprisonment in the penitentiary.

The information is in two counts, as follows:

"Now comes Rowland Hughes, prosecuting attorney for the state of Missouri, in and for the body of the county of Jackson, and, upon his official oath, informs the court that O. Montgomery, alias Frank Gale, whose Christian name in full is unknown to said prosecuting attorney, late of the county of Jackson aforesaid, on the 4th day of January, 1903, at the county of Jackson, state of

be the property of another person; but the court held that, the pistol having been in the possession of the person named in the information when violently taken by the defendant, the act of robbery charged was the same whether the pistol was his property or that of another person not the defendant.

So, an indictment which alleges the forcible taking from one person of property belonging to another, and which fails to aver the character of the possession of the person from whom it was taken, or that he was the agent or servant of the owner, or that it was taken without the knowledge and consent of the owner, is held, in *People v. Shuler*, 28 Cal. 490, to be sufficient under a statute defining robbery as the felonious and violent taking of money or other valuable thing from the person of another by force or intimidation. The court held that the statute did not require that the indictment should in terms contain a statement that the property was taken without the consent of the owner, or that the bailee had the right of possession; that, having possession of it, the law deems that possession rightful; and adds that, when money or goods are stolen out of the possession of the bailee, they may be described in the indictment as the property of either bailor or bailee.

And that it is not necessary, to make out a case of robbery, that the property should belong to the party from whose possession it is forcibly taken, is said, *obiter*, in *People v. Vice*, 21 Cal. 345.

This statement is quoted in *People v. Ammerman*, 118 Cal. 23, 50 Pac. 15, where an information for robbery that failed entirely to allege the ownership of the property was held to be fatally defective. Nothing is decided as to the necessity of the person from whom the property is taken being the owner, but this quotation from *People v. Vice* seems to imply that an allegation of ownership merely in some person other than the accused was considered to be sufficient.

That robbery may be committed by a taking from one not the owner of the property is also recognized in *Smedly v. State*, 30 Tex. 215, where the court said that the indictment must state correctly the ownership of the property, and that all the approved common-law forms set forth the ownership of the property taken as well as the name of the person from whom it was taken; adding that the Texas statute had not changed the rules of the common law in re-

Missouri, in and upon one William I. Mills unlawfully and feloniously did make an assault, and twenty-two dollars, in lawful money of the United States, of the value of twenty-two dollars, the money and property of said Williams I. Mills, and in the presence of the said William I. Mills, and against the will of said William I. Mills, then and there, by putting said William I. Mills in fear of immediate injury to his person, feloniously did rob, steal, take, and carry away, against the said peace and dignity of the state.

"And the prosecuting attorney aforesaid, upon his oath aforesaid, further informs the court that O. Montgomery, alias Frank Gale, whose Christian name in full is unknown to said prosecuting attorney, late of the county

aforesaid, at the county of Jackson and state of Missouri, on the 4th day of January, 1903, in and upon one William I. Mills unlawfully and feloniously did make an assault, and twenty-two dollars, in lawful money of the United States, of the value of twenty-two dollars, the money of T. J. Radford, which said money was then and there in the care, custody, and control of the said William I. Mills as the clerk of the said T. J. Radford, and in the presence of the said William I. Mills, then and there being, and against the will of the said William I. Mills, then and there, by putting the said William I. Mills in fear of immediate injury to his person, feloniously did rob, steal, take, and carry away, against the peace and dignity of the state."

quoting that it must clearly appear that the article taken belonged to some person other than the accused, or that the party deprived of the possession through violence is entitled to such possession as against the defendant. In this case the indictment charged the taking of a gun from one person, "the said gun being the corporeal personal property of one ———," and it was held defective in failing to state the name of the owner. The court remarked that, had the indictment charged that the gun was the property of the person from whom it was taken, it would probably have been supported by proof that the article was in his legal custody, though belonging to a third person.

Similar rulings are made in *Barnes v. State*, 9 Tex. App. 128, *Boles v. State*, 58 Ark. 35, 22 S. W. 887, and *Com. v. Clifford*, 8 Cush. 215, in all of which the indictments failed to allege the ownership of the property; and the court held that it was necessary to show that the property belonged to some person other than the one accused of its robbery. In none of the cases is the question whether it is necessary that the person robbed be the owner of the property raised. It seems to be taken for granted that this is not necessary.

So, in *State v. Hobgood*, 46 La. Ann. 855, 15 So. 406, it is held that possession of property, though without title thereto, is sufficient to support a charge of robbery. In this case it was attempted to destroy the allegations of ownership of the property by the person robbed by showing that he had failed to place it on the assessment roll, but the court said that such failure did not in itself destroy his actual or apparent ownership of the property.

And in *State v. Nelson*, 11 Nev. 334, it is held that in an indictment for robbery of the property of an express company from a stage coach the ownership of the money may be laid in the driver of the coach. The court said that the rule as to the ownership of the property is no more stringent in cases of robbery than in cases of larceny; that the only thing essential in either case seems to be an averment which shall show conclusively that the property does not belong to the defendants.

In *Reed v. State*, 88 Ala. 36, 6 So. 840, an indictment for robbery charging the felonious taking from the possession of a person by violence of certain articles and a certain sum of money, the property of another person, was held sufficient to support a judgment of conviction. 67 L. R. A.

The indictment was objected to on the ground that the description of the money was insufficient, and nothing is said about the fact that the stolen property did not belong to the person from whom it was taken.

While in *Danzy v. State*, 126 Ala. 15, 28 So. 697, an indictment for robbery from one who was not the owner of the property was held not to be subject to demurrer because it failed to aver that the person from whom the property was taken was lawfully in possession, or that he was the legal custodian of the money, the possession of the money by the person from whom it was taken being prima facie presumed lawful. Nothing is said as to the effect of the ownership of the property.

In *Spencer's Case*, 2 East, P. C. chap. 16, § 128, p. 712, the prosecutor swore that, having in his possession corn belonging to other persons, the prisoner came to him, together with a great mob marching in military order, and said that, if he would not sell the corn for a certain sum, they would take it by force, on which the prosecutor sold the corn for the sum offered, which was less than its value. This was held to be robbery, and the prisoner was convicted and executed. The sufficiency of the prosecutor's ownership to sustain the indictment was not questioned. This seemed to be taken for granted.

In a note to *King v. Taylor*, 1 Leach, C. L. 356, it is said that it was held in the case of *Ralph Packer at the Old Bailey* in April session, 1714, that goods stolen from a washerwoman, who takes in the linen of other persons to wash, may be laid to be her property, for persons of this description have a possessory property, and are answerable to their employers, and can maintain a bill of robbery or larceny and have restitution.

And it is held in *Wright's Case*, Style, 156, without any discussion of the question, that, if a man's servant be robbed of his master's goods in sight of his master, it shall be taken for a robbery of the master.

A conviction of robbery was had in *People v. Oldham*, 111 Cal. 648, 44 Pac. 312, on an indictment alleging the taking of money of an express company from the driver of a stage to whom it had been intrusted for transportation. The question treated in this note was not considered, the point under discussion being the necessity of proving the ownership of the express company. The court held that the pos-

At the trial the state was required to elect, and the second count was dismissed.

The facts in evidence were these. On the 4th day of January, 1903, about 10:15 p. m., the defendant entered the drug store of Mr. T. J. Radford, located at the corner of Ninth and Locust streets, in Kansas City, Missouri. Mr. Radford was at that time at his home, in the suburbs of the city, and William I. Mills, his clerk, was in charge of the store. The defendant walked in, pointed a revolver at Mills, and commanded him to throw up his hands. The clerk complied with the demand, while defendant took about \$22 in money from the cash register of the store. Putting the money in his pocket, defendant backed out of the store and escaped. Two days afterwards he was arrested by a detective, and identified by

Mills. The evidence of the state further showed that the money alleged to have been taken was not the property of said Mills, as charged in the information, but was the property of his employer, Mr. Radford; that Mills was a clerk in the store, and had charge of the store and the money in the register, with authority to put the money received on sales therein, and to take cash therefrom to make change, and had no other interest in the money taken or in the store, and was not, under the terms of his employment, required to make good the loss of this money.

Mills testified:

Q. Did Mr. Radford hold you responsible for that money after it was gone?

A. No, sir; he didn't.

session by the driver of the state was the possession of the company, and that, in the absence of evidence to the contrary in larceny or robbery, proof of the possession of the stolen property by the person from whom it was taken is sufficient evidence of ownership.

In *United States v. Wood*, 3 Wash. C. C. 440, Fed. Cas. No. 16,756, the prisoner was indicted for aiding in the robbery of the mail, putting the life of the carrier in jeopardy by means of dangerous weapons. There is nothing to show in whom the property was laid in this indictment, but it is evident that the carrier could not have had more than a special property in the mail carried, and so it is a case of robbery by taking from one person the property of another.

All cases in which the robbery was from a wife or servant have been placed in the next division, even when the subject is discussed generally, and not with reference to the question whether a wife or servant can have a special ownership in property of another in her or his possession.

III. *Taking from wife or servant.*

That the violent taking from a wife or servant of property belonging to another constitutes robbery is now well settled, even under statutes requiring the taking to be from the person or in the presence of the owner, although the possession of the wife may be regarded as that of her husband, and the possession of the servant as that of his master.

One of the leading cases is that of *Brooks v. People*, 49 N. Y. 436, 10 Am. Rep. 398, which was a case of robbery from a house left in charge of a minor child by putting her in fear, and in which it was contended that she was not the owner, but the mere servant of the owner, her father; that her possession was his; and that, therefore, she had no special property in the articles taken. The statute defined robbery as the felonious taking of the personal property of another from his person or in his presence and against his will, by violence to his person or by putting him in fear. The court held, however, that this did not mean that the property should belong absolutely to the person robbed; that this was not necessary at common law; and that it did not seem to have been the intention of the statute to alter the common

law; that, while the language of the statute, taken literally, declared that the person robbed must own the property, this simply meant that it must belong to someone other than the prisoner, and that the property must be taken from the person or in the presence of the person robbed. The court argues that, if all property found in the actual custody of the person robbed is not held to be his property under this statute, then whenever the master of the house is absent the house may be robbed with impunity so far as robbery is concerned, and, if a servant be intrusted with money to be deposited in a bank, and is robbed on his way, it is larceny merely, but not robbery; and concludes that, though such a construction is within the letter, it is not within the spirit or purpose, of the act, and that a purpose to change the common law should not be imputed, unless that purpose is plainly evinced. There were two counts in this indictment, one charging the goods to be the property of the daughter, and the other that they were the property of the father; and it was held that, as against the robber, the girl was the owner, though, as between her and her father, the latter had the possession and title, and that, therefore the property might be laid as belonging either to the actual owner or to the person robbed.

This decision seems to be much more reasonable than that in *State v. Lawler*, 130 Mo. 366, 51 Am. St. Rep. 575, 32 S. W. 979, where, under a statute almost identical with the New York statute, it was held that, in order to constitute robbery, the property must be taken from the person of the owner or in his presence, and that an indictment alleging the forcible taking from a woman of money belonging to her husband, who was not present at the time, was insufficient. The court admits that there is no doubt that the property may be laid either in the general owner or in a special owner, as a bailee, pawnee, carrier, and the like, but holds that a wife or servant cannot be included in such category, inasmuch as neither has the property or possession; adding that the turning-point and test rule in all cases of this sort may be formulated in the question, Did the party, alleged in the indictment to be the owner, have such a property or right of possession in the goods as would enable him to maintain an action for them if taken out of his custody? Tested by this rule, the court says that it must be obvious

Q. You were merely clerking there?

A. Yes, sir.

Q. You have no interest in that store?

A. None whatever.

Q. The money belonged to Mr. Radford?

A. Yes, sir.

The defendant introduced no evidence, but bottoms his appeal upon the fact of the variance between the allegation in the information that the money taken was the property of Mills, and the proof that it belonged, not to Mills, but to his employer, Radford.

The court refused to give the following instruction offered by the defendant, to which action the defendant excepted at the time: "The court instructs the jury that, if they find from the evidence in this case

that the money alleged to have been stolen was not the property of the said William I. Mills, but the property of T. J. Radford, and that he had no specific property therein, then they will acquit the defendant of the charge of robbery as alleged in said information."

As the law of this state had been adjudged prior to March 24, 1903 (Mo. Laws 1903, p. 162), to constitute the crime of robbery the taking must be laid in the indictment, and proved on the trial, to be from the person or in the presence of the owner—either the true owner, or one having such a special property therein, as a bailee, pawnee, carrier, or the like, as would enable him or her to maintain an action therefor if taken out of his or her custody. *State v. Lawler*, 130 Mo. 366, 51 Am. St. Rep. 575, 32 S. W. 979:

to even casual observation that the wife in this case had no such special ownership in the property taken as would enable her to maintain an action for it, and remarks that, not only does the indictment fail to allege ownership of any kind in her, but, on the contrary, alleges it to be in her husband, and that it is difficult to understand how robbery could be committed in the absence of the real or special owner. The court lays much stress on the fact that the statute requires the property to be taken from the person or in the presence of the owner; and it seems as if, in its desire to comply strictly with the requirements of the statute in this respect, it enforced the literal terms of its provisions at the expense of the spirit thereof. If it is necessary, to constitute the crime of robbery, that the property must be taken in the presence of the owner, and a servant or wife is not deemed to have a sufficient interest in property in his or her possession to constitute him or her a special owner, then in all such cases the person taking the property must escape conviction for robbery, no matter how great the violence used in the taking, though it is the violence used that constitutes the real essence of the crime of robbery, and distinguishes it from larceny. The court argues at great length that at common law it was necessary that the person robbed be either the absolute or the special owner, and that an indictment laying the property in a wife or servant was defective; but most of the cases cited by it to sustain this proposition were cases of larceny, holding that an indictment for larceny from a wife or servant must lay the property in the husband or master. To draw from these cases the inference that one violently taking property from a wife or servant is not guilty of robbery is not justified, even though it be conceded that the possession of the wife is that of her husband, and of the servant that of the master.

It is doubtless true that at common law it was necessary to lay the property in the husband in case of a robbery from a wife. Only one case of this kind has been found—that of *Reg. v. Sallows*, 2 Cox, C. C. 63—in which a married woman was assaulted, and a purse containing money which she had found lying in the road was violently taken from her. In the indictment the purse and money were described as the property of the woman's husband, and it was contended that this was error, as the purse

really belonged to the person who had lost it, and that the wife had a special property in it independent of her husband and good against everyone but the individual who had actually lost it. The court held, however, that the property was rightly laid as that of her husband, since the possession of a married woman under all circumstances is the possession of the husband, and, if the circumstances are such as to constitute only that special kind of property to which reference was made, it is still the special property, not of the wife, but of the husband.

This case sustains the contention of the *Lawler* Case, that the possession of a wife is that of her husband. But at common law this fact was important merely in determining the form of the indictment. It did not affect the character of the offense committed by the violent assault and taking, since the crime of robbery as understood at common law did not necessarily require a taking from the owner. The essence of the offense consisted in the manner of the taking, which was the only thing that distinguished it from larceny. There is absolutely nothing either in the cases or the textbooks which, when reasonably interpreted, sustains the contention of the *Lawler* Case, that at common law it was necessary that the taking be from the person or in the presence of the owner. If the question were merely one of pleading, as it doubtless was at common law, it would be of small importance; but, if statutes defining robbery as the violent taking of property from the person of the owner or in his presence are to be interpreted literally, as is done in the *Lawler* Case, then one may rob from a wife or servant, and subject himself to no greater liability than in case of larceny.

On the authority of the *Lawler* Case, an indictment for robbery of money from a saloon at night while in charge of the bartender was held, in *State v. Morledge*, 164 Mo. 522, 65 S. W. 226, to be fatally defective in laying the ownership of the money in the bartender instead of in the real owner. It was contended that, since the offense charged was robbery in the first degree, the proof should show that the money was taken from the possession or in the presence of the real owner, and that, as it appeared from the evidence that the bartender was not the owner, but only a servant or employee left temporarily in the possession of the

State v. Morledge, 164 Mo. 522, 65 S. W. 226. And it was expressly ruled in the case last cited that a clerk, such as Mills was in this case, had no such special property in the goods as would authorize the ownership of the property to be laid in him. Since the enactment of the statute of March 24, 1903, the offense can be charged for the taking from the wife, servant, clerk, or agent.

We are again confronted with the question whether the evidence in this case is sufficient to sustain the charge of robbery. The defendant relies upon *State v. Morledge*, 164 Mo. 522, 65 S. W. 226, and, if that case is to be followed, he is entitled to a reversal. The decision in that case was predicated upon *State v. Lawler*, 130 Mo. 366, 51 Am. St. Rep. 575, 32 S. W. 979. There is,

property, the defendant could not be convicted under the indictment. The court sustained this contention, and held that the possession of the money was that of the bartender's employers, and the indictment should have so shown. It should seem from this that the court considered the question to be merely one of the sufficiency of the indictment, and that an indictment charging the robbery from the servant, but laying the ownership of the property in the master, would have been good. And yet, it is difficult to see how this could be if, as claimed in *State v. Lawler*, it is necessary that the property should be taken from the person or in the presence of the owner.

However, these cases are no longer law in Missouri, it being held in *State v. MONTGOMERY* that, under the act of March 24, 1903, robbery may be charged for a taking from a wife, servant, clerk, etc., as well as from the absolute or special owner. And the court in this case says that the conclusion reached in *State v. Lawler*, that under no circumstances can the goods be laid in the servant, is not supported by the common law authorities, on which the court in the *Lawler* Case relied, but that, on the contrary, his possession is sufficient as against a robber or trespasser and all others but the true owner; and adds that they do not think that the rule laid down in *State v. Morledge*, that the party in whom the goods are laid must have such a special interest in them by lien or otherwise as would enable him to maintain an action for their possession or injury thereto against any other person than the true owner, applies to a prosecution for robbery. The facts in this case were almost identical with those in the *Morledge* Case, and the court concludes that the possession of the servant in charge of the store with the implied obligation of exercising ordinary care of his employer's goods and property was such as authorized the property to be laid in him, and that the court's opinion in *State v. Morledge* ought no longer to be followed as the law of the state; and that so much of *State v. Lawler* as holds that the possession of a wife or servant in circumstances such as shown by the record in the present case is not sufficient in a prosecution for robbery to justify the laying of the goods in them should also be overruled.

A case very similar in its facts to the *Morledge* Case is that of *State v. Gorham*, 55 N. H. 152, in which money was forcibly taken from 67 L. R. A.

however, this distinction between the two cases: In *State v. Lawler* the indictment alleged an assault upon, and putting in fear of, Mrs. Sexaner, and the taking of the goods and money of George Sexaner, whereas in the *Morledge* Case the indictment charged the assault upon, and putting in fear of, John Resmussen, and the taking of the money of said John Resmussen. In an exhaustive decision by Judge Sherwood, in *Lawler's Case*, as to the essentials of a good indictment for robbery, the conclusion was reached that the money or goods must be laid in the general or special owner, and it was said it was sufficient that they be laid in a bailee, pawnee, carrier, or the like. *State v. Moore*, 101 Mo. 316, 14 S. W. 182. "But in such category a wife or servant can-

a person who, while employed as a carpenter by the owner of a saloon, was left temporarily in charge of the saloon. The indictment laid the property in the money in the person robbed, though he had received it in payment for liquor sold, and it belonged to his employer; and this was held to be correct, notwithstanding the contention by counsel that, although there might be a sufficient ownership of goods stolen in one who had only a special property in them, yet, where the person from whom the money was taken was a mere servant of the real owner, the one taking it could not be convicted of robbery, as the possession of a servant is the possession of the master.

In contradiction of the statement in the *Lawler* Case that it was uniformly held at common law that the taking must be from the person or in the presence of the owner is the case of *Reg. v. Rudick*, 8 Car. & P. 237, in which the indictment charged the prisoners with having robbed a certain person of a sum of money, the property of another person, who was his master. It appeared that the servant had been sent by his master to receive the money from certain customers, and that he was on his return to the master's house when the money was taken from him. It was contended that the money could not be laid as the property of the master because it had never reached his hands, except by the possession of the servant, and Alderson, B., in delivering the opinion of the court, said that he was inclined to think the objection valid, as it was difficult to see how such an offense as embezzlement could have been a part of the criminal law if the possession by the servant of property which had never come to the hands of his master were construed to be in the possession of the master. He added that he should certainly reserve the question, but that, as the grand jury were still sitting, it would be better to prefer a fresh bill so as not to raise the question. A fresh bill was, therefore, taken and sent to the grand jury, which laid the money in one count as the property of the servant, and in the other as the property of the master, and on this indictment the prisoners were convicted. This case is universally cited to sustain the statement that in case of a robbery from a servant of money of the master, the property thereof may be laid in the servant; but, as seen by the statement of the facts above, the question was really not decided. Nevertheless it is authority for the contention that a person may

not be included." That the great weight of authority, at common law, sustains Judge Sherwood's opinion as to the possession of a wife at common law, we think there can be no doubt, because the possession of the wife was prima facie the possession of the husband, and by the common law she could have neither real nor personal property in possession. *Hughes v. Com.* 17 Gratt. 565, 94 Am. Dec. 498; *Wade's Case*, 17 Pick. 395; *Com. v. Williams*, 7 Gray, 337; *Com. v. Cullins*, 1 Mass. 116. But this doctrine has been so modified by statute that it can no longer be said to obtain in most of our states. The question presented by this record and in the *Morledge Case* is whether a clerk left in charge of, and intrusted with the care of, his employer's cash, with author-

ity to sell his goods and make change out of the drawer, is not a person in whom the ownership of such money may be laid, as against a robber. Certainly, if he is over sixteen years of age, he may be convicted of embezzlement of such money, if he fraudulently converts it to his own use without the consent of his master or employer. What, then, was the relation of Mills to the cash left in his possession in the cash register, and what his obligation in respect thereto? It is no answer to the question to show that his employer, Mr. Radford, did not hold him responsible for the money which was taken from his possession by putting him in fear of his life by presenting a revolver at his head. Is it the law that, if the president or cashier of a bank should be temporarily ab-

be guilty of robbery in forcibly taking an article of value from another, although the latter is not the owner thereof.

While in 2 East, P. C. 654, it is said that a man may even be guilty of robbery of his own goods, as if he send his servant with money, and afterwards waylay and rob him with intent to charge the hundred; and that in this case there could be no objection to laying the property of the goods in the servant, for, though in general it may be said that he had no property in them as against his master, although he had against every other person, yet, having a clear right to defend his possession against the master's unlawful demand, the special property still remained in the servant, but that a taking from the servant of the money or goods of his master in his presence by putting in fear is a taking from the master, and the offender may be indicted for robbing him.

And, as said in *State v. Adams*, 58 Kan. 365, 49 Pac. 81, where the *Lawler Case* was considered in passing upon an information for robbery under a statute very similar to the Missouri act: "It cannot be that the legislature ever intended to give less protection against violence to a wife or child in the possession of property belonging to the husband or father, or to a servant in the possession of the property of his master, than to the owner himself when in possession of his own property. The characteristic of robbery . . . lies in the violence inflicted on the person of the one in possession of the property, or in putting him in fear of injury to his person. So far as the mere taking of the property is concerned, the offense is neither greater nor less than if filched in any other way. . . . At common law it was never held that the property taken must belong to the person robbed. It was sufficient that the property belonged to the person robbed or some third person. . . . As against the robber, a servant has the same right, and rests under the same duty, to preserve and defend his possession of the property that the owner has. He is the custodian, and has a right to oppose, with violence if necessary, the violence offered by the robber. As against him he stands as the owner."

An indictment for robbery charging a taking from the person and possession of a married woman and laying the property in her husband was also held, in *State v. Ah Lol*, 5 Nev. 99, to be good as against the contention that, to con-

stitute the offense of robbery, the property must be taken from the possession of the real owner. The court said that the gist of the crime was the violent taking from the person of another against his will, and that it was not essential that the person robbed be the absolute owner of the property taken, that it was sufficient if it appear that the property did not belong to the prisoner; adding that, if the person robbed have a general or special property in, or a right of possession of, the goods taken, it is sufficient; otherwise the statute would be defeated, and there would be no robbery except when property is taken from the person or the immediate presence of the absolute owner, which, fortunately, is not the law.

In case of an indictment for the robbery of a key, containing several counts, in some of which the property in the key was laid in the person from whom it was taken, who was janitor of a bank, and in other counts was laid in the bank, it was contended that the indictment was not good, since, to constitute a valid indictment for the offense of robbery in the first degree under the statute, it must be averred that the property was taken from the person or in the presence of its owner and against his will, and by violence to his person, or by putting him in fear, and that, therefore, an indictment averring the taking of the property of one person by committing violence upon another is not good. The case of *Brooks v. People*, 49 N. Y. 436, 10 Am. Rep. 398, *supra*, was cited by the prosecution to sustain the sufficiency of the indictment, but the court held that it was not material to examine that question, since in all the counts the robbery was alleged to have been committed upon the janitor, and the first and second counts, which laid the property in him, were conceded to be good; and that, even if the others were bad, that would be no ground for directing an acquittal of the prisoner on the whole indictment. *Hope v. People*, 83 N. Y. 418, 38 Am. Rep. 460. In this case the question seems to be treated as one of pleading merely, and the fact that a robbery had been committed to be conceded. And the fact that the person robbed was a mere servant is not discussed.

It is apparently held in *Crews v. State*, 3 Coldw. 350, that a conviction of robbery cannot be had on an indictment in which the property taken is laid in the husband where the possession was in the wife and the property taken

sent from the bank, a robber may with impunity enter the bank, and present a revolver or gun at the clerks left in charge, and take all the money of the bank, and escape punishment for robbery? Or, to state it differently, if a gentleman confide to his friend his watch, for convenience, and, after they part, a robber places his revolver at the friend's head, and, by putting him in fear, takes the watch, there can be no robbery, because the real owner was not present, and was not put in fear, and, as the friend was not a bailee for hire, and makes no claim of any property rights, other than his possession, therefore the ownership cannot be laid in him. The question is one of much practical moment. Mr. Mills bore a contract relation to Mr. Radford, by which, in consideration of his wages as clerk, the law, in the absence of an express agreement, implied a promise on his part to exercise care and prudence in the management of Mr. Radford's store in the course of his employment. Certainly the law imposed upon him the obligation of collecting the price of the goods he sold, and of accounting for the same. He was, for that purpose, intrusted with the cash register; and by virtue of his employment he was authorized to take

money out of the register to make change when he sold an article, and was required to place his receipts in the register. He was an agent for hire, and Mr. Radford had, by the course of business adopted, delivered to him the possession of the cash in the register, in law, as effectually as if he had gone through the most formal act of delivery. The delivery in this case, while not the transfer of the absolute title to Mr. Radford's money, was a transfer of its possession, with its accompanying temporary rights. Even bailees without reward have an interest sufficient to enable them to sue tortfeasors, and to maintain trover against all strangers to the bailment who wrongfully invade their possession. Possession is *prima facie* evidence of right, and the party who seeks to dispossess should show a better title; and, moreover, the possessor sustains a responsibility to the true owner. The language of the statute defining robbery in the first degree is: "Every person who shall be convicted of feloniously taking the property of another from his person or in his presence and against his will by violence to his person or by putting him in fear of some immediate injury to his person, shall be adjudged guilty of robbery in

from her by violence. But the indictment is not set out in this case, and the statement of facts do not show that the property was taken from the wife, and the opinion of the court is so lacking in clearness that it is difficult to state just exactly what was decided. The facts set out show that the house of the prosecutor was entered while he and his family were asleep, and he was aroused by the presentation of a pistol at his head and a demand for money; that, alarmed and excited, he sprang from his bed, and he and his sister, in whom the property taken is laid in one count of the indictment, ran from the house. In their absence one of the prosecutor's daughters was compelled to go up stairs and bring down her father's box, which was broken open in the presence of the remaining members of the family, and some money, clothing, etc., taken away. The court holds, first, that to constitute robbery the taking must be from the person or in the immediate presence of the person robbed, and then states that another question to be decided is whether an indictment for robbery in which the property is laid in the husband can be sustained by proof that the possession was in the wife and the property taken from her or in her presence, under fear and violence. In answer to this question, the court says that the law is well settled, adding: "The goods or money taken must be proved to be the property of the person named as the owner in the indictment.

... True, there are cases where there is only a special property in the person put in fear, and from whom the goods or money are taken, in which it has been held to be robbery. As, if a servant, having collected money for his master, is robbed of it on his way home, it has been thought it should still be allowed the money of the servant until it has been delivered

to the master, or otherwise the servant could not be guilty of the crime of embezzlement. But that principle is not applicable to the case. Here the ownership, as well as the possession of the property was in the prosecutor and the taking must have been from his person or in his presence." To the end that another investigation, under a proper indictment, might be had, the judgment of conviction was reversed and a new trial awarded.

This is the only Tennessee case that has been found on this point: but it has been held in a later case (*Clemons v. State*, 92 Tenn. 282, 21 S. W. 525) that it is not necessary that an indictment for robbery should contain any allegation whatever as to the ownership of the property. The court says that the essential ingredient of the offense is the felonious and forcible taking from the person of another of goods of value by violence, and that an allegation of ownership is not necessary.

In *Ward v. Com.* 14 Bush, 233, there was an indictment for robbery charged to have been committed by taking certain articles from a dwelling house by putting the wife of the proprietor in fear. The indictment was under a statute providing that, if any person shall rob any person in his dwelling house, he, his wife, children, or servants, or third persons then being within, he shall be confined in the penitentiary for a certain period. Nothing is said here as to the necessity of the property being taken in the presence of the owner, or as to allegations of ownership in the indictment, the objection made to the indictment being that it failed to charge that the taking was with the intention to deprive the owner of his property, or to convert it to a use of the accused.

In *State v. Chapman*, 6 Nev. 320, the indictment alleged in one count that the property

the first degree." Rev. Stat. 1899, § 1893. The weight of the argument that the person robbed must have a general or special property in himself, and that possession alone is not sufficient, lies in the words of the statute, "taking the property of another from his possession." This identical question arose in *Brooks v. People*, 49 N. Y. 436, 10 Am. Rep. 398, on a statute couched in the exact words of our statute; and it was ruled by the court of appeals of New York that, as against a robber, the person robbed was the owner of the goods in his possession and custody, whereof he was robbed. Judge Peckham in that case traced the history of this section in the New York Code, and found that the revisers had said they defined robbery "according to 2 East, P. C. chap. 16, §§ 125, 129; the material ingredient in this offense being that it is done against the will, by violence or by fear of immediate injury" to the person. The learned judge pointed out that the elementary common-law writers generally did not insert in their definition of this crime that the property should belong to the person robbed. 1 Hale, P. C. 532; 4 Bl. Com. 241; 2 Russell, Crimes, 4th ed. 98, 867; Hawk. P. C. 95, chap. 34; *Com. v. Clifford*,

8 Cush. 215. The conclusion was reached that, as against a robber, the possession was sufficiently laid in the person robbed. The same question again arose on a statute in the same words in *State v. Adams*, 58 Kan. 365, 49 Pac. 81, and the court very aptly says: "The characteristic of robbery, distinguishing it from other forms of larceny, lies in the violence inflicted on the person of the one in possession of the property, or in putting him in fear of injury to his person. So far as the mere taking of the property is concerned, the offense is neither greater nor less if filched in any other way. The gravity of the offense lies in the breach of the peace, in the personal violence inflicted, or the terror excited in the mind of the individual robbed. At common law it was never held that the property taken must belong to the person robbed. It was sufficient that the property belonged to the person robbed or some third person." "As against the robber, a servant has the same right and rests under the same duty to preserve and defend his possession of the property that the owner has. He is the custodian, and has a right to oppose with violence, if necessary, the violence offered by the robber. As against him, he stands as

taken was that of an express company, and in another count that it was that of their messenger in custody thereof at the time. It was insisted that this was a charging of more than one offense in the same indictment; but the court said that it would be difficult, if not impossible, to frame a better indictment than the one at bar, and held the indictment good. Nothing is said, however, as to the effect on the nature of the offense of the property not having been taken from the owner or in his presence.

IV. Conclusion.

A careful review of the authorities shows that the contention that to constitute the crime of robbery the person from whom the property is taken must be the owner thereof cannot be sustained. There is nothing in the common-law definition of the crime to justify this claim, nor in the statutes when reasonably interpreted; nor is it borne out by the cases, not even by those decided under statutes that, by a literal interpretation of their provisions, might be construed as defining the crime more narrowly than was done at common law.

Lord Mansfield states (2 East, P. C. chap. 16, § 130, p. 725) that the true nature and original definition of robbery were the felonious taking of property from the person of another by force, in which there were three things to be observed: First, that it must be done feloniously; second, that it must be from the person of another; third, that it must be done by force. He adds that all the rest which was to be found in the books on this subject formed no part of the definition of the offense, but arose from legal construction.

The cases all concede that it is not necessary that the person robbed should be the absolute

owner; that it is sufficient if he be a special owner or bailee; while a majority of them hold that mere possession is sufficient. The claim that the interest of the person robbed must be such as would enable him to maintain an action for the property if taken out of his custody has been sustained by only two cases (*State v. Lawler*, 130 Mo. 366, 51 Am. St. Rep. 575, 82 S. W. 979, and *State v. Morledge*, 164 Mo. 522, 65 S. W. 226, ante, III.), which, since the decision in *STATE V. MONTGOMERY*, are no longer law.

As to the form of the indictment, it is usually held that the property may be laid in either the absolute or special owner, though it has been held that the real ownership of the property must be shown. In case of the robbery of a wife, it was necessary at common law to lay the property in her husband; and that may be still necessary in some states, notwithstanding the modern married women's acts, though as a rule this should not seem to be now necessary. No common-law case has been found squarely deciding the question in whom ownership should be laid in case of robbery from a servant. The implication from the case of *Reg. v. Rudlick*, 8 Car. & P. 237 (ante, III.), is that ordinarily the property should be laid in the master, though in that case it was questioned whether, because of the peculiar circumstances, it was not necessary to lay the property in the servant. And in 2 East, P. C. 654, it is said that, in case of a robbery by a man of his own goods from his servant, it should seem there could be no objection to laying the property of the goods in the servant. Under modern statutes it is generally held that a servant has such an interest in the property in his possession as to sustain an allegation of ownership in him.

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the owner; and we think the statute intended to extend to him the full measure of protection that it gives to the owner or bailee. The principles governing civil actions for the recovery of property wrongfully taken have no application in a case of robbery." In *State v. Lawler*, 130 Mo., *loc. cit.* 374, 51 Am. St. Rep. 575, 32 S. W. 981, it was said: "There is no doubt but that goods may be laid to be either in the general owner or in a special owner, with the like result of conviction where the evidence corresponds with the allegation. Thus they may be laid to be in a bailee, pawnee, carrier, or the like." We find, on examination, the foregoing is a substantial quotation from East on Pleas of the Crown, vol. 2, chap. 16, § 90, p. 652; but the learned author was treating of larceny, not of robbery. It is further said: "But if it appear in evidence that the party whose goods they are laid to be had neither the property nor the possession [and for this purpose the possession of a *feme covert* or servant is, generally speaking, the possession of the husband or master], the prisoner ought to be acquitted." But in the same section it is said: "If A. send his servant with money, and afterwards waylay and rob him, with intent to charge the hundred, . . . the felony is complete." East says: "And even in this latter case I see no objection to laying the property of the goods in the servant, for though, in general, it may be said that he has no property in them as against his master, although he has against every other person, yet, having a clear right to defend his possession against A.'s unlawful demand, the special property still remains in the servant. But a taking from the servant of the money or goods of his master, in his presence, by putting in fear, is a taking from the master, and the offender may be indicted of robbing him." So that, when the whole context is read, it does not support the conclusion reached in *State v. Lawler*, 130 Mo. 374, 51 Am. St. Rep. 575, 32 S. W. 981, that under no circumstances can the goods be laid in the servant, but, on the contrary, his possession is sufficient as against a robber or trespasser, and all others but the true owner. And while we think that the rule laid down in *State v. Morledge*, that the party in whom the goods are laid must have such a special interest in them, by lien or otherwise, as would enable him to maintain

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an action for their possession, or injury thereto, against any other person than the true owner, does not apply to a prosecution for robbery, yet even in a civil case "the law is that a person possessed of goods as his property has a good title against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by showing that there was title in some third person, for against a wrongdoer possession is a title." Lord Campbell, in *Armory v. Delamirie*, 1 Strange, 505; *Jefferies v. Great Western R. Co.* 5 El. & Bl. 802; Cooley, Torts, 2d ed. p. 520; Cobbey, Replevin, § 786; *Rosencrane v. Swofford Bros. Dry Goods Co.* 175 Mo. 518, 97 Am. St. Rep. 609, 75 S. W. 445; *Hoagland v. Forest Park Highlands Amusement Co.* 170 Mo. 335, 94 Am. St. Rep. 740, 70 S. W. 878.

Mills, then, being lawfully in possession, by virtue of his employment as clerk for Mr. Radford, of the money in the cash register, had a sufficient ownership thereof, as against the defendant, to justify the laying of said money in him for the purposes of this prosecution against the defendant, who robbed him of the same, and a sufficient ownership to meet the requirement of the statute that said money should be laid as his. The information properly charged the robbery of Mills, and laid the goods in him; otherwise there can be no robbery in such circumstances.

Upon a reconsideration, we are satisfied that the possession of Mr. Mills, as the clerk in charge of the store, with the implied obligation of exercising ordinary care of his employer's goods and property, was such as authorized the money to be laid in him, and that our opinion in *State v. Morledge* ought no longer to be followed as the law of this state, and that so much of *State v. Lawler* as holds that the possession of a wife or servant, in circumstances such as shown by the record in this case, is not sufficient in a prosecution for robbery to justify the laying of the goods in them, should also be overruled.

The information is not verified, but no objection was taken to it on that account, and the failure was waived.

The result is that the judgment of the Criminal Court must be, and is, affirmed.

Burgess and Fox, JJ., concur.

PENNSYLVANIA SUPREME COURT.

John KAUFMANN *et al.*

v.

John LIGGETT *et al.*, Trustees, etc., of
Sarah L. Hitchcock, Deceased, *Appts.*

(209 Pa. 87.)

1. Statutes providing a summary remedy for a landlord to obtain possession of the leased premises do not deprive equity of jurisdiction of a suit to determine the rights of the parties under a clause in the lease giving a right to renewal at a rental to be fixed by arbitrators, since the remedy provided by them is not adequate.
2. Equity may enjoin proceedings at law under statutes giving a summary remedy for obtaining possession of property under lease, where the lessee has an equitable right to a continuance of possession, and where the remedy at law is not adequate to determine the rights of the parties.
3. Failure of the arbitrators to fix the rental to be paid during the extended term, as the contract for renewal of the lease provided they should do, does not deprive the lessee of the privilege of renewal, where he has given the agreed notice of his desire to do so, and where, from the provisions of the contract, it is evident that the right of renewal, and not the rent to be paid, was regarded as the essence of the contract.
4. Equity has jurisdiction to fix the rent to be paid during the renewed term of a lease, if the arbitrators provided by the contract failed to do so, where the lessee has taken the required steps to preserve his right to renewal, and such right, and not the amount of rent to be paid, is the essence of the contract.
5. The fixing of the rental is not of the essence of a contract to renew a lease upon receipt of notice to that effect, upon a rent to be fixed by arbitrators to be appointed by the parties.

(May 2, 1904.)

APPEAL by defendants from a decree of the Court of Common Pleas, No. 1, for Allegheny County in favor of complainants in a suit to enjoin defendants from proceeding under the landlord and tenant acts to take possession of property which had been leased to complainants. *Affirmed.*

The facts are stated in the opinion.

Messrs. D. T. Watson, Marcus A. Woodward, and John M. Freeman for appellants.

NOTE.—As to injunctions against execution sales or other proceedings under final process, see *note* to *Parsons v. Hartman*, 30 L. R. A. 98.

For injunction against judgments, see *note* to *Jarrett v. Goodnow*, 32 L. R. A. 321.

For some cases in this series on injunctions against actions at law, see *Devlin v. Quigg*, 10 L. R. A. 665; *Kelley v. Ypsilanti Dress-Stay*, 67 L. R. A.

Messrs. Edwin H. Stowe, W. B. Rodgers, and J. Rodgers McCreery, for appellees:

Equity has jurisdiction to determine the rental in this case for the term of five years from April 1st, 1903.

The inducement, end, and purpose were improvement of lessor's premises and establishment of a business therein, by securing to lessees time to reap the fruits of their outlay and efforts. The fixing of rental for an extension term is not of the essence of the contract.

Dinham v. Bradford, L. R. 5 Ch. 522; *Weater v. Wood*, 9 Pa. 222; *Fitzsimmons v. Lindsay*, 205 Pa. 79, 54 Atl. 488; *Fry, Spec. Perf.* §§ 343-346; *Backus's Appeal*, 58 Pa. 186.

The material thing in the mind of the parties was the notice. When that notice was given appellees were absolutely bound to take the premises for the term, and appellants to grant the term. And therefore the fixing of the rent was not of the essence of the contract.

There is no time limited for the ascertainment of the rent, therefore, that could not be considered as essential to the renewals.

The conduct of appellants has been such as to estop them from taking their present position.

Dunnell v. Keteltas, 16 Abb. Pr. 205; *Meynell v. Surtess*, 3 Smale & G. 113.

The fact that the arbitration did not fail until in the renewal term adds measurably to the equities, and makes the necessity for, and jurisdiction of, the court to grant relief more clear.

Philadelphia Library Co. v. Beaumont, 39 Pa. 43; *Boswell's Appeal*, 3 Pennyp. 305; *Dunnell v. Keteltas*, 16 Abb. Pr. 205; *Arnot v. Alexander*, 44 Mo. 25, 100 Am. Dec. 252; *Fiany v. Ferran*, 5 Abb. Pr. N. S. 110; *Piggot v. Mason*, 1 Paige, 412; *Gregory v. Mighell*, 18 Ves. Jr. 328; *Dike v. Greene*, 4 R. 1. 285; *Herrman v. Babcock*, 103 Ind. 461, 3 N. E. 142; *Gourlay v. Somerset*, 19 Ves. Jr. 430.

A court of equity may restrain proceedings under the landlord and tenant acts. These contemplate decision of matters of fact, by one not learned in the law, and do not apply to cases where the termination of

Mfg. Co. 10 L. R. A. 686; *Proctor v. National Bank*, 9 L. R. A. 122; *Milwaukee Mut. F. Ins. Co. v. Sentinel Co.* 15 L. R. A. 627; *Leighton v. Young*, 18 L. R. A. 286; *Central Trust Co. v. Moran*, 29 L. R. A. 212; *Bomelsier v. Forster*, 39 L. R. A. 240; *Siever v. Union P. R. Co.* 61 L. R. A. 319.

the tenancy involves the decision of a difficult legal question.

Graver v. Fehr, 89 Pa. 463; *Scott v. Fuller*, 3 Penr. & W. 55; *Newell v. Gibbs*, 1 Watts & S. 499; *Blashford v. Dunoon*, 2 Serg. & R. 486; *Clark v. Everly*, 8 Watts & S. 231; *Davis v. Davis*, 115 Pa. 261, 7 Atl. 746; *Steel v. Thompson*, 3 Penr. & W. 38.

Potter, J., delivered the opinion of the court:

The complainants in this case, Kaufmann Bros., leased certain premises on the southeast corner of Fifth avenue and Smithfield street, in the city of Pittsburgh, from Sarah L. Hitchcock, for a term of years. By the leases, two in number, it was provided, in language substantially identical, that the lessees should have the privilege of re-renting at the expiration of the first term, which ended April 1, 1898, for a period of five years more, at a rental to be determined by four arbitrators, two selected by each party, with power, in case of disagreement, to choose an umpire, whose decision should be final and without exception or appeal. It was also stipulated that no such privilege of renewal should be granted unless the lessees gave written notice to the lessor or her heirs of their intention to exercise such privilege for six months prior to April 1, 1898; also that, if the arbitrator and umpire should not agree within two months after their appointment, then others should be chosen in the same manner; also that if the lessees should occupy the premises for the term of five years from April 1, 1898, they should have a further privilege of lease for another period of five years, upon a like six-months' notice, at a rental to be fixed and determined in the same manner. There was no provision in either lease covering the contingency of a failure to agree upon the part of the second set of arbitrators. The lessees exercised their privilege of renewal for the five years beginning April 1, 1898, and the rental was determined according to the provisions of the leases. Six months prior to April 1, 1903, which was the termination of the first extension of five years, they gave notice of their intention to renew for another period of five years. Arbitrators were named by both sides in accordance with the provisions of the leases, but they failed to agree upon a rental or to select an umpire within two months. A second set of arbitrators was then chosen. But again there was a failure to agree, and upon April 9, 1903, the arbitration was dissolved and adjourned *sine die*. Meanwhile the respondents, who were trustees under the will of the lessor,—she having died during the tenancy,—had given notice to the lessees, under the landlord and tenant acts of 1772 (1 67 L. R. A.

Smith's Laws, p. 370) and 1863 (P. L. 1864, p. 1125), to surrender possession of the premises, and threatened proceedings to dispossess them. The lessees then filed this bill against the trustees, praying (1) for an injunction to restrain them from proceedings at law to disturb or interfere with the complainant's possession of the premises; and (2) for a determination by the court of the amount of rental to be paid for the five years beginning April 1, 1903.

Upon the trial the court made a full finding of facts, all of them being practically undisputed, and reached the following conclusions of law: (1) That equity has jurisdiction; (2) that there is no sufficient remedy at law; (3) that the landlord and tenant acts of 1772 and 1863 have no application; (4) that an injunction should be granted until further order. Exceptions were filed to certain of the findings of fact, as being irrelevant and immaterial, and also to the conclusions of law and the opinion of the court. These exceptions were dismissed, and a decree was entered directing that an injunction be issued, restraining the respondents from interfering with the possession of the plaintiffs until further order of the court, by proceeding under the landlord and tenant acts of 1772 and 1863, or otherwise. The present appeal was then taken by the respondents. The decree of the court below is not assigned for error, but the assignments are confined to the dismissal of the exceptions to the conclusions of law reached by the court below.

That a court of equity has jurisdiction in a proper case to restrain proceedings under the landlord and tenant acts of 1772 and 1863 was expressly held in *Denny v. Fronheiser*, 207 Pa. 174, 56 Atl. 406. Justice Mitchell there said (p. 177, 207 Pa., and p. 407, 56 Atl.): "The jurisdiction of equity to restrain actions at law is too well established to require discussion, and there is nothing in the act of 1772 to give proceedings under it any immunity from such restraint in a proper case." In that instance it was held that equity would not interfere, not because it is without jurisdiction to do so, but because a proper case was not made out for its exercise. The summary remedy provided under the acts of 1772 and 1863 is not adapted to the determination of intricate and delicate questions of law. As the present chief justice said in the case just cited (p. 179, 207 Pa., and p. 407, 56 Atl.): "The act was passed in the interests of justice, to give against tenants who held over without even color of right after the expiration of their terms a better remedy than the old, cumbersome, dilatory, and expensive one by action of ejectment." But as Justice Sterrett said in *Davis v. Davis*, 115 Pa. 261, 7

Atl. 746, speaking of the provisions of the act of 1863 (p. 265, 115 Pa., and p. 746, 7 Atl.): "It also clearly indicates that the legislature, in providing a remedy so summary that the person in possession may be ousted therefrom in a few days, intended to further limit the jurisdiction of magistrates, and restrict the remedy to plain cases of ordinary tenancy." And further in the same case (p. 266, 115 Pa., and p. 747, 7 Atl.) he says: "In view of the fact that the special and summary jurisdiction given to justices of the peace and magistrates by the act of 1863 and supplements has been so sharply defined by the legislature, and limited to a class of cases that are of easy solution, it would illy become us, even if we had the power to do so, to enlarge its scope so as to embrace cases which the average justice of the peace or city magistrate is incompetent to dispose of."

In the present case the appellees contend for the right to hold the premises in dispute under the covenants in the lease providing for a renewal for five years from April 1, 1903. This raises a somewhat complicated question of law, which must be settled before it is possible to determine whether or not the right of possession in the lessees ended with the term which expired March 31, 1903. Had no notice been given by the appellees six months prior to that date of their intention to exercise the right of renewal, which was expressly granted to them by the original lease, then there would be but a simple question of fact for determination, entirely within the province of the justice and the jury to decide. But it is undisputed that the six-months notice was given, and the rights of the parties now turn upon questions of law, rather than upon any disputed facts.

We are clear that, under the circumstances of the present case, neither the act of 1772, nor that of 1863, supplies an adequate remedy, nor do they provide a proper tribunal for the determination of the questions involved. They cannot, therefore, be allowed to operate as a bar to the maintenance of this bill.

In the second prayer of the bill, the lessees ask that the court shall fix and determine the rental to be paid by the plaintiffs for the premises for the term of five years from April 1, 1903. But it is urged by counsel for the appellants that the court has no jurisdiction to grant this relief, because, as they allege, the leases terminated March 31, 1903, by reason of the failure of the mode provided by the parties for the fixing of the rental. As we have seen, the original term in both leases expired April 1, 1898, but each provided for similar renewals,—one for five years from April 1, 1898, and 67 L. R. A.

another for a further term of five years from April 1, 1903; and, by another agreement, two additional extensions from that date were provided on both of the above leases,—one for five years, and, at its expiration, another for four years,—so that extensions are provided for, which run, at the option of the lessees, until April 1, 1917. The leases therefore contemplate, in addition to the first term of thirteen years, four extensions in all,—three for five years each, and one for four years. The entire contract embraces a period of thirty-two years' occupancy of the premises by the lessees, if they choose to avail themselves of the rights placed at their disposal by the terms of the agreement. The rental for the first thirteen years was fixed by the parties at the outset. That for the first extension of five years was fixed by arbitration in accordance with the terms of the lease, and the present dispute grows out of the failure upon the part of the arbitrators to fix the rental for the second period of extension of five years.

The language of the original lease of 1885 is as follows: "And the said parties of the first part hereby grant unto the said J. Kaufmann & Brothers or their assigns, the privilege of rerenting the premises at the expiration of the first term of thirteen years for a period of five years longer." It will be noticed that here is a direct and positive grant of the right of renewal. It is not left to be determined by anybody else, but is definitely settled by the parties. And with reference to the second extension of five years the language is no less clear. It is: "And the said parties of the first part further agree to and with the said parties of the second part that, should they occupy the said premises for the said five years above designated, that they hereby grant to the said J. Kaufmann & Brothers a further privilege of lease for a period of five years upon a like six-months' notice." So that in both cases there was an absolute contract between the parties to the lease stipulating at the time of the making of the lease, not only for one term of thirteen years, but for the privilege of further extensions. Clearly the question of whether or not an extension should be made was not left open to be determined by arbitration. That much, at least, was definitely fixed by the contract. It is true that these extensions were to be at a rental to be fixed by arbitration, and the manner and method of the arbitration were pointed out. But when the lessees exercised their right to an extension, by giving notice to the lessors six months before the expiration of the pending term, the lessees were then absolutely bound to take the premises for the extended term, and the lessors were bound to the grant of the additional term. With

that matter the arbitrators had nothing to do. It was the amount of the rental for the buildings and premises for the extended periods which alone was left to be determined by arbitration.

The learned judge of the court of common pleas reached a conclusion which he expressed in his opinion as follows: "The plaintiffs having exercised their option for a renewal of the leases within the time prescribed, their right to a lease, and to keep possession of the premises for a new term of five years, was vested in them, regardless of whether the arbitrators fixed the amount of the rent or not. If the right to renewal had been intended to depend upon the rent being fixed in advance, it would not only have been the easiest, but most natural, thing to have said so. It seems clear to us that no such result was even thought of by either party." We agree with the conclusion thus stated. The lessees were stipulating for what was certainly to them a valuable privilege, in providing for a long term, made up of successive extensions. Under the contract, that privilege was absolutely secured to them, provided they gave six months' notice, prior to the expiration of each term, of their desire to take advantage of the agreement for the extension.

The arbitrators were appointed, in the language of the lease, "for the purpose of determining the amount of rent which the said J. Kaufmann & Brothers shall pay per year during the said five years." The right to a renewal was not in any way before them for consideration. Can it be said that, because the arbitrators failed in their duty, which was to determine the amount of the rental, or to agree upon an umpire, whose decision upon that subject should be final and conclusive, the lessees are to be deprived of the privilege of a renewal, which they had taken the pains to secure for themselves by means of carefully drawn stipulations in the contract?

To the mind of the trial judge, the specifications of the lease for successive renewals at the end of the intermediate periods appeared to be the substantial part of the contract, and he viewed the manner of fixing the rental value as merely incidental thereto. In his opinion he thus states his conclusion: "It is evident that the essence of the contract in the leases was the options for renewals, and that the parties so understood it. This is strengthened by the fact that the leases were made to terminate, subject to the options, in 1917, and by the following clause of the agreement of 1897, *viz.*: 'It is desired by the said parties of the second part for the better security for the future of their business interests where the same is at present located to provide for

and obtain the right of future options. . . . And the parties of the first part deeming the grant of such options as of advantage to the estate of Sarah L. Hitchcock, . . . and . . . it being understood that on failure to exercise any of the said options within the time and according to the terms of said leases as aforesaid, the leases terminate with the term in which notice of such option is to be given according to the terms thereof.' Now, under these somewhat extraordinary conditions, the real subject-matter of the contract being a right to the renewal of the leases, and fixing of the rent being only secondary, the terms as to rental being, in substance and effect, that the rent shall be a fair one, fixed by an impartial tribunal,—for that is all that the clause as to fixing the rent means,—has equity jurisdiction? We think it has."

After careful consideration of this question in the light of the elaborate argument of counsel for the appellant, we agree with the conclusion of the court below that the fixing of the rental value of the premises for the period in dispute in this case is not of the essence of the contract, but that the right of renewal constituted the substantial element in this portion of the agreement. It was that feature which, in great measure, justified the lessees in erecting upon the premises a large and costly building, adapted to the needs of their business. As a general rule, in construing provisions of a lease relating to renewals, where there is any uncertainty, the tenant is favored, and not the landlord, because the latter, having the power of stipulating in his own favor, has neglected to do so, and also upon the principle that every man's grant is to be taken most strongly against himself: *Taylor, Land. & T.* 9th ed. § 81.

Nearly all of the cases cited by the appellants to sustain their contention that the fixing of the rental value is of the essence of the contract were proceedings to enforce specific performance of contracts for the sale of land; and in this class of cases it has invariably been held that the price to be paid is an essential element of a contract of sale, and, unless the price has been fixed, the contract is not certain, and cannot be enforced. We are not, however, here dealing with a contract for the sale of land, but we are dealing with covenants for the renewal of a lease, and that, too, in a case where the lessees have been in possession of the premises under the lease for more than eighteen years, and have made valuable and extensive improvements upon the property during that time, and have built up a large and extensive business thereupon. During all these years the lessors have been receiv-

ing a rental for the property which was entirely satisfactory. There is a marked distinction between the rule which may equitably be applied to a contract for the sale of land, and that which should govern in an agreement for the renewal of a lease, where possession has been enjoyed and improvements made during the first period under a reasonable expectation of benefits to be derived therefrom during future extensions of the lease at the option of the lessee.

One of the cases upon which the appellants rely is *Milnes v. Gery*, 14 Ves. Jr. 400. The contract in that case was one for the sale of land, and the court, by Sir William Grant, said that the price is of the essence of a contract of sale. But the same eminent judge afterwards delivered the opinion in *Gregory v. Mighell*, 18 Ves. Jr. 328. In this case there was a parol agreement for a lease of twenty-one years,—the amount of rent annually to be fixed by two indifferent persons,—under which the lessees entered and made improvements. Sir William Grant here held that the failure of the arbitrator to fix the rent could not affect the agreement, but that the court would find some means of completing its execution. Specific performance was accordingly decreed, and it was referred to a master to ascertain what the rent ought to be. And in *Gourlay v. Somerset*, 19 Ves. Jr. 429, a lease was to be given with such conditions as the defendant's steward should judge to be reasonable and proper, or, in the event of his death, by some other person to be mutually agreed upon. The question arose, under a bill filed by the tenant, whether the terms of the lease should be settled by the steward of the defendant or by a master of the court. And in this case Sir William Grant held that when the agreement to give a lease is binding, and such as ought to be executed, it does not require foreign aid to carry the details into execution.

The appellants also cite the case of *Hopkins v. Gilman*, 22 Wis. 476. This was the case of a letting, and not a sale, but it seems favorable to the position of the appellees, rather than of the appellants. The lease stipulated that at the end of the term the lessor should have the value of the land, independently of the improvements placed upon it by the lessee, determined by the arbitrators, to be chosen in a specified way, and that the lease should then be renewed at a percentage of the valuation, or else the improvements taken at a valuation to be fixed by arbitrators. It was held that, while the court would not compel an arbitration, it would restrain the lessor from proceeding at law to dispossess the tenant until the improvements were paid for, and also that a 67 L. R. A.

court of equity had power itself to ascertain the value of such improvements, notwithstanding the provisions of the lease as to arbitration. It was there said (p. 481): "The court, having acquired jurisdiction of the cause, should provide and grant any relief consistent with the case made by the complaint and embraced within the issue."

In *Dinham v. Bradford*, L. R. 5 Ch. 519, two partners made an agreement containing a provision that, on the determination of the partnership, one partner should purchase the share of the other at a valuation to be made by two persons, one appointed by each partner, and the partnership was carried on for some time under that agreement. Held, that though the valuation could not be so made, because no umpire was provided, the court would carry the partnership agreement into effect by ascertaining the value of the shares. Lord Hatherley said, *inter alia* (p. 523): "This case is not like that of the sale of an estate, the price of which is to be settled by arbitration, but is a case in which the whole scope and object of the deed would be entirely frustrated if the court were to apply the well-known doctrine to the present state of circumstances. In cases of specific performance the matter is very plain and simple. One person agrees to sell his estate in a given way, and no rights are changed by the circumstance of that method of selling the estate having failed. The estate remains where it was, and the money where it was. But here is a man who has had the whole benefit of the partnership in respect of which this agreement was made, and now he refuses to have the rest of the agreement performed, on account of the difficulty which has arisen. It is much more like the case of an estate sold, and the timber, on a part, to be taken at a valuation, the adjusting of matters of that sort forming part of the arrangement, but being by no means the substance of the agreement; and in such cases the court has found no difficulty. If the valuation cannot be made *modo et forma*, the court will substitute itself for the arbitrators. It is not the very essence and substance of the contract, so that no contract can be made out, except through the medium of the arbitrators. Here the property has been had and enjoyed, and the only question now is, What is right and proper to be done with regard to settling the price?"

In *Dunnell v. Keteltas*, 16 Abb. Pr. 205, the law is stated as follows (p. 211): "It is true, indeed, as a general rule, that a court of equity will not decree specific performance of a covenant or agreement to appoint arbitrators or appraisers. Where, upon a contract for the sale of property, the price is not fixed, but is left to be determined by certain persons named in the con-

tract, the court will not force them to a decision, and will not undertake to perform the duty intrusted to them, so that, if they do not fix the price, the agreement must fail, unless under certain circumstances there has, notwithstanding the defect, been an acquiescence under it, or such a part performance that it would be inequitable not to enforce its execution. In such a case the court will ascertain what is the fair value. Where, also, the agreement was to sell at a fair valuation, and no persons were appointed to make it, there being nothing to preclude the court's interference, a court of equity has taken upon itself to determine what is a proper price, and has decreed a specific performance accordingly. In fact, where any term of a contract in all other respects complete is left to the determination of others, and the same is not of the essence of it, the court will take upon itself to decide that matter, and will thereupon decree a specific performance. See *Jeremy, Eq. Jur.* 442, 443, and cases there cited."

In *Viany v. Ferran*, 5 Abb. Pr. N. S. 110, it was held, under facts similar to those of the present case, that a court of equity had power to compel the execution of a renewal lease, and also to determine the rent to be paid for the new term.

The contention of the appellants that the fixing of the rental is of the essence of the contract does not seem to be borne out by the authorities. Thus, in *Taylor's Landlord & Tenant*, 9th ed. § 14: "A stated rent, however, is not essential to the contract, because, from favor, or for a consideration passing to the lessor at the time of its inception, a lease, beneficial in its nature to the lessee, may be made without a reservation of rent." And several authorities are there cited to sustain the proposition. In *Weaver v. Wood*, 9 Pa. 220, Gibson, Ch. J., held that an agreement for a lease at a fair rent is sufficiently certain to be enforced. And in *Mitchell v. Com.* 37 Pa. 187, in the opinion of this court, delivered by Thompson, J., an agreement for holding premises rent free was construed to be a lease. One of the latest cases in which the question here involved was considered is that of *Grosvenor v. Flint*, 20 R. I. 21, 37 Atl. 304, where the court said: "The case is before us on bill, answer, replication, and proof. The case presents two questions for decision; viz.: (1) Whether the court, by a master or otherwise, can appraise the rent payable to the complainants, if the arbitration provided for in the lease has failed; and (2) whether, as a matter of fact, the arbitration has failed. In answer to the first question, we think it is clear that the court has jurisdiction to do, either directly or by its master, what the appraisers or arbitrators could have done 67 L. R. A.

under said provision of the lease, if it is shown that the arbitration has in fact failed. And refusal to agree to a third man constitutes such a failure. *Brock v. Dwelling House Ins. Co.* 102 Mich. 583, 26 L. R. A. 623, 47 Am. St. Rep. 562, 61 N. W. 67; *Niagara F. Ins. Co. v. Bishop*, 154 Ill. 9, 45 Am. St. Rep. 105, 39 N. E. 1102; *Brown v. Harper*, 54 Iowa, 546, 6 N. W. 747; *Watson v. Northumberland*, 11 Ves. Jr. 153. The covenant to appraise the rent does not stand alone, but is merely a subsidiary part of the lease in question. That is to say, the manner of determining the amount of rent to be paid is a matter of form, rather than substance. And if it appears that this question cannot be determined in the manner provided for in the lease, by reason of the refusal of one party to the contract to do what, in equity, it ought to do, the court will determine it upon the application of the other." The question is also fully discussed, and the authorities bearing upon it are carefully considered by Judge Dillon, in *Tscheider v. Biddle*, 4 Dill. 58, Fed. Cas. No. 14,210. The reasoning in *Coles v. Peck*, 96 Ind. 333, 49 Am. Rep. 161, is also helpful in determining the question at issue. In that case there was a lease providing for the erection of a building, with an option to purchase; the price to be determined by arbitrators. The court held that the plaintiff was entitled to equitable relief on a failure of the arbitration. Many American and English cases are cited and commented upon. After referring to the doctrine laid down by *Milnes v. Gery*, 14 Ves. Jr. 400, that contracts for the sale of land will not be specifically enforced when the purchase price is to be determined by arbitrators, and such arbitration has failed, the court says (p. 339, 96 Ind., p. 166, 49 Am. Rep.): "The doctrine of that case has, however, generally been followed by the courts of the United States only in a limited and restricted sense, and is mainly applied only to contracts for reference in which, by the form and language of the stipulation, the mode of determining the price by values on arbitration is made an essential provision—in fact, condition—to the validity of the agreement, and to cases in which the parties can be easily placed *in statu quo*, or where an action for damages can be made to afford an adequate remedy."

After a careful consideration of all the cases bearing upon the subject which have been brought to our attention, or which we have found, we are satisfied that the authorities well agree that equity will not compel an arbitration, and this upon the very good ground that the courts remain open to the parties, with better provisions for securing justice than are possessed by arbitrators,

but that in cases of renewal leases the weight of authority clearly favors the view that the tenant in such a case has a quasi proprietorship, a right, lacking merely a valuation; and that the grossest inequity would be worked, should he lose his right through a failure upon the part of the arbitrators to fix a valuation. While, therefore, a court of equity will not undertake to compel an arbitration, which it cannot control, it will in such case make an appraisal itself, or direct it to be done by its own officer, and will thereafter enforce specific performance of the contract upon the terms so found.

Under the facts of the present case, the court has complete jurisdiction in equity to fix the amount of the rental to be paid by the lessees during the extension of five years from April 1, 1903, and to enforce specific performance of the agreement providing for such extension.

The assignments of error are overruled, and this appeal is dismissed, at the cost of the appellants. *The decree of the court below is affirmed*, and it is ordered that the record be remitted for further proceedings in accordance with this opinion.

John Henry RADEY

v.

James MCCURDY *et al.*, *Appts.*

(209 Pa. 306.)

The insertion in a renewal lease of a clause giving the tenant the right to remove trade fixtures is not necessary to enable him to remove, before the termination of the extended period, fixtures which he might have removed before the expiration of the original term.

(May 28, 1904.)

APPEAL by defendants from a judgment of the Court of Common Pleas, No. 1, for Philadelphia County in favor of plaintiff in a suit to enjoin the removal of fixtures from plaintiff's property. *Reversed.*

The facts are stated in the opinion.

Messrs. Daniel C. Donoghue and M. Hampton Todd, for appellants:

The right of a tenant to remove trade fixtures continues as long as the tenant is in possession as a tenant.

Hill v. Sewald, 53 Pa. 271, 91 Am. Dec. 209; *Hey v. Bruner*, 61 Pa. 87; *Davis v. Moss*, 38 Pa. 346; *Seitzinger v. Marsden*, 2

Pennyp. 463; *Watts v. Lehman*, 107 Pa. 106; *Charlotte Furnace Co. v. Stouffer*, 127 Pa. 336, 17 Atl. 994; *Wick v. Bredin*, 189 Pa. 83, 42 Atl. 17; *Penton v. Robart*, 2 East, 88; *Weeton v. Woodcock*, 7 Mees. & W. 14.

In the absence of an express agreement title to fixtures in Pennsylvania, as between landlord and tenant, depends upon the tenant's intention when the fixtures were placed upon the property; and there is no presumption that a tenant who annexes trade fixtures to the freehold intends to make a gift of them to the landlord for the benefit of the property.

Hill v. Sewald, 53 Pa. 271, 91 Am. Dec. 209; *Watts v. Lehman*, 107 Pa. 106; *Darrah v. Baird*, 101 Pa. 265; *Townsend v. Underhill*, 6 Pa. Co. Ct. 544; *Charlotte Furnace Co. v. Stouffer*, 127 Pa. 336, 17 Atl. 994; *Davis v. Moss*, 38 Pa. 346; *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362; *Penton v. Robart*, 2 East, 88.

The insertion of a clause permitting the removal of the fixtures was not necessary to preserve that right.

Seitzinger v. Marsden, 2 Pennyp. 463; *Seeger v. Pettit*, 77 Pa. 437, 18 Am. Rep. 452; *East Sugar-Loaf Coal Co. v. Wilbur*, 5 Pa. Dist. R. 202; *Darrah v. Baird*, 101 Pa. 265; *Shellar v. Shivers*, 171 Pa. 569, 33 Atl. 95.

If the second lease is not to begin until the first lease ends, the taking of the second lease is no surrender of the first lease.

2 Co. Litt. pp. 554, 555n; *Roe ex dem. Berkely v. York*, 6 East, 86.

Trade fixtures are personal property, even though physically annexed to the property.

Voorhis v. Freeman, 2 Watts & S. 116, 37 Am. Dec. 490; *Pyle v. Pennock*, 2 Watts & S. 390, 37 Am. Dec. 517; *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209.

Trade fixtures in Pennsylvania are personal property belonging to the tenant as long as the latter is in possession.

Lemar v. Miles, 4 Watts, 330; *White's Appeal*, 10 Pa. 252; *Seitzinger v. Marsden*, 2 Pennyp. 463; *Church v. Griffith*, 9 Pa. 117, 49 Am. Dec. 548; *Wick v. Bredin*, 189 Pa. 83, 42 Atl. 17.

The preponderance of authority in the late decisions outside of this state supports the appellant's contention.

Kerr v. Kingsbury, 39 Mich. 150, 33 Am. Rep. 362; *Bernheimer v. Adams*, 70 App. Div. 114, 75 N. Y. Supp. 93; *Smusch v. Kohn*, 22 Misc. 344, 49 N. Y. Supp. 176;

NOTE.—As to right of tenant to remove fixtures on leased premises, see also, in this series, *Collamore v. Gillis*, 5 L. R. A. 150, and *note*; *Friedlander v. Hewitt*, 9 L. R. A. 700, and *note*; *Sanitary District v. Cook*, 39 L. R. A. 369; *Bass v. Metropolitan West Side Elev. R. Co.* 39 67 L. R. A.

L. R. A. 711; and *Baker v. McClurg*, 59 L. R. A. 131.

As to what are fixtures as between landlord and tenant, see *note* to *Overman v. Sasser*, 10 L. R. A. 723; also *Wright v. DuBignon*, 57 L. R. A. 669.

McCarthy v. Trumacher, 108 Iowa, 284, 78 N. W. 1104; *Second Nat. Bank v. O. E. Merrill Co.* 69 Wis. 501, 34 N. W. 514; *Ross v. Campbell*, 9 Colo. App. 38, 47 Pac. 465; *Lewis v. Ocean Nav. & Pier Co.* 125 N. Y. 341, 26 N. E. 301.

Mr. William MacLean, Jr., for appellee:

A fixture is an article which was a chattel, but which, by being physically annexed or affixed to the realty by someone having an interest in the soil, becomes a part and parcel of it.

Darrah v. Baird, 101 Pa. 265; *Lemar v. Miles*, 4 Watts, 330; *Wick v. Bredin*, 189 Pa. 83, 42 Atl. 17.

A tenant must assert his privilege to remove fixtures attached by him during the term. If he does not they remain inseparable by the tenant from the freehold, and he can neither remove them nor recover them as personal chattels by an action of trover.

Overton v. Williston, 31 Pa. 155; *Davis v. Moss*, 38 Pa. 346; *Darrah v. Baird*, 101 Pa. 265; *Carver v. Gough*, 153 Pa. 225, 25 Atl. 1124.

Where a tenant sells his fixtures to an incoming tenant, he should obtain his landlord's consent.

Williams, Pa. Law of Land. & T. 153; *Chitty*, Contr. p. 504; *Thropp's Appeal*, 70 Pa. 395.

The tenant does not lose his right to his personal property left upon the premises.

Sattler v. Opperman, 14 Pa. Super. Ct. 32.

The reason why he loses title to the fixtures is the impossibility of the interest of the tenant in any part of the freehold outlasting the period of his contract.

Overton v. Williston, 31 Pa. 155.

When the term is ended the tenant is presumed to have abandoned, not the fixtures, but his right to remove them. This is an irrebuttable presumption of law, and it may be quite apart from the real intention.

Davis v. Moss, 38 Pa. 346; *Deeble v. M'Mullen*, 8 Ir. C. L. Rep. 355; *Barff v. Probyn*, 11 Times L. R. 467.

A tenant having the right to remove fixtures loses that right upon entering into a new agreement with his landlord for the future possession of the premises, unless the right is reserved at the time.

Taylor, Land. & T. ¶ 176; *Fitzherbert v. Shaw*, 1 H. Bl. 258; *Thresher v. East London Waterworks Co.* 2 Barn. & C. 608; *Heap v. Barton*, 12 C. B. 274; *Sharp v. Milligan*, 23 Beav. 419; *Merritt v. Judd*, 14 Cal. 59; *Jungerman v. Bovee*, 19 Cal. 354; *Abell v. Williams*, 3 Daly, 17; *Loughran v. Ross*, 45 N. Y. 792, 6 Am. Rep. 173; *Cook v. Scheid*, 6 Ohio Dec. Reprint, 493; *Carlin v. Ritter*, 68 Md. 478, 6 Am. St. Rep. 467, 13 Atl. 67 L. R. A.

370, 16 Atl. 301; *Scott v. Haverstraw Clay & Brick Co.* 135 N. Y. 141, 31 N. E. 1102; *Williams v. Lane*, 62 Mo. App. 66; *Talbot v. Cruger*, 151 N. Y. 117, 45 N. E. 364; *Sanitary District v. Cook*, 169 Ill. 185, 39 L. R. A. 369, 61 Am. St. Rep. 161, 48 N. E. 461; *Gauggel v. Ainley*, 83 Ill. App. 582; *Stephens v. Ely*, 162 N. Y. 79, 56 N. E. 499; *Van Vleck v. White*, 66 App. Div. 14, 72 N. Y. Supp. 1026; *Smyth v. Stoddard*, 105 Ill. App. 510; *Champ Spring Co. v. Roth Tool Co.* 103 Mo. App. 103, 77 S. W. 344; *Nieland v. Mahnen*, 89 App. Div. 463, 85 N. Y. Supp. 809. See also *Lee v. Risdon*, 7 Taunt. 188; *Van Ness v. Pacard*, 2 Pet. 137, 7 L. ed. 374; *Shepard v. Spaulding*, 4 Met. 416; *Devin v. Dougherty*, 27 How. Pr. 455; *Eten v. Luyster*, 60 N. Y. 252; *Ex parte Hemenway*, 2 Low. Dec. 496, Fed. Cas. No. 6346; *Hedderich v. Smith*, 103 Ind. 203, 53 Am. Rep. 509, 2 N. E. 315; *Marks v. Ryan*, 63 Cal. 107; *Macdonough v. Starbird*, 105 Cal. 15, 38 Pac. 510; *Wright v. Macdonnell*, 88 Tex. 140, 30 S. W. 907; *George Bauernschmidt Breuring Co. v. McColgan*, 89 Md. 135, 42 Atl. 907; *Baker v. McOlurg*, 198 Ill. 28, 59 L. R. A. 131, 92 Am. St. Rep. 261, 64 N. E. 701; *Young v. Consolidated Implement Co.* 23 Utah, 586, 65 Pac. 720; *O'Brien v. Mueller*, 96 Md. 134, 53 Atl. 663; *Spencer v. Commercial Co.* 30 Wash. 520, 71 Pac. 53.

The obligation upon a tenant to reserve his right to removal in a new agreement is authoritatively stated in all the approved text-books.

Gibbons, Fixtures, Phila. reprint of London ed. 1836, p. 42; Ewell, Fixtures, p. 114; Amos & F. Fixtures, 3d ed. 1893, p. 100; Taylor, Land. & T. ¶ 552; 6 Lawson, Rights, Rem. & Pr. ¶ 2899; Tiedeman, Real Prop. 2d ed. ¶ 7; Jones, Real Prop. ¶ 1768; Boone, Real Prop. ¶ 9f; Foa, Land. & T. 3d ed. p. 645; Woodfall, Land. & T. 17th ed. p. 712; Theobald, Law of Land, p. 26; Washb. Real Prop. 6th ed. ¶ 38; 1 Parsons, Contr. *511, note 2; Williams, Land. & T. p. 49; Jackson & G. Land. & T. p. 54; Guillou, Land. & T. p. 23.

Brown, J., delivered the opinion of the court:

This was a bill by a landlord to restrain his tenants from removing trade fixtures from the demised premises. A preliminary injunction was awarded, but subsequently dissolved. Before final hearing all the articles were removed by the tenants, and the court's decree was that they pay their landlord \$5,400, the value of the articles removed, together with the costs of suit.

On September 17, 1892, the appellee leased the premises described in the bill to John C. McCurdy and James McCurdy, trading as

McCurdy Brothers, for the term of ten years from October 1, 1892. The court found that the articles enumerated in the bill were trade fixtures, and belonged to the lessees under the lease of September 17, 1892. The legal conclusion of the learned judge that the tenants had the right to remove them during the term of their lease was, therefore, manifestly correct, and under the facts found the landlord could have raised no question if they had been removed at any time prior to October 1, 1902. Before the expiration of the lease, the tenants, as required by it, gave three months' notice to the landlord of their intention to terminate it. In 1899 John C. McCurdy, as found by the court below, "sold his interest in the stock of goods, wares, and merchandise, together with the machinery and fixtures, contained in the building at the northwest corner of Front street and Susquehanna avenue, to James McCurdy." On July 11, 1902, a new lease was executed by the appellee to the said James McCurdy and Samuel McCurdy, another brother, trading under the same firm name of McCurdy Brothers, and James and Samuel became the lessees under the agreement of that date, which defines the lease to be an "extended and renewed" lease of September 17, 1892, at a reduced rental. The appellants removed all the fixtures before October 1, 1903, the date of the expiration of the extended and renewed lease.

Under the foregoing facts the court below made the decree mentioned for the reason that, even if the lease of July 11, 1902, is to be treated as a renewal of the lease of 1892 between the same parties, the appellants had no right to remove the fixtures after the expiration of the first lease, in the absence of a clause in the second one reserving the right to do so at its expiration. Though the lessees under the first lease had an unquestioned right to remove the fixtures at any time before October 1, 1902, and, if they had done so, could immediately after that date have reinstalled them in the premises with the same unquestioned right to remove them at any time before October 1, 1903, the view of the learned court below is that they became the property of the landlord, because they were not removed and reinstalled; and there is no clause in the "extended and renewed" lease reserving the right of the tenants to remove them before it expired. Though this has been declared to be the law by some courts, and the learned judge had authority outside of this state to sustain him, we cannot subscribe to such a doctrine as being either in harmony with reason or consistent with fair dealing between man and man. When a tenant attaches to the land fixtures necessary for him in the con-

duct of his business, the presumption is that at the expiration of his lease he will remove them; and it is his right to do so. They are not put in for the benefit of the landlord; and until the tenant, after his term expires, leaves them on the premises in which he no longer has any interest, no intention can be imputed to him to abandon them to his lessor. *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209; *Watts v. Lehman*, 107 Pa. 106. There is a distinct finding that McCurdy Brothers, the lessees under the lease of 1892, never intended to abandon their trade fixtures. One of the brothers, owning and having them in his possession, on July 11, 1902, entered with another brother into the "extended and renewed" lease. The possession of the premises and the fixtures remained unbroken from 1892 to 1903 in at least one of the present appellants; and yet, because he did not, on the last day of September, 1902, remove them, and put them back on the following day, when the "extended and renewed" lease began, and the lessees under it failed to formally reserve the right to remove them at the expiration of the "extended and renewed" term, an intention is to be imputed of an abandonment of them to the landlord. Abandonment to him being a question of intention, it cannot be that under the undisputed facts in this case the appellants ever intended to or did abandon their trade fixtures. To have removed them one day and put them back the next would have been a vain and useless thing, which the law requires of no one; and it offends reason to say that the landlord had a right to regard his tenants' property as abandoned to him because one of them, who was to continue as such for another year, needing the same fixtures in his unchanged business into which he had taken another person, had not, when the lease was extended and renewed, inserted a clause giving the tenants the right to remove the fixtures at the end of the extended term.

It will profit nothing to review the very many cases brought to our attention by the learned counsel for the appellee to support the decree of the court below. It is sufficient to say that none of our own do so. They are rather in accord with the view which we entertain that the plaintiff's bill should have been dismissed. "That a tenant who erects fixtures for the benefit of his trade or business may remove them from the demised premises is an established doctrine of the law, but with this qualification,—that the removal be made during the term. After the term they become inseparable from the freehold, and can neither be removed by the tenant nor recovered by him as personal chattels by an action of trover, or for goods

sold and delivered. *White v. Arndt*, 1 Whart. 91, and the cases cited in the argument. If a tenant remain in possession after the expiration of his term, and perform all the conditions of the lease, it amounts to a renewal of the lease from year to year, and I take it he would be entitled to remove fixtures during the year." *Davis v. Moss*, 38 Pa. 346. "It is a well-settled rule of law, that a tenant for years who erects fixtures for the benefit of his trade or business, may, at any time during the term, remove them from the demised premises; but cannot after the expiration thereof, unless he remain in possession and hold over, so as to create an implied renewal of the lease." *Darrah v. Baird*, 101 Pa. 265. In the late case of *Donnelly v. Frick & L. Co.* 207 Pa. 597, 57 Atl. 60, we said: "The presumption of the law, being in favor of trade, is that a tenant does not intend to make his trade fixtures part of the realty for the permanent benefit of his landlord, but will remove them before the end of his term; and it is only when he leaves without removing them during the term that an intention of making a gift of them to the landlord is to be imputed to him. *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209; *Watts v. Lehman*, 107 Pa. 106. If, during the term, no intention can be imputed to the tenant to make a gift to his landlord of fixtures, which he had attached to the land for the use of his business, and he has a right to remove them during the tenancy, the same rule ought to and does apply when by permission of the landlord, even without a formal renewal or extension of the lease, he continues to remain on the premises for a definite or indefinite term. During such period in the absence of any agreement to the contrary, his intention as to his fixtures remains unchanged, and his right to remove them is unaffected by his holding over." Of great weight is the following from the learned Judge Cooley in *Kerr v. Kingsbury*, 39 Mich. 150, 33 Am. Rep. 362: "The right of a tenant to remove the erections made by him in furtherance of the purpose for

which the premises were leased is conceded. The principle which permits it is one of public policy, and has its foundation in the interest which society has that every person shall be encouraged to make the most beneficial use of his property the circumstances will admit of. On the other hand, the requirement that the tenant shall remove during his term whatever he proposes to claim a right to remove at all is based upon a corresponding rule of public policy for the protection of the landlord, and which is that the tenant shall not be suffered, after he has surrendered the premises, to enter upon the possession of the landlord or of a succeeding tenant to remove fixtures which he might and ought to have taken away before. A regard for the succeeding interests is the only substantial reason for the rule which requires the tenant to remove his fixtures during the term. Indeed, the law does not in strictness require of him that he shall remove them during the term, but only before he surrenders possession, and during the time that he has a right to regard himself as occupying in the character of tenant. *Penton v. Robart*, 2 East, 88; *Weston v. Woodcock*, 7 Mees. & W. 14. But why the right should be lost when the tenant, instead of surrendering possession, takes a renewal of his lease is not very apparent. There is certainly no reason of public policy to sustain such a doctrine. On the contrary, the reasons which saved to the tenant his right to the fixtures in the first place are equally influential to save to him on a renewal what was unquestionably his before. What could possibly be more absurd than a rule of law which should, in effect, say to the tenant who is about to obtain a renewal: 'If you will be at the expense and trouble and incur the loss of removing your erections during the term, and of afterwards bringing them back again, they shall be yours; otherwise, you will be deemed to abandon them to your landlord.'"

The decree of the court below is reversed, and plaintiff's bill dismissed, at his costs, which include those on this appeal.

MISSOURI SUPREME COURT.

Frederick W. CLEMENS, *Respt.*,

v.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY *et al.*, *Appts.*

(.....Mo.....)

Injunction will not lie, under a consti-

tutional provision requiring compensation in case property is damaged for public use, to stay the improvement of a public street, according to a grade lawfully adopted by the municipal corporation, until the damages are paid to the complaining property owner, whether the property abuts upon the street or not, where none of

NOTE.—For other cases in this series as to injunction against change of grade of street without making compensation for damages to 67 L. R. A.

abutting owners, see *Vanderlip v. Grand Rapids*, 3 L. R. A. 247; *Selden v. Jacksonville*, 14 L. R. A. 370; and *Brown v. Seattle*, 18 L. R. A. 161.

It is taken, but it is merely subjected to consequential injuries; his sole remedy being at law to recover the damages, after the improvement is completed and they can be ascertained.

(July 16, 1904.)

APPEAL by defendants from a judgment of the Circuit Court for the City of St. Louis in favor of plaintiff in a suit to enjoin the changing of the grade of a certain street. *Reversed.*

The facts are stated in the opinion.

Messrs McKelghan & Watts and **Shepard Barclay**, for appellants:

Injunction would not be available, even if the suit had been properly brought.

Plaintiff is not an abutting owner upon Arkansas avenue, the street where the change of grade is charged to have occurred.

Cummings v. Huse & L. Ice & Transp. Co. 156 Mo. 28, 56 S. W. 282; *Glasgow v. St. Louis*, 107 Mo. 198, 17 S. W. 743; *Knapp, S. & Co. Co. v. St. Louis*, 156 Mo. 343, 56 S. W. 1102.

The evidence does not prove that, by any alleged change of grade anywhere, any damage will be caused to plaintiff's property by diminishing its value in any particular. Such proof is essential to a recovery of damages for change of grade, and, for stronger reason, it is essential to any injunction such as was decreed in this case.

Schuster v. Myers, 148 Mo. 422, 50 S. W. 103; *Cole v. St. Louis*, 132 Mo. 633, 34 S. W. 469; *Van De Vere v. Kansas City*, 107 Mo. 83, 28 Am. St. Rep. 396, 17 S. W. 695; *Christian v. St. Louis*, 127 Mo. 109, 29 S. W. 996; *Cummings v. Huse & L. Ice & Transp. Co.* 156 Mo. 28, 56 S. W. 282.

As the petition now stands, plaintiff has a plain, adequate, and complete remedy at law, and hence it states no cause of action for an injunction.

Christian v. St. Louis, 127 Mo. 109, 29 S. W. 996; *St. Louis & S. F. R. Co. v. Louder*, 138 Mo. 533, 60 Am. St. Rep. 565, 39 S. W. 799; *Bornachein v. Finck*, 13 Mo. App. 120; *St. Louis, I. M. & S. R. Co. v. Reynolds*, 89 Mo. 146, 1 S. W. 208; *Missouri, K. & E. R. Co. v. Hoereth*, 144 Mo. 136, 45 S. W. 1085.

It appears, on the face of his pleading, that plaintiff is not an abutting owner; and hence injunction is not available to him.

Knapp, S. & Co. Co. v. St. Louis, 153 Mo. 560, 55 S. W. 104; *Christian v. St. Louis*, 127 Mo. 109, 29 S. W. 996; *Bailey v. Culver*, 84 Mo. 531.

The slight elevation of the street at the outlet of said alley would not impair any

right of ingress to, or egress from, the plaintiff's property.

Cole v. St. Louis, 132 Mo. 633, 34 S. W. 469; *Bailey v. Culver*, 12 Mo. App. 175, Affirmed in 84 Mo. 531; *Rude v. St. Louis*, 93 Mo. 408, 6 S. W. 257; *Christian v. St. Louis*, 127 Mo. 115, 29 S. W. 996; *Schuster v. Myers*, 148 Mo. 429, 50 S. W. 103; *Knapp, S. & Co. Co. v. St. Louis*, 153 Mo. 573, 55 S. W. 104; *Gates v. Kansas City Bridge & Terminal R. Co.* 111 Mo. 28, 19 S. W. 957; *Fairchild v. St. Louis*, 97 Mo. 85, 11 S. W. 60.

Messrs. Rassieur & Buder, for respondent:

The fact that plaintiff is not an "abutting owner" is not a bar to an injunction against the defendants. It is only necessary to show that the property itself, or some right or easement connected therewith, is directly affected, and that it is specially damaged.

Van De Vere v. Kansas City, 107 Mo. 83, 28 Am. St. Rep. 396, 17 S. W. 695; *Rude v. St. Louis*, 93 Mo. 408, 6 S. W. 257; *Glaessner v. Anheuser-Busch Brewing Asso.* 100 Mo. 508, 13 S. W. 707; 3 Sedgw. Damages, 8th ed. p. 303, § 1093.

When a person suffers some special damage over and above the community in general, he may have his action therefor, even though others may have like actions.

Schoen v. Kansas City, 65 Mo. App. 134.

The proper remedy is an injunction, until the damage to plaintiff's proprietary rights is ascertained and paid.

Schopp v. St. Louis, 117 Mo. 131, 20 L. R. A. 783, 22 S. W. 898; *Glaessner v. Anheuser-Busch Brewing Asso.* 100 Mo. 508, 13 S. W. 707; *Gates v. Kansas City Bridge & Terminal R. Co.* 111 Mo. 28, 19 S. W. 957; *Carpenter v. Grisham*, 59 Mo. 247; *McPike v. West*, 71 Mo. 199; *Van De Vere v. Kansas City*, 107 Mo. 83, 28 Am. St. Rep. 396, 17 S. W. 695.

Gantt, P. J., delivered the opinion of the court:

This is an appeal from a decree of the circuit court of the city of St. Louis perpetually enjoining the defendants from changing the grade of Arkansas avenue, in said city, between the north line of Cherokee street and the south line of McKean avenue, and from changing the grade of the alley running from Gravois road or avenue to Arkansas avenue, through city block 1492 of the city of St. Louis. The suit was commenced June 20, 1899, and a preliminary injunction was granted June 26, 1899.

The petition states that the plaintiff is the owner of lots 8, 9, and 10 in block 1492, having an aggregate front of 116 feet and 1

inch on the north line of Cherokee street, by a depth northwardly of 127 feet 8¾ inches, in a line parallel with the east line of Arkansas avenue, to an alley 15 feet wide, and that the Connecticut Mutual Life Insurance Company is the owner of lot No. 7 in said block, a strip of ground 70 feet wide on the north line of Cherokee street, and running northwardly of that width 127 feet 8¾ inches to the said alley, and the said defendant also is the owner of the remainder of said block 1492, which said block bounds on the east line of Arkansas avenue between Cherokee street and McKean avenue, and also owns block 1494, which bounds on the west line of Arkansas avenue, between said two streets; that the city of St. Louis established a grade for the said Cherokee street and Arkansas avenue at their intersection, and at the places where they adjoin the said city blocks, and, with the knowledge of said grade, the plaintiff purchased and improved his said property, adjusting his buildings to said grade; that the defendant and its agent, without legal authority and against the protest of plaintiff, are now engaged in making and constructing the said Arkansas avenue between said Cherokee street and McKean avenue, and, in so doing, are changing the grade of said Arkansas avenue from Cherokee street to McKean avenue, and of the said Cherokee street at the point of its intersection with Arkansas avenue, by raising the same 2.6 feet, "and by raising the same at said alley at the point of its intersection with said Arkansas avenue 4 ²⁸/₁₀₀ feet, thereby interfering with the free ingress and egress to and from plaintiff's said property over and along said alley from and into said Arkansas avenue; that, by so making said grade as they are about to do, the property of plaintiff will be placed in a depression below the grade of neighboring streets, and subject to overflows to the irreparable damage of plaintiff."

The answer is as follows:

"(1) The defendants, by their counsel, for answer to the plaintiff's petition herein, admit the defendants are corporations as alleged. Whether or not plaintiff is the owner of the tracts of land, or any of them, mentioned in said petition, said defendants have no knowledge or information sufficient to form a belief, and therefore require proof. Whether plaintiff purchased, improved, or maintained his said property with knowledge of the grade of the adjacent streets, these defendants have no knowledge or information sufficient to form a belief, and therefore require strict proof. Defendants admit that the city of St. Louis by ordinance es-

tablished a grade for the said Cherokee street and Arkansas avenue. Defendants deny that they are changing the grade of Arkansas avenue from Cherokee street to McKean avenue, or of Cherokee street at its intersection with said Arkansas avenue. Defendants deny that they are raising the grade at either of said streets, or portions of said streets, 2.6 feet. Defendants deny that they are changing the grade of any of said streets, or portions of said streets. Defendants further deny that they are now engaged in making or constructing any portion of said streets without legal authority.

"(2) Defendants, for further answer, admit that they have been making certain improvements in and upon the streets aforesaid, but defendants aver that the same are strictly in accordance with the grade as fixed by the city of St. Louis at the places where said improvements are being made by defendants. Defendants further deny generally all the allegations of the petition not otherwise referred to in this answer. Having fully answered, defendants ask to be hence discharged with their costs."

No reply was filed.

At the April term, 1900, a final decree of injunction perpetually enjoining defendants was entered.

The facts developed on the trial are the following: Plaintiff is the owner of lots 8, 9, and 10 in block 1492, and defendant owns lot No. 7 and the remainder of said block. City block 1492 is bounded on the south by Cherokee street, on the east by Gravois road or avenue, on the north by McKean avenue, and on the west by Arkansas avenue. At the time plaintiff purchased his said lots there was in force an ordinance (No. 12,525, approved November 7, 1883) establishing the grade of Arkansas avenue at the intersection thereof with Cherokee street and with McKean avenue. On November 26, 1897, another ordinance (No. 19,206) was enacted, establishing the grades of streets and avenues in the district bounded south of Cherokee street and by Utah street, running west of Grand avenue, north by Arsenal street, east by Louisiana avenue and Gravois avenue, and west by Spring avenue, and repealing parts of ordinances 12,525, 15,432, 16,178, 17,274, and 17,732. The defendant, through its agents, the Pitzman Surveying Company, was proceeding to curb and gutter its property, and construct the superstructure of Arkansas avenue adjacent to its property in said street, under a permit from the city authorities, when this injunction was granted, perpetually enjoining it from doing said work in conformity to ordinance 19,206. The city

of St. Louis was not made, and is not, a party to said suit. The liability of the city for damages resulting to adjoining property owners who have built their improvements in conformity to the first grade established by the city by a change of such grade is only incidentally and collaterally involved in this case, and the city has not been made a party defendant, and no damages are asked against the city. It appeared that plaintiff purchased his lots 8, 9, and 10 in block 1492 in 1890 and 1893, and had constructed thereon a brick stable and feed store and sheds and carriage houses and a residence, and laid granitoid pavements abutting on Cherokee street in front of lots 8, 9, and 10, fronting on said street. Plaintiff's said property nowhere touches Arkansas avenue. By the changes of grade from that established by ordinance 12,525 in 1883 to that fixed by ordinance 19,206 in 1897, Arkansas avenue, at the intersection of Cherokee street, will be raised 2.6 feet, and at the mouth of the alley between Arkansas avenue and Gravois avenue, in block 1492, on Arkansas avenue, the grade will be raised 4.2 feet, and, at the point on Arkansas avenue where the same intersects with McKean avenue, the grade will be raised 5.8 feet; and plaintiff's evidence tended to prove that when said grade was thus changed the southwestern corner of plaintiff's lot 8 would be 1 foot and 4 inches below said new grade. It will thus be seen that plaintiff's property does not abut on Arkansas avenue, the street affected directly by the change of grade, but plaintiff's right to recover in this suit is based on the claim that, notwithstanding his property does not abut on Arkansas avenue, his property and certain rights and easements connected therewith will be affected to his injury by the said contemplated changes of grade by ordinance 19,206 of November 26, 1897, and his ingress and egress to and from his said property over and along the alley in block 1492 to Arkansas avenue would be interfered with. It was admitted the city had taken no steps to have such supposed damages to plaintiff's property assessed. According to the evidence of Mr. Varrelman, the street commissioner of the city, and witnesses for plaintiff, the grade of the alley itself had never been established, and no profile of it had ever been made. The plaintiff's evidence showed that the mouth of the alley necessarily conformed to the street into which it opened, but no work had ever been done in the alley itself, and no stakes driven in it, and, save as to the point of intersection of the alley with Arkansas avenue, there was not even a paper grade defined by the city authorities. While 67 L. R. A.

there is a large volume of evidence, there is practically little conflict.

By § 26 of article 3 of the scheme and charter of St. Louis (paragraph 2), the municipal assembly of the city of St. Louis has the power to grade and change the grade of streets, avenues and alleys in said city, when deemed best for the public good, subject to the liability of the city for damages resulting to abutting property owners from the exercise of such power. Prior to the amendment of the Constitution in 1875, the city, in the legitimate exercise of its corporate powers, could change the grade of a street or alley by ordinance without being liable for any consequential damages to an abutting owner. *St. Louis v. Gurno*, 12 Mo. 414; *Taylor v. St. Louis*, 14 Mo. 20, 55 Am. Dec. 89; *Hoffman v. St. Louis*, 15 Mo. 651; *Soulard v. St. Louis*, 36 Mo. 546. With the exception of *Thurston v. St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463, the decision in *St. Louis v. Gurno* was uniformly followed by this court until the adoption of our Constitution of 1875. By § 21 of article 2 of that Constitution, it is provided that "private property shall not be taken or damaged for public use without just compensation." After these words "or damaged" were added to this section, it was ruled in *Householder v. Kansas City*, 83 Mo. 488, that a city cannot change the grade of a street, to the damage of a lot abutting upon it, without compensation to the owner. *Sheehy v. Kansas City Cable R. Co.* 94 Mo. 574, 4 Am. St. Rep. 396, 7 S. W. 579. In *Van De Vere v. Kansas City*, 107 Mo. 83, 28 Am. St. Rep. 396, 17 S. W. 695, a fire-engine house was commenced by the city upon the lot adjoining the plaintiff's lot, and he sought an injunction to prevent it. Judge Black, after advertising to the settled rule prior to the change in the Constitution above mentioned, reviewed the authorities on this subject; and the whole court concurred in holding that the amendment did not cover the case, and dismissed the bill. Among other cases, he cited the decision in *Rude v. St. Louis*, 93 Mo. 408, 6 S. W. 257, in which case the plaintiff owned the property on High street 500 feet distant from a point where railroad tracks crossed that street. The tracks were depressed by authority of authorized ordinances from 4 to 6 feet, to conform to a system of bridges then in process of erection. The street was allowed to remain in this condition, impassable for teams, for three years. Suit was for damages because of the obstruction of the street, and it was held he could not recover. The like result was reached in *Fairchild v. St. Louis*, 97 Mo. 85, 11 S. W. 60, and *Canman v. St.*

Louis, 97 Mo. 92, 11 S. W. 60. These cases were like *Rude's Case*, except that in one plaintiff's property was 350 feet, and in the other 125 feet, from the same obstruction. In those cases it was held that, to bring a case within the amendment, the plaintiff, if suing for consequential damages, must show that he suffered an injury special and peculiar to his property, and that it was not enough to show a damage the same in kind as that suffered by other persons, though different in degree, but he must show that the property itself, or some right or easement connected therewith, is directly affected, and that it is specially affected. Judge Adams, who, by common understanding, was the author of the amendment, "or damaged," to § 21 of article 2 of the Constitution, and who wrote the opinion in *Thurston v. St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463, in the last-mentioned case said: "I maintain that the legislature may grant power to cities to improve the streets or to appropriate them to the injury of the lot holder. But, when such power is exercised to the injury of the lot holder, he must have an adequate remedy. The city may exercise the power, but must answer for the consequences to the lot holder. The true ground of his right to recover is his appurtenant easement or property interest in the street itself." In *Knapp, S. & Co. Co. v. St. Louis*, 153 Mo. 572, 55 S. W. 104, it was held that, to entitle a property owner to relief against the attempt of the city of St. Louis to vacate a street, he must allege and prove that he owns property abutting on that part of the street which the ordinance vacates, and that he will suffer a special injury, and not merely such inconvenience as is cast upon all other persons in that neighborhood, and, unless the petition for injunctive relief avers that the plaintiff's lot abuts on the street to be vacated, it is fatally defective. In various cases it has been ruled that an abutting owner has a clear legal right to damages for vacating a street on which his property abuts. *Heinrich v. St. Louis*, 125 Mo. 424, 46 Am. St. Rep. 490, 28 S. W. 626; *Christian v. St. Louis*, 127 Mo. 109, 29 S. W. 906. But the very fact that he had ample remedy at law was held to deprive him of the remedy by injunction. *Knapp, S. & Co. Co. v. St. Louis*, 153 Mo. 574, 55 S. W. 104. The foregoing cases sufficiently indicate the state of the decided law on this subject in this commonwealth.

Applying these principles of law and equity to the facts developed, ought the decree of the circuit court to be affirmed? Arkansas avenue, the grade of which was raised by the ordinance of 1897, is distant

70 feet from the plaintiff's premises. In other words, plaintiff is not an abutting owner on said Arkansas avenue. The defendant the Connecticut Mutual Life Insurance Company did own property abutting on Arkansas avenue, in blocks 1492 and 1494, and was proceeding to improve its said property by constructing guttering and curbing, and the superstructure of the street in front of said property, presumably for the purpose of putting it on the market, as it was wholly unimproved. It was having these street improvements made in strict conformity to the grade established by ordinance in 1897 for Arkansas avenue. There can be no doubt the city had authority to establish the grade in the first instance, and to change it in 1897, if, in the opinion of the municipal assembly, it was deemed best for the public interest. No change of the grade on Cherokee street adjoining plaintiff's property had been made when this injunction was sued out, and it is only by assuming that the city hereafter will adopt a level or straight grade from the points established on Arkansas avenue and Gravois avenue that there will be any change of grade in front of plaintiff's property on Cherokee street. There was much evidence from plaintiff's own witnesses that the city often accommodates the grade to the buildings built in conformity to the old grade when a new one is adopted. No actual grade lines have been drawn between Arkansas avenue and Gravois avenue or along the projected alley in block 1492. The ordinance of 1897 does not define those lines. It merely fixes the points of elevation at the intersections of Arkansas avenue and the mouth of the alley. The act of June 2, 1899, p. 61, which went into effect in August, 1899, has no application to this case, which was commenced before that act took effect, and is bottomed on facts existing prior to the enactment of that law.

This case presents an important question: Does § 21, art. 2, of the Constitution, in the absence of any legislation, permit any public improvement on a street which does not take the property of a citizen, or invade or trespass upon it, to be stopped until every damage to owners near and remote on the street is paid? We have seen that prior to the Constitution of 1875 a change of grade under a valid charter power did not give any cause of action, but by the amendment of § 21, art. 2, of the Constitution, damages resulting to an abutting owner by the change of the grade of a street are actionable. Unquestionably, when there is a taking of the property, the owner has a right to his compensation before his possession is

disturbed; but where, instead of taking, his property is merely damaged by the lawful public improvement, can he stop the work until his damage is ascertained and paid? We find no case in which this view of this constitutional question has been presented to and decided by this court. It is true, there are some general observations, but the facts did not call for any opinion. This exact point has been covered by the supreme court of Louisiana. The Constitution of that state of 1879 has the same provision which is found in § 21, art. 2, of our Constitution of 1875. It is known as article 156 of the Constitution of Louisiana. In *McMahon v. St. Louis, A. & T. R. Co.* 41 La. Ann. 827, 6 So. 640, an injunction was sought in aid of a suit for damages to abutting property by the construction of a railroad on a street in pursuance of authority from the city of Shreveport. The defendant was permitted to give bond and proceed with the work. The court, through Judge Fenner, said: "It is true, the Constitution, article 156, provides that 'private property shall not be taken nor damaged for public purposes without adequate compensation being first paid.' We will not say what might be the effect of this article on the right to bond if the act prohibited involved the taking of property, the value of which might be settled in advance. But in this case there is no taking of plaintiffs' property which is not invaded or touched. The damages claimed are purely consequential in their nature, necessarily conjectural, and impossible of any accurate determination, except after the construction of the road. To impose upon the parties the necessity of settling and paying such damages before proceeding with the work would be to require a manifest impossibility, and, if such an injunction could not be bonded, it would operate a perpetual bar to the construction of public works, which was certainly not contemplated by the Constitution. . . . The defendant has done nothing but what it had a legal right to do, and it has exercised that right in a proper, prudent, and cautious manner, inflicting upon plaintiffs no injury or damage except such as necessarily results from the exercise of the right. . . . But in this case the legal right passed to the defendant encumbered with the restriction imposed by article 156 of the Constitution, above quoted, and it must discharge that burden. . . . The article 156 of the present Constitution, in providing that 'private property shall not be taken nor damaged for public purposes without adequate compensation,' etc., only extended its protecting shield over one additional injury, 67 L. R. A.

and required compensation, not only for property taken, but also for property damaged. As in the case of a taking, the measure of compensation is the [diminution in the] value of the property." In *Denver, & S. F. R. Co. v. Domke*, 11 Colo. 247, 17 Pac. 777, injunction was sought by an abutting owner to restrain further operation of the railroad on the street. The supreme court, for the purposes of the case, assumed that the laying of a third rail and doing the business of a standard-gauge railroad on the street was a new and additional servitude, and that those acts might result in damage to the abutting owner, for which, under the Constitution, he was entitled to compensation, and then asks the question: "Should a court of equity, at his suit, in view of the facts of this case, grant an injunction forbidding the acts in question?" The court answers in the negative, and says: "Where the fee of an individual is not sought to be taken through an abutting lot owner, he cannot enjoin the construction and operation of a railroad merely because the damages to his premises are not compensated in advance, provided the company act under sufficient legislative and municipal authority. 1 High, Inj. 2d ed. § 637. It is contended that this doctrine ought not to be held applicable here, because of the peculiar phraseology of our Constitution. True, this instrument declares that private property shall not be 'damaged' without compensation. It does not, however, require that the damages where property is not 'taken' shall be computed and paid before the injuries complained of are inflicted. It provides that 'property shall not be needlessly disturbed or the proprietary rights of the owner therein divested' till remuneration be made. The proprietary rights of plaintiffs in the land are not divested because such rights do not exist. There may be a disturbance of the easements connected with the use or enjoyment of their abutting lots, but needful disturbances of property may take place without prior compensation. . . . The city council, by adopting the right-of-way ordinance, determined conclusively, so far as the general public is concerned, including all interests of the plaintiffs common to the general public, that the anticipated disturbances were needful. But the disturbances mentioned in the Constitution are, in our judgment, disturbances of property sought to be taken, or, at least, property of the same owner out of which that desired is to be carved. We do not think the clause in question was intended to require the prior assessment and payment of probable damages for disturbances to take place in the

future of an easement connected with the property of a party, no part of which is taken near or adjacent to the land condemned." The court then refers to the decisions of the supreme court of Illinois construing a provision of the Constitution of Illinois similar to that of Colorado, in which injunctive relief was denied. *Steitson v. Chicago & E. R. Co.* 75 Ill. 74; *Patterson v. Chicago, D. & V. R. Co.* 75 Ill. 588; *Peoria & R. I. R. Co. v. Schertz*, 84 Ill. 135. In the *Schertz Case* the court says: "In this case, as in that, it was contended that under that clause of § 13, art. 2, of the Constitution which provides, 'Private property shall not be taken or damaged for public use without just compensation,'—all abutting landowners are entitled to have such consequential damages as they may sustain assessed and paid, before a railroad company can acquire any right to put down and operate a track in a public street, and that putting it down without such assessment and payment is a violation of law. But in our former decision it was distinctly ruled, such company was not bound to make compensation for consequential or expected damages that might result to others previous to entering upon its own land, or lands of others not complaining, to do work it has a lawful right to do under powers conferred by its charter." These principles were fully sustained and reiterated in the later case of *Parker v. Catholic Bishop*, 146 Ill. 158, 34 N. E. 473. In a most elaborate and thoroughly considered decision, the supreme court of West Virginia gave the same construction to this constitutional provision. 67 L. R. A.

Spencer v. Pt. Pleasant & O. River R. Co. 23 W. Va. 406. See also *Lorie v. North Chicago City R. Co.* 32 Fed. 270. In nearly all of these cases it is held that the remedy is by action at law.

In our opinion, the Colorado, Illinois, West Virginia, and Louisiana courts correctly construe this § 21 of article 2 of our Constitution, which is found in the Constitutions of those states in practically the same words as in ours, and in holding that where the property of the citizen is not taken, and his proprietary rights not disturbed, but the damage to his property is purely consequential, he is not entitled to have the same ascertained and paid before the proposed public work is done, and is not entitled to have the work done in pursuance of valid legislative and municipal authority enjoined until his damages are ascertained and paid; but that his remedy is one at law for damages. Having reached this conclusion, we hold that, whether plaintiff was an abutting owner or not, he was not entitled to have the improvements which were being made pursuant to an ordinance of the city, and clearly within its charter powers, enjoined; that plaintiff has not brought himself within any recognized head of equity jurisdiction, and, if he has any cause of action, it is against the city for damages. It becomes unnecessary for us to determine other propositions urged by counsel.

The judgment of the Circuit Court is reversed with directions to dissolve the injunction and dismiss the bill.

All concur.

ILLINOIS SUPREME COURT.

Louis W. MERRIFIELD *et al.*, Appts.,
v.
CANAL COMMISSIONERS OF THE ILLI-
NOIS & MICHIGAN CANAL *et al.*

(212 Ill. 456.)

1. Canal commissioners who have contracted for the right to take water from a river to supply the canal in consideration of permitting the riparian owner to take a certain quantity of water from the feeder, and who have subsequently leased to another person all the surplus after the rights of the riparian owner are satisfied, may take steps to enforce a judgment in an action between its lessee and the riparian owner or his representatives for the determi-

nation of the respective rights of the parties under a contract, by placing weirs so as to limit the amount which can be taken from the feeder by the riparian owner to the amount awarded him by the judgment.

2. Canal commissioners who have contracted to permit a riparian owner to take water from its feeder in consideration of the right to take the water of the river to supply their canal, will not be permitted to place weirs intended to restrict him to the quantity to which he is entitled, in such a manner as to deprive him of a portion of the water to which he is entitled under his contract.
3. Maintenance for nearly fifty years, with the knowledge and acquiescence of the canal commissioners, of flumes to take water from a canal feeder,

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I. *Form; estate created.*

A water power which may be the subject of a grant may consist of the physical thing which constitutes the natural formation of the power, or it may be merely a portion of an artificially accumulated body of water. In the former case the water power is real estate and all the formalities must be observed which are necessary to convey that species of property. In the latter form the power may be treated as personalty and rights in it conferred by parol.

The form which the grant of a water power must take will depend largely upon the estate which is intended to be created by it. The general question of how far water rights are included in a transfer of a mill is treated in a note to *Cox v. Howell* (Tenn.) 58 L. R. A. 457. 67 L. R. A.

No easement or permanent right can be acquired in a dam or water course by parol agreement. *Weare v. Chase*, 98 Me. 264, 44 Atl. 900.

But valid contracts as to the use of power already created can be made by parol.

Thus, the right to use power created by an accumulation of water above a dam in a navigable stream may be granted by parol, since, riparian ownership not extending to the soil under such stream, the water is not a part of the real estate of the owner, but is in the nature of personal property. *Johnston v. Bowersock*, 62 Kan. 148, 61 Pac. 740.

So, an agreement regarding the rebuilding of a dam, whereby a deed conferring water privileges is altered, is not within the statute of frauds. *Jackson v. Litch*, 62 Pa. 451.

And even though an agreement by a grantee to put a spout in a ditch on his land for the purpose of permitting the grantor to draw water therefrom, arising by implication from his acceptance of a deed reserving such right, be considered as within the statute of frauds, the delivery of the deed by the grantor constitutes a part performance taking the agreement out of the statute. *Randall v. Latham*, 36 Conn. 48.

A parol grant of the right to flow land given in connection with a conveyance of a mill site has been sustained after the structure was completed, in *Newcomb v. Royce*, 42 Neb. 323, 60 N. W. 552, and *Johnson v. Sherman County Irrig. W. P. & I. Co.* (Neb.) 98 N. W. 1099, on the theory of executed license. The fact that the license was given in connection with a sale of land may have furnished a consideration for it so that it could be enforced in equity. But the principle of those cases cannot be relied upon to perpetuate parol conveyances of water power generally. See note to *Pifer v. Brown*, 49 L. R. A. 497.

A mere relinquishment to the trustees of a municipality by the owners of mill property, of the right to use a portion of the slack water above their dam, is not a right or interest of such a nature as could be conferred only by a duly executed and acknowledged instrument or deed of conveyance; but a written contract therefor for a valuable consideration is sufficient. *Fremont v. June*, 8 Ohio C. C. 124.

The right to the perpetual use of water need not be dependent upon the ownership of a particular estate with which it is connected, but

under a contract by which the commissioners granted the right to take it, the bottoms of which are level with the bottom of the feeder, so that whenever the grantee was entitled to take water he would receive it under a head, is a practical construction of the rights of the parties which will prevent the commissioners from subsequently placing weirs in the flumes so that no water can be received until it has reached a certain height in the feeder.

4. Under a contract giving the right to withdraw a certain quantity of water from a canal feeder, with the proviso that the water shall not be drawn so that "during the season of navigation" the water in the canal shall be reduced to less than a specified depth, the canal commissioners have no right to place weirs in the flumes by which the water is taken from the feeder, so as to maintain the water in the feeder, at

all times, of a depth requisite to maintain the specified depth in the canal, even after the close of navigation, and at times when water from the feeder is not necessary to maintain the specified depth in the canal.

(October 24, 1904.)

A PPEAL by defendants from a decree of the Circuit Court for La Salle County enjoining them from interfering with weirs placed by complainants in flumes leading water to their mills. *Reversed.*

The facts are stated in the opinion.

Mr. Clyde A. Morrison, with *Messrs. Eddy, Haley, & Wetton* and *Jarvis R. Burrows*, for appellants.

Mr. Lester H. Strawn, for appellees:

The estoppel of a judgment covers the

it may be held separate and distinct from ownership in other lands. *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 43 S. C. 154, 20 S. E. 1002.

A deed of a certain piece of land, actually described as "a right of drawing water from a dam" for the purpose of furnishing power to a tannery, containing neither courses and distances nor metes and bounds, is a grant of an easement only. *Trudeau v. Field*, 69 Vt. 446, 38 Atl. 162.

A written contract by which one party was granted the right to use and improve a milldam and race upon condition that he build and put into operation a gristmill, and that if he, or they who might hold under him, should fail to put such mill into operation, or should fail to maintain the same, then the privileges granted should revert to the grantors, which contract was executed concurrently with the execution of a deed by one of the grantors to a mill and mill site to the same person, including a dam near where the new dam was to be built, to which the written contract refers, and which was expressly given for the purpose of enabling the grantor in that conveyance to accomplish the objects for which the conveyance was made, and of enabling the grantee to enjoy fully the rights thus conveyed,—conveyed a fee simple title to the water-privileges, which passes to the grantee's heirs. *Wickersham v. Bills*, 8 Ind. 387.

The objection to parol arrangements with regard to the use of water is that they are not binding on assignees of the respective parties.

Where there is an oral understanding between the owner of a dam and another who owns a dam which was constructed first farther down the stream, that if the upper dam, above which the water is diverted from the stream, affects the lower dam owner to his injury, the water will be restored, such parol understanding does not pass any rights to a subsequent owner of the lower dam who has no notice of the parol agreement, and who buys with knowledge of the existence of the upper dam and the diversion of the water. *Cape v. Thompson*, 21 Tex. Civ. App. 681, 53 S. W. 368.

A reservation, in a deed to land on which was a mill and milldam, of "the right to keep up and maintain the milldam at its present height so as not to back the water on the wheels of the mill" of a designated party above, which reservation extended through all the sub-

sequent conveyances to the present owner, being one that the grantor, as the former owner of both mills, had a right to make, and that was for the benefit of the upper mill owner, to whom he had formerly conveyed,—inures, and extends to the benefit of such owner's grantees, and gives them a right of action for damages resulting from a breach of the limitation. *Williamson v. Yingling*, 80 Ind. 379.

A reservation in a deed, "provided, nevertheless, that nothing above mentioned shall be so construed as to injure the privilege heretofore enjoyed with regard to raising water for the benefit of my saw-mill," reserves the whole interest of the grantor in the mill pond, and not merely a life estate; and such interest will pass by a devise of land "together with the rights appurtenant to the same mill privileges," etc. *Burr v. Mills*, 21 Wend. 290.

A deed of land "excepting and reserving" to the grantor the "right and privilege" of free watering places for his convenience, reserves to the grantor a mere easement, and passes to the grantee the fee in the land subject to the right and privilege of using the watering places for all the purposes intended by the conveyance. *Smith v. Cornell University*, 21 Misc. 220, 45 N. Y. Supp. 640.

A reservation in a grant of a mill privilege for one half of it to certain, named persons, without words of inheritance, until it shall run down, will reserve a life estate only. *Curtis v. Gardner*, 13 Met. 457.

A covenant in a deed of a water power, that it shall be enjoyed so long as it is needed for machinery and no longer, will not limit the granted powers to the grantee, his heirs, executors, and assigns forever. *Jewett v. Jewett*, 16 Barb. 150.

A right of election existing in a grantor reserving to himself, by way of exception from a grant of land bordering on a river an acre of land and the right to build a dam against any point of the conveyed premises, together with flowage rights, but who does not fix in his conveyance as to where the acre and the dam shall be located, continues to his heirs or successors in title, when the grantor fails to exercise the right himself. *Smith v. Furbish*, 68 N. H. 123, 47 L. R. A. 226, 44 Atl. 398.

A grant of a mill site and appurtenant water rights, to continue so long as the grantee occupies said privilege with mills, grants an ea-

whole matter in dispute in the cause in which it is rendered, and goes to every point decided between the parties in the course of the proceedings which lead to the judgment.

1 Herman, Estoppel & Res Adjudicata, §§ 111, 247; *Moore v. Williams*, 132 Ill. 589, 22 Am. St. Rep. 563, 24 N. E. 619; *Hanna v. Read*, 102 Ill. 596, 40 Am. Rep. 608.

The judgment itself operates as a bar, and the decision of a particular issue as an estoppel.

1 Herman, Estoppel & Res Adjudicata, § 111; *Hanna v. Read*, 102 Ill. 596, 40 Am. Rep. 608.

Whenever it appears that the same question has been decided by a court of competent jurisdiction between the same parties it is *res judicata*.

1 Herman, Estoppel & Res Adjudicata, §§

tate both descendible and assignable. *Moulton v. Trafton*, 64 Me. 218.

But a grant of the right to take water from the grantor's aqueduct for the use of the grantee does not convey an assignable interest, where no words of inheritance are used, and the intent to convey an assignable interest is not apparent. *Wilder v. Wheeler*, 60 N. H. 351.

A right to erect a dam on a designated river is not a personal privilege, but is appurtenant to the land, and will pass with a conveyance thereof, where the grant by the designation of the lands on which the dam may be erected makes the ownership of such lands essential to its operativeness. *Jones v. Pettibone*, 2 Wis. 308.

A right of flowage over granted lands, reserved in the deed as a mill privilege for the benefit of a mill to be operated on the grantor's remaining land on the other side of the river, is deemed to be a right appurtenant to such remaining land, and not merely an easement in gross in the grantor. *Smith v. Furbish*, 68 N. H. 123, 47 L. R. A. 226, 44 Atl. 398.

A grant of lots and of the perpetual right to draw from the pond through the head race "on" the north end of said lots, and use a specified quantity of water, conveys an easement appurtenant to the land, and not in gross, and therefore taxable as part thereof,—especially where the grant covenants for the payment by the grantees of a portion of the expense of maintaining the dam and race, and gives the right to enter on such lands and into any buildings which may be constructed thereon, and to shut off "from said lands" all of such water, until their *pro rata* payment is made, and declares all water gates constructed "on such lands" to be the property of the grantors, their heirs and assigns; and the character of such easement, or the rule of taxation in respect thereto, is not changed by the fact that the lots are unimproved, and that the head race is not constructed or excavated to them. *Spensley v. Valentine*, 34 Wis. 154.

A company authorized to draw water from a river, and owning the raceway to land upon which it is conducted, has a right to use the water flowing therein as an incident to the ownership of the land; and neither the grant of the water, nor the right to receive and demand it, is a franchise so that it will pass by a mort-

109-340; *Hanna v. Read*, 102 Ill. 596, 40 Am. Rep. 608; *Moore v. Williams*, 132 Ill. 589, 22 Am. St. Rep. 563, 24 N. E. 619; *Powers v. Chelsea Sav. Bank*, 129 Mass. 44; *McCampbell v. Mason*, 151 Ill. 500, 38 N. E. 672; *Hale v. Hale*, 146 Ill. 227, 20 L. R. A. 247, 33 N. E. 858; *Bennitt v. Wilmington Star Min. Co.* 119 Ill. 9, 7 N. E. 498.

One operating under a grant cannot claim a different use from that conveyed by the grant under which he claims.

Angell, Watercourses, 4th ed. §§ 144, 145.

If the question of an adverse user could be considered, or had been shown, it would not create any rights as against the state.

Angell, Watercourses, § 254; Gould, Waters, § 225; *Kaskaskia v. McClure*. 167 Ill. 23, 47 N. E. 72.

Riparian proprietors on one side of a

gage sale of the company's property. *Potts v. Trenton Water Power Co.* 9 N. J. Eq. 592.

Under a deed reserving to the grantor the privilege of drawing water from the grantee's ditch, for the accommodation of the grantor's mill, and providing that the grantee keep a spout 10 inches square at the bottom of said ditch, to which the grantor shall have access for the purpose of drawing said water, it was held that the right to compel the grantee to put in the spout was not a mere unassignable chose in action, but it constituted an equitable easement which passed under a conveyance of the mill property expressly conveying the rights and privileges reserved in said deed. *Randall v. Latham*, 36 Conn. 48.

It was further held that the right was not a mere personal license to the grantor, but was appurtenant to the mill and passed under a conveyance of the mill property. *Randall v. Latham*, 36 Conn. 48.

Under a clause in a deed whereby the owner of land and water rights on a river conveyed part of the premises, to the effect that the grantor reserves the right of entering on said land for the purpose of erecting a dam and drawing water therefrom, if it amounted to a reservation, the privilege reserved became attached to the estate retained by the grantor, and not to him personally, and passed to his grantees of the remaining land. *Hickox v. Parmelee*, 21 Conn. 87.

Where the owners of two pieces of land and a mill pond conveyed the upper piece together with one-half interest in the mill pond, reserving to themselves the right to take the water from the pond in a particular manner for the use of the shop located on the lower piece, although without words of inheritance or mentioning their assigns, the reservation was not personal, but passed to their grantees. *Kennedy v. Scovill*, 12 Conn. 317.

The grant of the right to build a dam across a stream and raise water to a specified height attaches as an incident, and becomes appurtenant to that tract of land of the grantee to which water is thereby conducted through a race for mill purposes, and to the enjoyment of which it is essential, so as to be subject to the lien of a judgment on such land and pass on a sale thereof under such judgment, although not specifically named in the levy. *Morgan v. Mason*, 20 Ohio, 401, 55 Am. Dec. 464.

stream have no right to divert any water from the stream, as the property in the water is indivisible.

Angell, Watercourses, §§ 99, 100; *Sanitary District v. Adam*, 179 Ill. 406, 53 N. E. 743.

Boggs, J., delivered the opinion of the court:

The appellees the canal commissioners of the Illinois & Michigan Canal of the state of Illinois and the appellee the Ottawa Hydraulic Company, a corporation organized under the laws of the state of Illinois, filed this, their bill in chancery, praying for an injunction restraining the appellants Louis W. Merrifield and George Galloway, his employee, and other persons and corporations,

Under a statute incorporating a board of trustees of a canal, and empowering the state to release to it a canal and the property held therewith, and directing the trustees to complete the canal and furnish to the state, free of charge, 500 horse power of water power, the right of the state to the use of the power to be absolute, the state acquires the right to such water power, separate and distinct from ownership in any particular lands to which it might be appurtenant, it constituting a right of *profit à prendre*; and a contract by the state leasing or conveying the same for a term of years at an annual rental is valid. *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 43 S. C. 154, 20 S. E. 1002.

II. Successive and conflicting grants.

When the power created by a particular dam is more than sufficient to operate a single mill or factory, rights are frequently granted to other persons to draw power from the dam. In such cases the rights of the respective grantees will depend on their deeds if, as is usually the case, they are defined thereby. If the rights are not defined, the grantees are entitled to priority to the extent of their respective rights in the order of the grants. The first grantee acquires the first right, and the grantor, unless he has expressly reserved his own rights, will be compelled to obtain them from the power remaining after all the grants are satisfied.

There can be no doubt that the owner of a water privilege may grant rights to another, or to several parties, to use the water proportionately, by measurement, through sluiceways of certain dimensions, for certain specified machinery, and may grant to one subject to the prior rights of another, or, generally, under such conditions as he may see fit to prescribe. And it is equally beyond question that he may bind his estate to the maintenance of such an easement as he may have granted to another. *Matteson v. Wilbur*, 11 R. I. 545.

One in possession of mills and appurtenant water rights under a grant from a town upon certain conditions, so long as such conditions are complied with, may apportion the title and privileges he holds to others in any manner he chooses, with or without preferences among his grantees, and, upon breach of any conditions thereby, the town alone can object. *Dewey v. Williams*, 40 N. H. 222, 77 Am. Dec. 708.
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from removing weirs which the canal commissioners had placed, or were about to place, in certain flumes which had been constructed for the purpose of conveying water from the Fox river feeder of the Illinois & Michigan canal to certain industries operated by the defendants to the bill. The bill was dismissed as to all the defendants thereto except the defendants Merrifield and Galloway. A hearing on bill, answer, replication, and proof resulted in a decree restraining the appellants substantially in accordance with the prayer of the bill. This is an appeal perfected to reverse the decree.

In 1838 the board of commissioners of the Illinois & Michigan Canal were about to enter upon the work of constructing a "feeder"

A conveyance of an indefinite amount of the water of a river leaves the amount to be determined by the conditions prevailing at the time the grant is made and the interpretation of the parties as evidenced by the amount of water used under such grant, and the several grants must be satisfied in the order of their priority, and cannot be impinged upon by subsequent grants. *Dexter v. Jefferson Paper Co.* 22 Misc. 389, 50 N. Y. Supp. 557.

Where it is provided in conveyances of water power that a particular owner is entitled to priority over others, that fairly and reasonably implies that he is entitled to a head of water sufficient to enable him to make a practical, beneficial use of the amount to which he is entitled, and the continued use thereof by other parties subsequent in right, when the pond gets low, so as to deprive him of his right, is a wrongful diversion of this water for which they are liable in an action for damages. *Samuels v. Blanchard*, 25 Wis. 329.

One who has granted a water right to another cannot afterwards assert his riparian rights when they would conflict with those previously granted by him. *Fowler v. Kent* (N. H.) 52 Atl. 554.

A water grant reciting its purpose to be the carrying on of a clothier's business where the grantor lives, and conveying a right to take from his gristmill pond enough water to run a fulling mill and shears, reserving sufficient for the gristmill when the supply is scanty, with habendum to the grantee and his heirs and assigns, so long as he or they shall carry on the clothier's business at or near the same place and bear a sixth of the expense of repairing the dam and flume, does not make the grantor and grantee tenants in common. *Shed v. Leslie*, 22 Vt. 498.

Under a grant of sufficient of a water power to run two millstones, without reservation, and a subsequent grant, subject to the former one, of sufficient of the power to propel five run of stone, to be used upon an equality of right with three other run of stone to be used by the grantor, the rights, under the first grant, of two run, are to be first satisfied, and the grantee can do nothing to interfere therewith, and the grantor cannot use more than his proportional part of the three-run power until the machinery of the grantee is fully supplied to the extent of the rights granted to him; and the grantor cannot, by running his mill at night,

by which to convey water from Fox river southwardly from a point near the village of Dayton, on said Fox river, to the main channel of the canal at Ottawa, a distance of about 4 miles. John Green and William Stadden then owned the east half of section 29, town 34 north, range 4 east of the third principal meridian, at Dayton. This tract of land formed the west shore line of Fox river at the point where it was determined to begin the construction of the feeder to receive the water from said river. Said Green and Stadden, on the 5th day of June, 1838, executed an instrument in writing authorizing the canal commissioners to enter upon their premises and proceed to the construction of a dam and lock and other necessary structures in that part of the bed of Fox

river to which the riparian rights of Green and Stadden extended, and also to construct a "channel" on the said land for the purpose of receiving the water to be taken from the river, and conveying the same from thence to, and discharging it in, the Illinois & Michigan Canal at a point some 4 miles below. The instrument reads as follows:

Whereas the board of commissioners of the Illinois and Michigan Canal, in surveying different routes for a navigable feeder from the best practical point on Fox river to the Illinois & Michigan Canal at the town of Ottawa, and such basins of lateral canals connecting the Illinois river with said canal at that point as in their opinion will most enhance the value of the property of the

deprive the grantee of his portion of the water in the daytime. *Seneca Woolen Mills v. Tillman*, 2 Barb. Ch. 9.

Those deriving water rights from a grantor who first granted to the owner of the site on the other side of the stream a preference in all cases where there was not sufficient water for both will only have a right to such water as is not required by the first grantee, as stipulated in his grant. *Jordan v. Mayo*, 41 Me. 552.

A grantee of the surplus water of a mill pond after a mill is supplied is bound to take notice of wants of the other mill and shut his gate when there is an insufficiency of water; but in case the owner of the other mill undertakes to regulate the flow of the water he is bound to permit water to flow to the second mill as soon as the supply is sufficient for both. *Sumner v. Foster*, 7 Pick. 32.

But the rule that a grantee of water power must take subject to the rights of prior grantees on the same reservoir, so that in case the supply is insufficient his contract will not be specifically enforced, is not applicable to the case of an artificial channel which can be indefinitely enlarged so as to be capable of supplying the power called for by the later contract. *Conant v. Bel-lows Falls C. Co.* 29 Vt. 263.

A grant having been made to a canal corporation of a right to erect dams in a navigable river, a subsequent grant of a right to erect a dam and mill on the same stream is subordinate thereto, and damages cannot be recovered for the exercise of the prior franchise. *Union Canal Co. v. Landis*, 9 Watts, 228.

Where the owner of a water power leases to one the right to draw water for two wheels of a certain description, and to another the right to draw for one, and at times there is not enough water for both, the lease which was given first has, by law, the priority in the use of water, and the lessee under the later lease can claim the surplus only after the other has been supplied. *Ranlet v. Cook*, 44 N. H. 512, 84 Am. Dec. 92.

The last grantee of one who, owning a mill-pond, dam, and mills on both sides of a stream, conveys the property on one side with the first right to draw water from the pond, and subject to repair and rebuild the dam when necessary, reserving only the right to take water for the other mill without damaging the first mill when there shall be a scarcity, is not entitled, on the raising of the dam 6 inches, by the dominant 67 L. R. A.

owner, to use water for the servient mill until the level of the pond falls to the original height of the dam, for the first grantee's privileges are primary and exclusive. *Wilder v. Bennett*, 30 Vt. 670.

A grant of a certain amount of water to one party with the remainder to another would not, upon the first grantee's omission to make use of his share, give the second grantee a right to its use. *Fowler v. Kent* (N. H.) 52 Atl. 554.

But where the owners of a stream granted seven eighths of the privilege of the stream to the proprietors of a sawmill, to continue as long as the sawmill was kept in repair, reserving to themselves sufficient water to carry their fulling mill four days in a week, and subsequently made another grant of a right to erect a slitting mill upon the same stream, with the same reservation to themselves, and providing that such grant was not to prejudice the sawmill, the subsequent extinguishment of the right of the sawmill by its being suffered to go to decay inures to, and enlarges, the right of the subsequent grantee. *Rowe v. Stoddard*, 1 Root, 447.

Where a grantor owns two mills on the same bank of a mill privilege, and grants the upper with the stipulation that only such an amount of water shall be taken from the privilege as will not impede the speed and usefulness of the lower mill, the grantee must treat the flume leading past his property to the lower mill as appurtenant to the lower mill exclusively, unless it becomes necessary to take water therefrom for the use of his machinery which he has a right to operate, or unless it can be so taken without being practically detrimental to the lower mill. *Hammond v. Woodman*, 41 Me. 177, 66 Am. Dec. 219.

A grantor may repair or rebuild, and forbid grantee's use of, a flume which leads from a dam down past grantee's mill to his own lower mill, having reserved in his grant of the upper mill with appurtenant water privileges the right at all times to take and use water sufficient to drive his lower mill, it being shown that grantee is not dependent upon that flume for the reasonable enjoyment of his grant. *Ibid.*

After a grant of a privilege of drawing water from a milldam for certain purposes when the water is not needed for grantor's mill, grantor will be limited to the use of the same quantity of water as he was using at the time of the

state, pursuant to an act entitled "An Act to Amend an Act Entitled 'An Act for the Construction of the Illinois & Michigan Canal,' approved January 9, 1836," have surveyed one route passing over the lands and premises of the subscribers:

Now, therefore, we, the subscribers, for the purposes of encouraging the construction of said feeder, as also said canal, and also for the application of water to manufacturing purposes for the use of the state, or any person claiming, by purchase or otherwise, under the state, and as an inducement for determining on such route and location for said feeder and basins as will pass over or otherwise benefit our lands and premises, do hereby fully and absolutely release, acquit, and discharge the people of the state of

Illinois and the board of commissioners of said canal of and from all damages which we may sustain or might claim in consequence of the construction of the feeder and basins, or their or either of their fixtures and appendages, of whatsoever kind, at, on, over, or through our lands and premises, and of and from all claims and demands for or on account of any lands, waters, or streams that may be entered upon, taken, or appropriated for the construction and use of the said feeder and basins and their fixtures and appendages: Provided, however, that these presents be understood with this limitation, *vis.*: That the subscribers forbear to relinquish, and hereby reserve to themselves, whatever claim or right they may have acquired to one fourth part of the water that

grant, as otherwise the grantee might be deprived of that for which he contracted. *Davis v. Muncey*, 38 Me. 90.

The purchaser of milling property together with the water power appurtenant thereto may extend an end of the dam higher up the stream after its destruction by flood, where rendered necessary by the washing away of the bank at that end, and may increase the height of the dam sufficiently to supply the water necessary to operate the mill according to its capacity at the time of the grant, as against grantees of the remainder of the grantor's property on both sides of the mill race and dam upon which, by the creation of the mill site, the grantor had imposed a burden in favor of the latter premises, which passed with the grant thereof, and subject to which the grantees of the remaining property necessarily took. *Riverdale Park Co. v. Westcott*, 74 Md. 311, 22 Atl. 270.

When the owner of a mill privilege with three mills thereon grants the first mill with a limited amount of power to be taken after his gristmill is supplied, and then grants the gristmill with the amount of power then used, a subsequent grantee of the third mill will be entitled to only that power remaining after the prior granted mills receive their stipulated amounts. *Klaer v. Ridgway*, 86 Pa. 529.

A grant of a lot upon one shore of a river divided into two branches by an island, and a certain amount of the water power of such river, entitles the grantee to such amount of water from that pertaining to the shore on which such lot is situated; and, if such water is insufficient because of prior grants from the same grantor, then from the water pertaining to the island, also owned by such grantor. *Dexter v. Jefferson Paper Co.* 22 Misc. 389, 50 N. Y. Supp. 557.

Where the owner of two mill sites situate on a stream of water conveyed the upper one and one half of a pond flowed by a dam, with a reservation that the grantor was to have and retain the privilege of conveying water from said dam in a prescribed method until the same should arrive at the upper mill and thence on to the lower mill, for its necessary accommodation and use, it was held that no prior right was reserved to the grantor, but that the grantee was to have one half the water, and the grantor the other half with the privilege of carrying that half across the premises granted to the lower mill. *Scovill v. Kennedy*, 14 Conn. 349.

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A provision in a deed of premises and the water rights appurtenant thereto, that the grant of the water right is subject to the right of the grantor and his legal representatives at all times to draw from the dam an amount of water corresponding in extent to a water right appertaining to other property of the grantor whose right was originally subordinate to that granted by the deed, will be construed as intending merely to prevent any possibility of embarrassment of the grantor in his ownership of the subordinate right, and not to change the original order of the rights, where the deed provides that the grantee shall have the right to the use of the water in operating the factory upon the premises as fully and amply as the same is now employed by the grantor. *Dexter Sulphite Pulp & Paper Co. v. Frontenac Paper Co.* 20 Misc. 442, 46 N. Y. Supp. 363.

A deed conveying a factory site together with an undivided eighth of the land flowed and subject to flowage, and further providing that, if the eighth of the water power intended to be conveyed does not amount to a specified number of inches, the grantee shall be entitled to use enough water to make up such amount, subject to the grantor's right to use first a sufficient quantity to drive four run of millstones, does not entitle the grantor to use the entire power for his mill if necessary to operate the four run of stone, but conveys absolutely to the grantee one eighth of the land subject to flowage, including the water thereon, together with the qualified right to additional power if not needed by the grantor. *Emery v. Three Rivers*, 78 Mich. 438, 44 N. W. 401.

A deed conveying land on one side of a stream, together with one half the water power of a dam, to be drawn or taken from any point between the bank and the center of the stream, passes the right to the use of the momentum of water in its passage, and not a given quantity of water, and the grantor's right to the use of the other half of such water power is necessarily restricted to the opposite half of the stream; and therefore the grantee will have the undisputed control of the use of the water which has passed through a sluiceway from the main dam into a lower dam or pond constructed by him from a slough on his side of an island, at the head of which the main dam is located, inasmuch as the water, when it reaches this pond, has passed beyond any point where it can be used as motive power on the op-

may flow in the Fox river, diminished as that quantity may chance to be, in the just measure of its proportion, by the leakage, evaporation, etc., necessarily incident to such good and workmanlike dam and lock structures as shall be deemed requisite for the said feeder and basins and useful to the state and after the necessary quantity has been drawn out for the purpose of the navigation of said canal, but agreeing that, in the application or use of said fourth part aforesaid, the same shall be drawn out of said feeder, within $\frac{1}{4}$ of 1 mile from the head of the guard lock, according as and in the manner to be directed by said commissioners or other authorized agents. This reservation being subject to the farther limitation that it shall not at any time au-

thorize the subscribers, even within the quantity of said proportion, to reduce the water of the said Illinois & Michigan Canal during the season of navigation below the depth of 6 feet, which, only, shall be done by the permission of some authorized agent of the state. They, the said subscribers hereby relinquishing to the people of the state of Illinois, for the reasons and purposes assigned, as aforesaid, all and whatever right and claim they may have to the residue and all other portions or portion of the waters of the said Fox river beyond and above the one-fourth reserve as aforesaid, and they do hereby acquit and discharge the people of the said state of Illinois and the board of commissioners of the said canal from all liability whatsoever for the constant use

posite side of the main channel of the stream; and such grantor can, at most, but object that, by the enlargement of the sluiceways, more water is drawn into this pond than his grant authorized; and a subsequent sale by him of the right to draw more than one half of the water into such pond, since it cannot be a sale of the water of the river or its momentum, which he can only use on his own side of the stream, can amount only to an estoppel of his right to use the momentum of so much water, leaving the water, after passing into the lower pond, to be used in accordance with the rights of those entitled, by grants from the original grantee, to share with him in such power. *Batavia Mfg. Co. v. Newton Wagon Co.* 91 Ill. 230.

An increase of water power created by the enlargement of a dam belongs to all the owners of water power in proportion to their respective interests, and not to the original owners of the dam or their successors in interest, where such owners sold all the water the dam would afford, except what they reserved for their own use, exacted covenants from the various purchasers for the repair and maintenance of the dam, both the owners of sold water and reserved water have in every way treated each other as owners of the dam and all its power, and the improvement of the dam has been paid for by assessments upon all the owners of water in proportion to their respective interests, although the deeds conveyed but a given number of square inches of water at a certain head, or water sufficient under any greater head to be equivalent in power. *Janesville Cotton Mills v. Ford*, 82 Wis. 416, 17 L. R. A. 564, 52 N. W. 764.

Grantees of a residue of a water power who join a voluntary association formed for keeping up the power, and pay assessments on the interest granted to them, will be estopped from claiming that the conveyance of the prior interest was void as an attempted severance of an appurtenance from the land to which it was attached, both by the deeds of their grantors, in whose position they stand, and by their conduct with reference to the association. *Forrest Mill Co. v. Cedar Falls Mill Co.* 103 Iowa, 619, 72 N. W. 1076.

A reservation by the original owner of mills located on both sides of a dam and having water privileges in common, in his deed to joint grantees, of half of that mill which, by private partition, was later made servient to the other in the matter of water power, is no answer to 67 L. R. A.

the complaint by the subsequent owner of the dominant privilege, that the water has been unlawfully diverted, when it is not shown that the reserved rights vested in the defendant. *Rogers v. Bancroft*, 20 Vt. 250.

On the determination of the water rights of two mill owners who claim through a common grantor, evidence of the manner in which such water rights had been exercised between the grantor and his immediate grantee is admissible as defining the water rights of each as they understood them, and not as tending to vary the terms of a written instrument. *Fuller v. Daniels*, 63 N. H. 395.

III. What rights conveyed.

a. By general grant.

1. In general.

As in case of other grants the question of the effect of a grant of water power will be determined chiefly from the intention of the parties so far as that can be ascertained. If the conveyance is of a parcel of land containing the water power, or of the right to use water to create a power, or of a portion of an already accumulated store, the solution of the question what is conveyed usually is plain. So if a particular tract of land or mill to which a water power is appurtenant is conveyed the power will be held to be included in the grant.

In construing a grant of a water right, the situation and circumstances of the parties may be considered. *Strong v. Benedict*, 5 Conn. 210.

A grant from the state of water rights will be construed the same as a similar agreement between natural persons, although the remedy for its breach may not be the same. *Com. ex rel. Cass v. Pennsylvania R. Co.* 51 Pa. 351.

Where tenants in common owning mills served from the same dam simultaneously execute partition deeds of their joint lands and appurtenant water rights, the conveyances are to be construed together as one instrument, and a limitation of the use of water contained in one, the other being silent in respect thereto, is binding upon both parties and their successors in interest. *Rogers v. Bancroft*, 20 Vt. 250.

The right of each party to the conveyance must be exercised so as not to interfere any further than possible with those of the other party.

A grant of a right to draw water as shall

and exercise of the rights and powers herein declared: Provided, if the board of commissioners shall alter or change the dimensions of said feeder as now located, the said board are to pay to said subscribers, or either of them, such damages as they may sustain in consequence of said change.

In witness whereof we hereunto set our hands and seals this 5th day of June, in the year of our Lord, 1838.

John Green. [Seal.]

William Stadden. [Seal.]

Signed, sealed, and delivered in presence of Giles Spring and James Turney.

A dam was constructed by the commissioners across Fox river at this point; also a lock at the dam on the premises of said

Green and Stadden on the west side of the river; and the commissioners also dug the feeder from the lock to the outlet thereof in the canal at Ottawa. The feeder was, when constructed, a channel of the width of 60 feet at the top and 40 feet at the bottom, and was capable of conveying water to the depth of 5 feet a portion of the way and 4 feet the remainder of its length. Four flumes were by the commissioners put in the banks of the feeder within the limits of the Green and Stadden land for the purpose of receiving water for power uses reserved by said Green and Stadden. These flumes were constructed in 1838 or 1839, and remain in practically the same condition to this day. The water power reserved by Green and Stadden by proper assignments

best convenience grantee must be exercised in a reasonable manner, and so as not, by wantonness or negligence, unnecessarily to injure the grantor. *Raler v. Beaman*, 49 Me. 207.

A grantee of water power from a canal has no right to use more than the amount stated in his deed, under the claim that the canal has a greater capacity than was estimated. *Powers v. Perkins* (Mich.) 9 Det. L. N. 516, 92 N. W. 790.

A grantee of water power is not entitled to use more power than his deed grants him, where the power of an artificial canal is divided into two classes, the grantees of first-class runs being entitled to be supplied first, under the claim that he has the right to use all power of both classes which has been granted to him so long as all the first-class runs have not been conveyed. *Ibid.*

When a deed of a mill site and privilege includes a provision that grantee shall leave a place in the race to pass off as much waste water as he, in his discretion, may think proper, grantee cannot arbitrarily or capriciously deprive grantor of the beneficial use of the waste water which was undoubtedly contemplated at, and has been enjoyed since, the time of the grant. *Paschall v. Passmore*, 15 Pa. 295.

Purchasers of a manufactory with all water rights appurtenant thereto cannot be restricted by the grantor to the returning of water to the stream at a point where the land conveyed is situated on both sides of the stream, where it is so situated for but a short distance below the dam, so that to compel such a return would render the water power of little value, and at the time of the purchase it is returned lower down the stream at a point where the premises conveyed were located on one side only, opposite other lands of the grantors. *Ely v. Stewart*, 2 Md. 408.

A grant of the right of commanding and conducting water from a pond for the use of mills through any gates that may be erected, whenever the same may be necessary for the use of the mill privilege, gives no right to require the grantor to open the gates for the benefit of the mill, but merely a right to the grantee to open the gates whenever he finds it necessary to do so. *Revere v. Leonard*, 1 Mass. 90.

An agreement to convey land by the same description as used in former deeds will not imply that the parties intended to include a right, 67 L. R. A.

as the right to have water flow to a mill which passed under such deeds, not by force of special mention, but by virtue of its then appertaining to the land, and which both parties know has since been extinguished. *Smith v. Thayer*, 155 Mass. 48, 28 N. E. 1131.

Reference to a prior deed for a description of a water right conveyed will limit the extent of the right to that described in that deed, and it cannot be measured by the use to which the grantor has put it. *Perry v. Binney*, 103 Mass. 156.

Purchasers for a nominal consideration of lots between a stream and a canal cut under the authority of the legislature for the improvement of navigation and for the purpose of securing hydraulic power from the surplus water by means of a dam constructed at the head of the canal for that purpose, in whose conveyance there was no express grant of water power and whose lots as platted were not intended to extend to the canal, are not entitled to the use of the water power created thereby as appurtenant to their lots, and they are estopped from claiming such right and from claiming that leases thereof were taken by them by mistake as to their legal rights, where for many years they continued in possession and paid rent thereunder and permitted the lessor to make improvements at great expense. *Lawson v. Mowry*, 52 Wis. 219, 9 N. W. 280.

The grant of land on both sides of a stream, including mills, dams, and water rights, to one who, prior to that time, owned only a piece of land bounded by the margin of the stream and the right to draw water only for tanning purposes, extinguishes the limitations of the first grant, and thenceforward the grantee possesses all the common-law rights of a riparian proprietor having the right to the reasonable use of all the water of the stream, subject, only, to the rights of a lower proprietor. *Rackliff v. Rackliff*, 96 Me. 261, 52 Atl. 839.

The grant of so much of the waters of a stream as may be spared from a water power gives the implied right to erect such structures as may at any time be necessary for the purpose of diverting such waters to the purpose for which they were appropriated; such a right being indispensable to the enjoyment of the rights granted. *Denton v. State*, 72 App. Div. 248, 76 N. Y. Supp. 167.

The grant of a right to the waters of a spring for the use of a mill does not include the use

came to be owned, at the time of filing this bill, as follows: Three parts thereof by the appellant Merrifield, three parts by the Standard Fire Brick Company, and two parts by the Columbia Straw Paper Company.

In 1852 the canal commissioners entered into a contract with the Ottawa Hydraulic Company, by which they purported to sell and lease to the Ottawa Hydraulic Company for a term of twenty years from the 1st day of May, 1852, so much of the water and water power furnished by the Fox river feeder to said canal as could be used, in the manner stated in said contract, by said Ottawa Hydraulic Company without interfering with an ample supply of water for said canal, and agreed that said Ottawa Hydraul-

lic Company should have the privilege of using and subleasing the said water. At the expiration of this lease, in 1872, it was renewed for a further period of twenty years, and on the expiration of that term was again renewed for a third period of twenty years, thereby continuing the same in force until the 1st day of May, 1912.

On and before the 2d day of March, 1899, the appellant Merrifield had one of the flumes connected with a plant which he operated, for the purpose of generating electricity, and had another of the flumes connected with a tile factory owned by him, and drew water from the feeder through these two flumes for the purpose of operating the machinery at these respective plants. On said last-mentioned date the Ot-

of it for domestic purposes at the private residence of the miller, who is the grantee. *Woodring v. Hollenbach*, 202 Pa. 65, 51 Atl. 318.

A grant of water power, made by a riparian owner who subsequently becomes the owner of an island in the river, gives the grantees no right to any water pertaining to such island, or to the opposite shore on the other branch of the river. *Dexter v. Jefferson Paper Co.* 22 Misc. 389, 50 N. Y. Supp. 557.

A partition deed executed between tenants in common, by which one of them acquires the premises on which a mill is situated, vests in the grantee the whole water power contained therein, unless restricted by the terms of the deed. *Mandeville v. Comstock*, 9 Mich. 536.

A grant of a parcel of land which contains "2 acres . . . and embraces all the mill privileges" on one side of a river, does not create any mill privileges appurtenant to the land, but only passes such water rights as are already appurtenant to the land conveyed. *Pray v. Great Falls Mfg. Co.* 38 N. H. 442.

A water right acquired by grant from an upper to a lower riparian owner on a natural stream will pass by the latter's deed of his property under the term "appurtenances." *Hall v. Sterling Iron & R. Co.* 148 N. Y. 432, 42 N. E. 1056.

A sale or conveyance of mill property, either voluntarily by the owner or by judicial process, will invest the purchaser with title to an appurtenant water power, race, and dam which are on state land, although they be not described or mentioned in the conveyance. *Hoover v. Hale*, 56 Neb. 67, 76 N. W. 457.

A grant of land with mills thereon, with a "privilege of flowage, use of water and repairing of dam, to have and to hold, with the privileges and appurtenances to the same belonging," merely enumerates the rights passing as incidents of the land and mills, and does not warrant or convey any more rights than would pass without such enumeration as appurtenant to the property conveyed. *Sevey v. Jones*, 43 N. H. 441.

The sale of land on a stream with mill privileges, with a prohibition to raise the water beyond a stipulated point, is not a guaranty of any quantity of water, or of sufficiency of water power for any particular use in machinery. The right to use the stream for mill purposes is restricted by the limit to the height of the dam, implied in the inhibition against the over-

flow beyond the specified point. *Salado College v. Davis*, 47 Tex. 181.

A grant of a dam with all of the water power on grantor's land will not limit grantee to the use of but one dam. *Nitzell v. Paschall*, 8 Rawle, 76.

And the right given by an instrument apportioning the power created by waterworks, of erecting a new building and placing wheels and gates adapted to the action of such machinery, will give as an incident the right to make new flumes and openings into the reservoir for the purpose of drawing the quantity of water to which the party is entitled and applying it most beneficially to his works. *Bardwell v. Ames*, 22 Pick. 333.

A grant of a right to take water from an upper to a lower pond will not include the right to take it to a wheel below the lower pond. *Johnson v. Jaqui*, 25 N. J. Eq. 410.

A representation by a grantor that there will always remain sufficient water in the dam to furnish the quantity conveyed is not fraudulent, as it is merely the expression of an opinion. Nor can a representation that the supply furnished by the milldam is about three times that conveyed be considered fraudulent, where the grantees receive the quantity so conveyed, as they are not prejudiced thereby, and such representation is merely the expression of an opinion or estimate of the quantity discharged by the dam. *Morrison v. Koch*, 32 Wis. 254.

The reasonable implication from the grant of a surplus of the water power of a mill pond is that the grantor shall preserve a surplus or make reasonable efforts to that end, upon which the grant can take effect; and where such grantor permits water to escape through the dam because the same is out of repair, which by the exercise of reasonable care could be repaired, the loss must fall upon him, and cannot be charged against the grantee, where the former has the right to enter upon and keep the said dam in repair, which right does not exist in the latter; and especially as the latter is charged a certain proportion of the expense of keeping the same in repair. *Batavia Mfg. Co. v. Newton Wagon Co.* 91 Ill. 280.

Under a deed conveying certain flowage rights in general terms in order to effect the purposes of the grantee, stated in the recital of the deed, of obtaining a greater head of water by raising the grantee's old dam or building a new one higher than the old one, the

tawa Hydraulic Company commenced an action of trespass on the case in the circuit court of La Salle county against the appellant Merrifield for the purpose of fixing the respective rights of the parties thereto in said water and water power furnished by said Fox river feeder, and for the purpose of determining whether said Merrifield was using more water than he was entitled to. In said suit such further proceedings were had that on or about the 1st day of February, 1901, this court, by its judgment rendered in said cause, found said defendant, Louis W. Merrifield, guilty, and entered a judgment in favor of the plaintiff and against the defendant for \$1 and costs, only nominal damages being sought in said suit, which said judgment still remains in full force and effect.

grantee may build the dam in contemplation only at the site of the old one, and not at some other place. *Woods v. Nashua Mfg. Co.* 5 N. H. 467.

When a riparian proprietor reserves from a grant of land on his stream, to himself, "his heirs and assigns forever, the right to all the water power created by a dam on the premises of the present height of the rolling part of the dam now standing on the premises," he has the right to have all the water that would naturally come down the stream to the dam flow over it; and any substantial diversion by the grantee of water that had once got into the stream, and which, but for such diversion, would have flowed over the dam, will constitute an interference with grantor's rights. *Whitney v. Fitchburg R. Co.* 178 Mass. 559, 60 N. E. 384.

One who has granted another the right of using the water in a creek for mill purposes is not entitled to injunctive relief against a diversion of the water from a lake of which the creek is the outlet and a discharge of it into a neighboring river instead of the bed of the creek, where the grantor did not object until after the grantee had erected his mill, dug a race, and built a dam at large expense. *Jacox v. Clark, Walk. Ch. (Mich.)* 249.

The grantee of a right of using the power generated at a dam will also have such easement over grantor's land as will enable him to have full enjoyment of that right. *Elliot v. Shepherd*, 25 Me. 371.

A deed executed by the owners of the bed of a water-power canal to persons having an easement in the water power thereof appurtenant to mill lots owned by them, whereby the right was granted to them to make certain improvements upon the canal, which they, in connection with the grantors, had agreed with others to make, reserving to each grantor an interest equal to his right to water power, and providing that the rights should be enjoyed by the parties as tenants in common in proportion to the right of each to use the water power,—does not estop the grantors from asserting title to the bed against the grantees, each of the grantees being the owner of a mill lot as well as of an undivided interest in the bed as tenants in common in proportion to their respective rights to the water power. *Nichols v. New England Furniture Co.* 100 Mich. 230, 59 N. W. 155.

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After the termination of this litigation between appellant Merrifield and the Ottawa Hydraulic Company, the canal commissioners installed in each of the flumes by means of which Merrifield was drawing water from the feeder a contrivance called a "weir," for the purpose of regulating the amount of water that should pass from the feeder through each of said flumes. The weir that was placed in the flume at the electrical power station was so constructed and installed as to give to said Merrifield all of the water power of said feeder which, in the opinion of the canal commissioners and according to the decision of the court in the trespass case brought against him by the hydraulic company, he was entitled to take, and the weir installed in the flume of the said Merrifield at his tile mill permitted him to use

2. Construction of grants.

There are many cases which depend so entirely upon the peculiar language of the instrument, or upon the special circumstances of the transaction, that little more can be done than to state the holding of the particular case, general rules being of little or no application.

A grant of a mill "to have the first privilege of water for running the same" purports to give as much water as is necessary, and not merely as much as is not subject to valid claims. *Hapgood v. Brown*, 102 Mass. 451.

A sale of land on one side of a river, including one half of the water power of the river controlled by a dam adjacent to such land, has reference only to the one half of the water power of the river on that side thereof adjacent to the land conveyed. *Jobbins v. Gray*, 34 Ill. App. 208.

Where a corporation, having, pursuant to statute, constructed a leat or water course for the purpose of supplying a town with water, conveyed certain mills situated on the leat, "together with the fourth part of and in the said close, and the leat or watercourse coming and going to all the said mills," the grantee did not take a one-fourth part of the leat, but merely became entitled to such amount of the water as remained after satisfying the public purposes. *Atty. Gen. v. Plymouth*, 9 Beav. 67, 15 L. J. Ch. N. S. 109.

Under a grant of a mill with "privilege of drawing water," grantee is entitled to draw water from grantor's head of water in that locality, even if it be in two reservoirs, except so far as he may interfere with rights previously granted. *Elliot v. Shepherd*, 25 Me. 371.

A grant of a privilege of drawing water from a river "to the full extent and capacity of the bulkhead now there" will limit the quantity to such as would pass through the existing structure, and such quantity after a lapse of time and change of conditions must be determined as one of fact. *Appleton Paper & Pulp Co. v. Kimberly & C. Co.* 100 Wis. 195, 75 N. W. 889.

Where the owner of two mills located on a watercourse covenanted to maintain a dam of sufficient height to turn the waste water into a wing dam of the covenantee, by waste water was meant all of the water remaining after the use of all which was reasonably necessary for the beneficial enjoyment of the mills as they

two thirds as much water as the weir in the flume at said electrical power station. Such division of the water was made at the request of said Merrifield, and upon his agreement not to use water through both flumes at the same time. The appellant Merrifield contended these weirs so obstructed the flow in the flumes as to deprive him at all times of a portion of the quantity of the water and of the "head" of water that he was entitled to receive under the Green and Stadden contract, and to deprive him at other times, when the stage of the water is low in the feeder, of all water whatever, and he and his coappellant, George Galloway, an employee of his, removed the weirs from the flumes. The canal commissioners notified said Merrifield and said Galloway that their action in removing said device

was unlawful, and again put in said device in said flumes, and warned the said Merrifield and the said Galloway not to interfere with the same. Afterwards, in the night between the 10th and 11th days of March, 1901, the said Merrifield caused said device to be again destroyed and torn out, and the said Merrifield thereafter threatened that he would tear out and destroy any device or weir placed in his said flumes which would prevent him from using all the water he might need for his electrical power station. The canal commissioners replaced the weirs, and filed this, their bill to enjoin the removal of the same, and the decree appealed from granted the restraining order asked in the bill.

The appellant Merrifield contends that under the proper construction of the con-

then existed. *Fowler v. Kent* (N. H.) 52 Atl. 554.

A grant of the undivided half of a sufficiency of water to operate specified mills entitles the grantee to but one half of the entire quantity of water in the stream, and he has no right to draw a constant quantity unvaried by the fact of the diminution of the stream from natural causes. *Dow v. Edes*, 58 N. H. 193.

A grant of a portion of the powers created by a dam by the clause "to the capacity of the bulkhead now there" will not give a right to draw down the head so as to use the water in a wasteful way to the injury of the rights of other proprietors, although more power can be obtained from the particular flume by sacrificing volume to velocity of flow. *Appleton Paper & Pulp Co. v. Kimberly & C. Co.* 100 Wis. 195, 75 N. W. 889.

An agreement by adjoining landowners that one shall have a right to have all the water drawn by him from a canal feeder to run his mill flow over the land of the others, and that the latter shall have the right to have all the water drawn flow over his lands, will give them the right to all the water actually drawn, although the amount is in excess of what the former had a right to draw. *Armstrong v. Poits*, 23 N. J. Eq. 92.

A right to maintain a dam and reservoir on certain land, which has been acquired by one of the heirs of the former owner by an independent grant as appurtenant to land on which he has a mill, will not be given by a deed in which he joins with the heirs of such person in granting "all right, title, and interest of us and each of us in and to" the land, "hereby quitclaiming all our right, title, and interest in and to all the real estate" owned by their ancestor at the time of his decease, with covenants against "all encumbrances made or suffered by us or either of us respectively." *Kendall v. Brown*, 7 Gray, 210.

The owner of the water power, land, and mills on each side of a stream, who, after conveying one undivided half of the land and mill on one side, grants the other undivided half therein "with a privilege to draw the water . . . sufficient for one tub wheel at all seasons of the year," conveys only an undivided half of the quantity of water so specified, to correspond with the interest in the land and 47 L. R. A.

mill conveyed. *Loverin v. Walker*, 44 N. H. 489.

A conveyance of land "with appurtenances" did not pass to the grantee the right to water power to operate a tannery, where he erected the tannery after having taken possession under a parol sale, and was permitted by parol license, without consideration, to cut a race to grantor's mill race and draw water therefrom when the same was not needed to operate the grantor's mill, and the deed referred to, although executed after the mill and race were built, was made to carry out the parol sale, and made no mention of the mill or a right to take water, and did not by its terms purport to convey any such right. *Moore v. Sinks*, 2 Ind. 257.

A grantee of land with the privilege of taking 50 square inches of water, to be applied 5 feet from the surface of the river opposite the place of taking it from the race, is entitled to use such quantity, to be applied directly to his machinery by a race conducting the same from the grantor's race to the place where it should be applied, but cannot draw it into a flume or reservoir and afterward apply it by a larger discharge than 50 square inches. *Padack v. Pardee*, 1 Mich. 421.

A grant by the owner of land on both sides of a river, who has constructed a dam and a canal to convey water to mills, of one of the mills together with "all the canal-water privilege," excepting sufficient water to furnish a certain amount of power to the remaining mills, conveys all the water of the river which will flow through the canal, subjecting the entire river and bed to the servitude of the canal privilege. *Cummings v. Parker*, 61 N. H. 516.

A deed granting the "right to control the water, for the purposes of a gristmill, to the top of a stump standing in the pond, and reserving the right to draw water down to the top of such stump in any shape and for any purpose, from the dam or flume, so as not to interfere with the gristmill privileges," conveys an unimpeded right to the water after it has settled to the level of the top of the stump, not an exclusive use of the water as a mass below such top; and retains the free use of all the water when it is above such top, not merely an upper stratum. *Douglass v. Whittemore*, 32 Vt. 685.

Where, upon the partition of land and a mill

tract between Green and Stadden and the canal commissioners one half of the water in the Fox river was to be diverted from that stream and caused to flow through the feeder, and that said Green and Stadden reserved the right to withdraw from the feeder and use for their own purpose one half of the water so to be taken from the river. "diminished as that quantity may chance to be, in the just measure of its proportion, by the leakage, evaporation, etc., necessarily incident to such good and workmanlike dam and lock structures as shall be deemed requisite for the said feeder and basins and useful to the state, and after the necessary quantity has been drawn out for the purpose of the navigation of the said canal, but agreeing that, in the application

privilege, the tenant in common who becomes the owner of the pond and dam appurtenant to and above a mill grants to the tenant in common who becomes possessed of the mill under the partition the mill estate which borders on the stream, "together with a privilege to build and keep in repair a trench not exceeding 7½ feet wide, including all necessary materials of stone, plank, or timber, from the dividing line westward into the pond, bounding," etc., "with six tenths of the water appertaining to said divided premises," the grant will be construed as granting six tenths of the water power, and not merely that portion of the water; and in such case those claiming under the owner of the dam and pond cannot destroy such dam to the injury of those who claim under the owner of the mill estate,—especially where, at the time of the partition, the water power from the pond was necessary to the operation of the mill, and the deed of partition described the estate as "certain lot of land and water privilege;" and where it appears that for more than forty years the water has been conducted from the pond, through the trench, to the mill without objection or question as to the right, during which time the expense of repairs in the dam and flowage drainage has been paid by the owners of the dam and owners of the mill, proportionally. *Matteson v. Wilbur*, 11 R. I. 545.

The conveyance of a grain elevator together with the perpetual use of water power and the machinery of the grantor's adjoining mill, by which the elevator is operated, for which right consideration equal to that paid for the elevator is given, conveys an easement, not merely to a water power, but a right to have that power delivered to the elevator so as to operate the same without any further cost than the purchase price, and is a conveyance running with the land, and may be enforced by the grantee of the elevator against the grantee of the mill property, and is not a mere personal license to use water from the mill race by means of the machinery in existence at the time of the sale. *Hottell v. Farmers' Protective Asso.* 25 Colo. 87, 53 Pac. 327.

When a deed of a mill site grants the right to draw a given proportion of the water when and so long as it runs over the dam, and none at any other time, except that if the grantor or his assigns should not want to use it, the grantee may do so (subject to a factory right); 67 L. R. A.

or use of said fourth part aforesaid, the same shall be drawn out within ¼ of 1 mile from the head of the guard lock, according as and in the manner to be directed by said commissioners." The *Ottawa Hydraulic Company*, in the action of trespass brought against the appellant *Merrifield*, contended that, under the true construction of the contract between Green and Stadden and the canal commissioners, Green and Stadden reserved, and that they and their heirs and assigns were entitled to, the one-fourth part, only, of the water which came into the feeder from the river, diminished as that quantity might chance to be by evaporation, etc., and for the purpose of navigation of the canal, as specified in the contract. The canal commissioners construed the

the grant is to be construed as conveying, (1) all the water in the river (except the factory right) when the grantor or his assigns do not want to use it, and (2) the stated proportion when it runs over the dam, the grantor being confined to his then customary use; and whenever, with such use, there is sufficient water to run over the dam, then the grantee has a right to use his proportion of the water in the stream; and a construction of such instrument is not to be adopted whereby there passes to the grantee only the specified proportion of water when it runs over the dam, with a reservation to the grantor of everything else,—a tenancy in common of the water running over the dam, and a lesser wholly subordinate interest in any more according to the will and desire of the grantor and his successors in title. *Safford v. Gaysville Mfg. Co.* 71 Vt. 86, 42 Atl. 615.

Under a conveyance of land and water privilege describing the latter as the right to raise and pond back the water of the river running through the premises to a designated point, with the right to use all the water then used or which might thereafter be used at the two privileges owned by the grantor and situated above the premises conveyed, and followed by a covenant that the grantee should at all times have as much water to use as would equal the amount usually required, with a properly constructed breast wheel, to run six complete sets of woolen machinery during twelve hours of each working day, provided that the dam of the grantee should be kept properly graveled and the flume kept in suitable repair,—it was held that the privilege conveyed was limited by the provisions of the covenant, and the grant was of only sufficient water to run six sets of machinery during twelve hours of each day. *Fitch v. Belding*, 49 Conn. 469.

Under a grant from the owners of a mill pond conveying the right at all times of taking and using the water from the pond for any other mill which should thereafter be erected upon the site of the grantee's present gristmill to the same extent that they now have a right to do, or have been accustomed to do, for the operation of their said gristmill, the grantees acquired, not only a confirmation of their existing rights, but the right to the use of the water which they had been accustomed to use, although such customary use had not ripened into a right. *Avon Mfg. Co. v. Andrews*, 30 Conn. 476.

Green and Stadden contract as did the hydraulic company.

It appeared from the transcript of the proceedings had in the trespass case which the hydraulic company brought against Merrifield that the circuit court, in hearing and disposing of that proceeding, gave to the Green and Stadden contract the same construction contended for by the Ottawa Hydraulic Company, and under such interpretation of the contract entered judgment against Merrifield. The canal commissioners accepted this interpretation and decision of the circuit court as the true and legal meaning and construction of the Green and Stadden contract, and as fixing the rights of Merrifield and the Ottawa Hydraulic Company in respect to their rights,

The purchaser of a mill site under a grant conveying all the water power thereat and giving the right to construct dams on the grantor's land in aid thereof is not restricted to the water power which had at one time been used at such site by the grantor, but is entitled to whatever water power might be created at such point; and to make such water power available the height of dams may be increased, and, if necessary to the security and most beneficial use of his mill, the location of a guard lock may be changed, providing such changes do not interfere with or impair the free enjoyment of an upper mill by the grantor or his successor in interest. *Mack v. Bensley*, 63 Wis. 80, 23 N. W. 97.

A grant of water power equal to the quantity which a third person is entitled to draw from a reservoir under an indenture between the owners of rights thereon, which right is by the indenture fixed at the amount of water which will pass through a certain number of gates of specified dimensions, will convey only the amount of water which will pass through like gates, and not enough additional to make up for the difference in flow between the location of the works of the grantee and those of the person mentioned. *Bardwell v. Ames*, 22 Pick. 333.

Under a grant of 375 cubic inches of water under a 13-foot head at all times when there shall be so much water in the race more than shall be necessary to drive advantageously the mill on the premises granted with two run of stones and certain other machinery, the grantee is entitled to 375 inches under the head of 13 feet in addition to the amount necessary to drive the mill and machinery, and not simply what is left of it after deducting what shall be used under the prior right; and the grantor is bound to make reasonable effort to remove ice and slush which prevent the water from flowing into the race. *Torrence v. Conger*, 55 N. Y. 680.

Where a person acquires title to land on one side of a river and a milldam, including the use of one half the water power of such dam, which is situated at the head of an island in the river, such water to be taken from his side of the stream to its center; and by means of a dam across a slough between his land and the island he constructs a mill pond into which he conducts the water through a sluiceway from the main dam; and afterwards by deed he conveys

respectively, in the water which came into the feeder.

It appeared from the record of the proceeding in the action of trespass that the issue was whether the appellant Merrifield was receiving more water from the feeder than he was entitled to take as an assign of the said Green and Stadden, and that the determination of this issue involved the construction by the court of the provisions of the contract between Green and Stadden and the canal commissioners in respect of the reservation by Green and Stadden of the right to use water from the feeder. The trespass case was heard by the court without the intervention of a jury. The litigants presented to the court propositions to be held as the law applicable to the contentions

to another the right to one sixth of the water power of such mill pond remaining after he has reserved and set apart as preferred water power for his own use a certain quantity of water to be drawn under the full head that can or may be obtained,—such grantee acquires thereby the right to the use of one sixth of the whole residue of the water power, after such stated quantity has been reserved, and not merely of the half, and this, too, not only of the water power then obtained, but of the additional water power subsequently acquired by such grantor by purchase from the owners of the other half thereof on the other side of the river; and such purchaser is not entitled to preference as to such additional supply as against his grantee. *Batavia Mfg. Co. v. Newton Wagon Co.* 91 Ill. 230.

A subsequent general clause in a deed granting all the water of a designated river which can be conducted through a ditch and flume, the grant of which by a prior clause minutely and specifically describing the same is specifically limited to a half interest, conveys only a half interest therein, and not the whole thereof, as such first clause clearly indicates the intention of the parties thereto and the subsequent general clause must be construed as limiting the extent of the grant to its specific and particular description. *Fogus v. Ward*, 10 Nev. 269.

Where the owner of a tract of land through which a small stream flowed and on which had been erected a tannery and three dams conveyed, at a time when two of the dams had gone out of existence and entirely disappeared and the third was in a dilapidated condition, the water privilege, with the power and appurtenances thereunto "as they now exist," including absolute title to the tannery with appurtenances, with the right to repair and rebuild the dam, it was held that the grantee acquired only the dam existing at the time of the conveyance, and could not construct one at a different place. *Ferries v. Knowles*, 41 Conn. 308.

Under a covenant that a grantee should have the privilege of using water from a pond "when and at all times when water is and remains in said pond sufficient for driving and running the machinery of a gristmill, the property of grantor, and the said fulling and carding machine hereby sold to grantee;" and "provided always that when and whenever there is a

between them. These propositions asked the court to construe and interpret the Green and Stadden contract according to the respective views of the parties. The court refused to hold the propositions asked on behalf of the appellant Merrifield and held that the propositions presented in behalf of the hydraulic company correctly construed the contract.

Proposition No. 1 asked by the hydraulic company and held by the court declared that, under the proper construction of the Green and Stadden contract, the water which the said Green and Stadden reserved "was the one-fourth part of the water of the Fox river which passed through the guard lock at Dayton, Illinois, into said feeder, diminished as that quantity might

chance to be, according to the provisions of said release in that regard."

Proposition No. 2, presented in behalf of the hydraulic company and held by the court, was as follows: "That, under the release of water power in question made by John Green and William Stadden, the said John Green and William Stadden, their heirs and assigns, did not become entitled to withdraw from the Fox river feeder a quantity of water equal to one-fourth part of all the water in the Fox river at Dayton, Illinois, only diminished by its proportion of leakage, evaporation, and water for the navigation of the canal, as more particularly set forth in said release, even though such quantity of water might be all the water flowing in said feeder; but the true in-

scarcity of water in the said mill pond the said grantee shall be at liberty to use only so much of the water in the said ponds as shall be sufficient to turn one water wheel,"—the grantor was entitled to sufficient water to drive his mill before the grantee could use any, and grantee was not, by the proviso, entitled at all events to enough to turn one water wheel. *Craske v. Huffman*, 27 U. C. Q. B. 116.

3. Exceptions and reservations.

Rights to water power may be created by exceptions from grants and reservations of rights when granting others, and they have been frequently created in this manner. The same rules apply which apply in case of exceptions and reservations in instruments conveying real estate. The exception must not be repugnant to the grant.

"Under a lease of a fulling mill together with the water course and flood gates in trust for the benefit of the lessor's family, an exception of free liberty to the lessor at all times to divert the water from the mill for the watering of meadows which he shall think proper is not repugnant to the grant, and includes water rents for flooding meadows with water which is wholly diverted from the mill. *Lambert v. Bennet*, 3 Smith, 84.

A clause in a deed granting land which includes an unmentioned stream, reciting that it is the intention "to convey so much of the privilege of the water as shall be sufficient for the purpose of a mill whenever there is a sufficiency therefor," is not repugnant to the grant, but is good as a reservation to the grantor of the surplus water. *Sprague v. Snow*, 4 Pick. 54.

The tendency is to construe the reservation most strongly against the grantor, since, the instrument being his, it will be presumed that he mentions all he intends to reserve.

A reservation in a grant of the right to draw water from a mill pond of the right to use water necessary for a gristmill will not include the right to continue the use of water for domestic purposes, which is not necessary for the operation of the mill. *Crawford v. Parsons*, 63 N. H. 438.

A grant of water privileges sufficient to run a certain mill, with a reservation of water sufficient at all times to work grantor's mills as now used, will be held to reserve only the quantity of water then actually used, rather than to refer to the total capacity of the mill for using water; and grantor is not entitled to more water, except when there is a surplus over that required by the grantee's mill. *Wyman v. Far-*

rar, 35 Me. 64.

A grant of all water power in a river except sufficient to operate certain mills, which is limited to 100 horse power, reserves only as much power, up to the stated amount, as may be enough to drive the described mills. *Moore v. Wilder*, 66 Vt. 33, 28 Atl. 320.

A reservation in deeds of water power of sufficient power to drive six run of millstone and necessary machinery will be limited to a certain amount, which was at the time and has been since sufficient for that purpose, where the grantors, on the execution of subsequent grants, represented that as the amount so reserved, and were assessed for their proportion of the cost for repairing and rebuilding the dam on the basis of that amount. *Janesville Cotton Mills v. Ford*, 82 Wis. 416, 17 L. R. A. 564, 52 N. W. 764.

In an action for unlawfully diverting water, a reservation in a deed, the common source of title of both parties, of the privilege of half the servient mill owned by a third party, being in effect only an exception from the privileges conveyed, is to be measured by the extent of such third party's title at the time of the grant. *Rogers v. Bancroft*, 20 Vt. 250.

But the language will be given a reasonable construction to effectuate the intention of the parties as far as possible.

A reservation of water from a privilege for grantor's sawmills will reserve water power for mills about to be erected, although the evidence shows that grantor owned no mills at the time of the grant. *Blake v. Madigan*, 65 Me. 522.

A reservation in a deed of "the free and unobstructed use of the water which shall run or be turned into" a channel means and is equivalent to "the natural flow of the water that may run or be turned" into that channel. *Skowhegan Water Power Co. v. Weston*, 94 Me. 285, 47 Atl. 515.

A reservation in a conveyance of land adjoining a mill pond of the right to a mill then in operation, together with its appurtenances, includes the right to sufficient water to run the mill; and the grantee constructing a mill on the land conveyed can use the water to such an extent only as will not interfere with the

terpretation of the meaning of said release is that said John Green and William Stadden, their heirs and assigns, are only entitled to withdraw from said feeder one fourth of the water flowing in said feeder, and that one fourth subject to the limitations and reductions set forth in said release, and said one fourth subject to the further limitation and control of the canal commissioners or some authorized agent of the state to the extent that the water of the canal should not be reduced below the depth of 6 feet during the season of navigation."

Other propositions, giving the like construction to the contract, were presented to the court by the hydraulic company, and were approved as correct construction of

grantor's full and perfect use of the water. *Leggett v. Kerton*, 2 Rich. L. 156.

A grant of a mill site "with the right of use of all water not necessary in driving the wheel, or its equal, now used to carry the machinery in the shingle mill," belonging to the grantor, reserves the right to the water necessary to drive such wheel, although more machinery was operated by it than the shingle machine; and the same quantity may be used for other purposes. *Warner v. Cushman*, 82 Me. 168, 19 Atl. 159.

When an owner of both sides of a stream, in the middle of which is a ledge dividing it into main and subsidiary channels, who maintains a dam across the main channel ordinarily sufficient to furnish power to a gristmill on that side, but supplemented by temporary obstructions diverting the lesser to the greater current, deeds a sawmill site opposite the gristmill, with a right to dam and use the surplus water on the inferior side so as not to injure the gristmill,—there is reserved to the gristmill an unimpaired right to use all the water from both channels that may be needed to run it to its full capacity at the time of the grant; and the servient mill power will be enjoined from drawing down the level of the subsidiary channel so that its waters do not flow into the main one. *Eastman v. Parker*, 85 Vt. 643, 27 Atl. 611.

An exception by one owning both sides of a stream with a dam and mill pond serving a sawmill on the one bank and a gristmill, carding machine, and fulling mill on the other, in a deed of the sawmill site "with the privilege of drawing water to carry said mill, except in times of low water, when it is wanted for the carding and cloth dressing and for the gristmill," the grantee further having "the privilege of water to carry a turning lathe when it can be spared from the other wheels,"—was construed to be a reservation in favor of the works on the opposite side of the creek of all the water requisite successfully to operate them whenever it was low, either naturally or in consequence of the sawmill's use not leaving a sufficient supply. *Rood v. Johnson*, 26 Vt. 64.

In a reservation in a deed of a claimant for damages for the continuance of a canal for the benefit of a mill, the word "trench" was held to include a section of a canal, used as such at the time of the execution of the deed, as necessary to effect the avowed purposes of the reservation, and to carry out the intent of the par-

ties; notwithstanding there was another, but insufficient, outlet of water from the pond to the mills supplied by it, called "a trench." *Bailou v. Harris*, 5 R. I. 419.

Under a deed reserving to the grantor the privilege of drawing water from the grantee's ditch, and providing that the grantee keep a spout 10 inches square at the bottom of said ditch, to which the grantor shall have access for the purpose of drawing such water, it became the duty of the grantee, upon his acceptance of the deed, to put in the spout; and a court of equity will compel him to do so, although it is to be placed upon land other than that conveyed to him by the grantor. *Randall v. Latham*, 36 Conn. 48.

4. Sufficiency of conveyance.

To be effective the language of the grant must be such that it can have some operation upon existing conditions or those in the immediate contemplation of the parties. But it will be given effect if it is possible to do so. The insertion in the instrument of language intended to be of no effect will not be presumed.

A deed conveying the right to use water "for any purpose whatever" is a sufficient grant of the water, not only for canal, but for mill, purposes. *Lonsdale Co. v. Moles*, 21 Monthly Law Rep. 658.

A grant of water is not invalid for uncertainty because it is to be measured by the necessities of machinery to be subsequently erected. *Valley Pulp & Paper Co. v. West*, 58 Wis. 599, 17 N. W. 554.

A reservation in a deed of sufficient water to supply and work a No. 5 hydraulic ram is not void for uncertainty when such quantity is a matter capable of ascertainment by computation. *Walker v. Lillingston*, 137 Cal. 401, 70 Pac. 282.

An agreement to deliver a deed to land with the right of erecting a dam and flowing grantor's land is not fulfilled by the offer of a deed to the land alone, if the omission of the flowage right was a substantial defect. *Wilson v. M'Neal*, 10 Watts, 422.

A deed conveying property on which a water right is used, together with the appurtenances belonging thereto, is sufficient to pass title to the water right though it is not expressly mentioned or described, where the use of the power in connection with the premises is open and visible and essential and incidental to the rea-

Rep. 608. That is to say, as between the Ottawa Hydraulic Company and the appellant Merrifield the question as to the quantity of water Green and Stadden and their assigns were entitled to take under the correct construction of the contract with the canal commissioners arose for decision and was conclusively and finally settled in the trespass suit, and that the court in such litigation having decided that under said contract said Green and Stadden reserved for their own use and for the use of their heirs and assigns the one-fourth part, only, of the water which came into the feeder from Fox river, subject to be diminished by evaporation, etc., and after the necessary quantity had been drawn out for purpose of navigation of the canal, etc., that decision is

final as between the parties to that litigation.

The Green and Stadden contract provided that in the application or use of the said one-fourth part of the water reserved by Green and Stadden, the same should "be drawn out of said feeder within $\frac{1}{4}$ of 1 mile from the head of the guard lock, according as and in the manner to be directed by the said commissioners." It was within the power of the commissioners of the canal to control and direct the withdrawal of the water from the feeder by Green and Stadden, and by the appellant Merrifield, the assign of Green and Stadden; and, the commissioners having sold and leased to the hydraulic company all of the water and water power furnished by the said Fox river

sonable and intended enjoyment of the property, notwithstanding that the land was described by metes and bounds, or that the water power is not derived or taken from lands owned by the grantor. *Dexter Sulphite Pulp & Paper Co. v. Frontenac Paper Co.* 20 Misc. 442, 46 N. Y. Supp. 363.

b. Grant of flow of stream.

Where a grant of land excepts and reserves to the grantor, his heirs and assigns, the sole and only right of the stream of water running through it, and the grantee is not to erect any kind of waterworks whatever on said stream, but the grantor reserves the same to himself, there is reserved only the right of using the water power, the water, and all other rights in it passing to the grantee. *Provost v. Calder*, 2 Wend. 517.

A grant of the free use and privilege of a stream flowing through other lands of the grantor, with the unobstructed right of conveying the water in an open race to a certain mill as it is now running, with a right to enter to cleanse, repair, and scour the race, confers a right to use the quantity required for the mill for such purpose as the grantee may desire. *Davis v. Hamilton*, 6 Pa. Super. Ct. 562.

A grant of mill property and water power, together with the "privilege of excavating and drawing said creek as low as he pleases at all times," conveys to the grantee, not only the right to the use of the water power, but the right to divert such creek from its natural bed permanently and perpetually if it becomes necessary for the purpose of using the water power at the mill. *Potter v. Burton*, 15 Ohio, 196.

A grant by a riparian owner of the lower part of his land, together with the use of the water of the stream for the purpose of operating the mill of the grantee "free from interference or detention," does not convey the use of all the water in a regular flow or in its natural condition uninterrupted or unaffected by the reasonable use of the stream above; but the grant must be construed as subject to the reasonable use of the stream above by the grantor, leaving the question of what constitutes such reasonable use to be determined by general principles of law independent of the grant. *Red River Roller Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 187.

Purchasers from the owners of a sawmill of land lower down, with the right at all times to

use "all the water which naturally flows below said sawmill in said stream unobstructed by" the grantors, take only the right to the water which flows below such mill when the same is in operation, and not the natural flow unobstructed by the grantors' dam, in view of the limitation therein, on the construction of a dam by the grantees at a point "below" such sawmill, and the limitation of the back flow therefrom to the foot of the overshot wheel of the sawmill, and the fact that but for the sawmill dam, which stores the waters of the wet season, the grant of water power would be comparatively useless during the summer. *Oregon Iron Co. v. Trullinger*, 2 Or. 311, Affirming 3 Or. 1.

A grant by the owner of a head race, mill, and water power, of a small tract of land below the mill, together with all the water power on said mill lot "below" such mill and clear of the wheel thereof, does not give superior rights to the grantee, nor entitle him, as against a subsequent owner of the mill, to have the water come to his mill in the same volume, or with the same constancy, as if the upper mill was not there; but he takes subject to the reasonable use thereof at the upper mill. *Patten v. Marden*, 14 Wis. 473.

The grantor of the full and uninterrupted right and use of all the water falling into a dam and race, with the ground so used thereby, has no further interest therein, and cannot prevent a subsequent purchaser from diverting the stream for domestic uses by a community. *Hannum v. West Chester*, 70 Pa. 367.

c. Grant of dam.

A deed conveying the right to erect and maintain a dam, with the right to so much of the land as may be necessary therefor, will convey all of the grantor's interest in the land. *Monmouth v. Plimpton*, 77 Me. 556, 1 Atl. 693.

The reservation in a deed of land bounded on one side of a stream of the right to butt a dam on both shores of the stream will not reserve to the grantor the right to the use of the whole water of the stream. *Arthur v. Case*, 1 Paige, 447.

But a grant to a corporation engaged in constructing a water-power plant on one side of a river, and to "its successors and assigns forever," of the right to abut the dam upon the opposite bank and to keep the same in repair is a grant of an easement in fee appurtenant to

feeder which the said commissioners could lawfully sell, and which could be used without interfering with an ample supply of water for said canal, it became the duty of the said canal commissioners to take such steps as might be found proper to so control the withdrawal of water from the feeder by Merrifield as should be necessary to enable the hydraulic company to obtain the quantity of water it was entitled to have and use under the contract between it and the canal commissioners. Merrifield and the hydraulic company having submitted to a court of competent jurisdiction, in the action at law regularly pending between them, the question of the quantity of water Merrifield was entitled to have from the feeder under the proper construction of the Green

and Stadden contract, and that construction having been settled by the judgment of the court, which judgment remained unreversed and in no manner impeached, the canal commissioners would be fully justified in taking such steps as might be necessary and proper to restrict the outflow of the water in Merrifield's flumes in accordance with his rights as determined by the court in the suit between himself and the hydraulic company. It was within the power, and seems fairly to have been the duty, of the canal commissioners to adopt some adequate and proper means to restrict the flow of the water into Merrifield's flume so that he should receive the quantity it had been determined by the court that he was entitled to use and enjoy under the Green and Stadden contract. The

the power plant, so as to pass to successors in title; and it will pass by a grant of the dominant estate without special mention thereof. *Sweetland v. Grants Pass New Water, Light & P. Co. (Or.)* 79 Pac. 337.

A reservation, by one owning the bed of a stream, in a conveyance of one half of such bed to the opposite owner, of the right to butt a dam on both shores as he shall think necessary, does not deprive the grantee of the right to participate equally in the use of the water. *Case v. Haight*, 3 Wend. 632.

The conveyance of a certain half of a milldam, together with "the privilege of taking the water from any part of the said northerly half of the milldam," confers upon the grantee the right to one half the water power raised by such dam. *Runnels v. Bullen*, 2 N. H. 532.

A deed of a dam with the privilege of flowing during the winter only land of the grantor higher up the stream "for the benefit of carrying on the blacksmith business" does not limit the right to use the stream at all seasons for any reasonable purpose, including additional power subsequently created by the grantor's improvements. *Tourtellot v. Phelps*, 4 Gray, 370.

The reservation in a deed of the right of erecting a dam on the bank of a creek at a place specified, and of the right to occupy and possess the aforesaid premises without any let, etc., creates such an interest in the soil that ejectment may be maintained. *Jackson ex dem. Loux v. Buel*, 9 Johns. 298.

A grant of lands and one half of a designated dam "with all the privileges thereunto appertaining in said proportion" makes the grantees tenants in common with the grantor in the whole of the dam and water power, with the right to use one half the water therein when the head is above a designated height, although such half exceeds the amount specified in subsequent clauses as that to which such grantees are entitled when the head is above that height, where such specified amount is one half the estimated number of inches created by the dam, as such subsequent clauses are not intended to restrict the general grant, but only to define the interests and obligations of the respective parties in respect to the dam. *Richards v. Koenig*, 24 Wis. 360.

The conveyance, by general description, of lots on which a dam rests, gives the purchaser no title to the dam or land thereunder in the 67 L. R. A.

bed of the stream, where, previous to such purchase, the owners thereof had sold and leased part of the water power created thereby, and subsequently sold and leased other portions thereof, with covenants on the part of the grantees to contribute to the maintenance of the dam, and the consideration paid for such lots was but a small part of the value of the dam and water power; as an intention is clearly manifest thereby to separate the property in such dam and water power from the upland. *Smith v. Ford*, 48 Wis. 115, 2 N. W. 134, 4 N. W. 462.

The conveyance of premises on one side of a river, together with one half of a milldam, with the privilege of taking water from any part of the half granted by the grantor, who owns the other half of the dam and a mill on the other side of the river, does not confer upon the grantee such an absolute ownership in his share of the dam, or such unlimited rights to the water power, as would permit him totally to destroy or injure his portion of the dam, or draw water from it in unlimited quantities, or in any manner or at any period of time. *Runnels v. Bullen*, 2 N. H. 532.

The grantee of the use of a dam, who agrees to keep in repair one-twelfth part of the dam, as it is expected that he will use about that proportion of the whole, cannot be restricted to that proportion under a grant of power for "tanning purposes in all its various branches." *Deshon v. Porter*, 38 Me. 289.

A reservation in a deed of the right of raising, as well as of rebuilding, grantor's dam does not refer to one operation; but, after a dam has been raised, if it is swept away, he may enter and rebuild it. *State v. Suttle*, 115 N. C. 784, 20 S. E. 725.

The actual building of a dam under authority to construct it near a point specified will fix the location so that neither party can change it without the consent of the other. *Evangelical Lutheran St. John's Orphan Home v. Buffalo Hydraulic Assn.* 64 N. Y. 561, affirming 4 Hun, 419.

But the grantee by deed of the use of the water of a creek running through the grantor's land and the privilege of building a dam and race across such creek on such lands so as to get the entire benefit of the water of such creek, having once selected a site and erected his dam and race, is not thereby restricted to that spot if it is found impracticable to secure

canal commissioners caused the weir in question to be constructed and placed in Merrifield's flume for the purpose of so controlling the flow of water from the feeder that he should withdraw no more than he was entitled to have and use under the decision of the court in the suit which the hydraulic company had instituted against him for the purpose of obtaining the judicial ascertainment and declaration of the rights of Merrifield under the Green and Stadden contract. Whether this weir was so contrived and constructed and so placed in the flume as to effect the correct apportionment of the water in the feeder demanded careful consideration of the chancellor. Our investigation of the record as to this point has brought us to the conclusion that the appel-

lant Merrifield had just cause to contend that the weir deprived him, during a portion of the time, of water which he was entitled to have flow into the flume, and that it deprived him at all times of the full benefit of what is known to the parties as the "head" of water.

The flume was built in 1838 or 1839, and, so far as the evidence discloses, no material change has since then been made in it,—certainly not since 1855, a period of more than forty years,—before any contention arose as to the rights of the assigns of Green and Stadden to take water from the feeder through the flume. The flume was constructed with a permanent stone bottom, which put it on a level with the bottom of the feeder. The mouth of the flume was

by that dam the benefit of the water. *Conwell v. Brookhart*, 4 B. Mon. 580, 41 Am. Dec. 244.

A grant of a joint interest in the water in a raceway, with the right to repair or rebuild the dam, does not limit the right of the grantor to enlarge the dam if it can be done without impairing the rights of the grantee. *Butler Hard Rubber Co. v. Newark*, 61 N. J. L. 32, 40 Atl. 224.

The right granted by deed to the use of the water of a creek and to build a dam and race on the grantor's land for that purpose implies a right to the exclusive use and possession of so much of such land as may be necessary to that end, which continues so long as such dam is maintained and used for the purpose for which it was built. *Conwell v. Brookhart*, 4 B. Mon. 580, 41 Am. Dec. 244.

The conveyance of a water privilege will include the right to maintain the dam as it then exists and has been used previous to the grant. *Oakley v. Stanley*, 5 Wend. 523.

The partial destruction of a milldam by a freshet is not a natural and reasonable wear and tear, within the meaning of an exception to delivery of possession of a mill property at a future day under a contract to convey. *Green v. Kelly*, 20 N. J. L. 544.

A deed from the owner of the land on one side of a milldam, conveying the title to the lands upon which an abutment to the milldam stands, with, all and singular, the rights and appurtenances thereto belonging, vests in the purchaser all such owner's right to the water power created by the dam, at the height it was erected at the time of such purchase; and a court of equity will enjoin his use thereof, without such purchaser's consent, either through the dam or by a race cut through his own lands to the pond created by such dam, above. *Wall v. Cloud*, 3 Humph. 181.

Where tenants in common of a dam and mills partition them, and each covenants with the other to keep in repair a distinct and separate portion of the dam, case will not lie by one against the grantee of another for not repairing, but the remedy must be covenant. *Wilbur v. Brown*, 3 Denio, 356.

d. Head and flow.

Where a right is granted to construct a dam for a water power of a certain number of feet head, the distinction between the general or 67 L. R. A.

apparent and the efficient head of water power cannot be considered in ascertaining the proper method to be employed in measuring the number of feet head, it appearing that no such distinction was known or recognized at the time of the grant. *Langness v. Pettigrew*, 5 Dak. 45, 37 N. W. 758.

The grantee of a specified head of water from the works of a navigation corporation obtains no contract rights different from those of a riparian owner of a natural waterfall. *McKeen v. Delaware Div. Canal Co.* 49 Pa. 424.

The fact that a conveyance of a mill site and the right to a certain number of inches of water describes the lot by metes and bounds, and fixes the river boundary of the lot at low-water mark, does not limit the "head" of water power so as to prevent the grantee from excavating his tail race below the then low-water mark. *Forrest Mill Co. v. Cedar Falls Mill Co.* 103 Iowa, 619, 72 N. W. 1076.

In ascertaining the lowest practical point where a mill wheel can be set, reckoning from the top of a dam, to determine the quantity of water up to a definite limit of horse power excepted in a water grant, the location of the wheel respecting the bed and banks of the stream, the character of the mill business, and the expense of making and benefit accruing from a change, are properly taken into account. *Moore v. Wilder*, 66 Vt. 33, 28 Atl. 320.

A deed that conveys "the right of drawing as much water as will vent off through a gate or opening that is equal to 10 inches square" in a dam is not impaired by the subsequent diminishing of the head of water at the dam by grantor or his successors. *Gray v. Saco Water Power Co.* 85 Me. 526, 27 Atl. 455.

e. Races, channels, and flumes.

One to whom a lot abutting on a raceway is granted, with the right to maintain the raceway, enter the channel, and take power therefrom, acquires a perpetual easement therein, and is entitled to have the channel kept open and unobstructed. *McMillan v. Lauer*, 24 N. Y. Supp. 951.

A grant of land with a right to draw water from a dam across a brook flowing alongside of it is subject to a proviso that the flume shall be constructed so as not to exceed a foot in depth when the pond is full, and that the grantee shall never draw any water when none

provided with two gates, which were moved up and down by cogs designed and made for that purpose. By means of the gates the quantity of water which would flow from the feeder into the flume could be restricted or the flow thereof entirely obstructed. The inside dimensions of the flume were 7 feet in width by 5 feet in depth, and the bottom of the flume being on a level with the bottom of the feeder, the flume would therefore receive water whenever there was any water in the feeder, unless the gates were closed entirely down. The flume was of the length of 25 feet, the water being discharged from it into what is called the "penstock." The weir placed in the flume by the direction of the canal commissioners was so constructed that no wa-

ter could flow through the flume into the penstock unless there was more than 3.2 feet of water, in depth, in the feeder. The flume as originally constructed in 1838 or 1839, and as maintained continuously from that early date, received water from the bottom of the feeder, whenever there was any water in the flume, unless the gates were closed down. The flume was maintained during the long years after its construction before the Ottawa Hydraulic Company had contracted for water, and for many years thereafter, received water from the feeder under conditions and circumstances under which no water could flow into it after the weir was installed. The flume, in the absence of the weir, received the water with a head of water at all times when water

runs over the dam. *Cowdrey v. Colburn*, 7 Allen, 9.

Under a reservation in a deed of land bordering upon a mill pond, of a right of drawing from the pond such a portion of the water as may be necessary for fulling cloth or skins, the grantor is entitled to an easement for the passage of water from the pond through the premises conveyed. *Cocheco Mfg. Co. v. Whittier*, 10 N. H. 305.

The owner of a mill operated by water power is also the owner in fee of the land covered by the mill race through which the water supply is conducted, and of water privileges necessary to operate the mill, under a deed conveying a parcel of land as a mill site and water privileges from a certain race, with the right to widen the race and to keep the same in repair, reserving in the grantor the privilege to pass over the same and to put his fences on its bank, although such land is not specifically described in the deed,—especially as he has been in continuous and uninterrupted possession thereof for more than twenty years. *Branson v. Studabaker*, 133 Ind. 147, 33 N. E. 98.

The grant by the owner of the lower of a series of mills supplied by a flume, together with a certain fraction of the water power and flume, of an intermediate mill on the flume, with the water rights and portion of flume belonging thereto, will refer to the flume as it visibly exists, so as to prevent his claiming against his grantee the right to enlarge the flume across the granted property, on the ground that it does not carry water enough to give him the share of the power belonging to his lower mill. *Gilford Hosiery Co. v. Pitman Mfg. Co.* 63 N. H. 500, 3 Atl. 641.

A provision in a deed granting the rights of the grantor in a raceway which includes the right to enlarge it, which gives the grantor a right to build a dam below that from which the race leads, and to flow the granted land to within 5 feet of the top of the former dam, will not restrict the right of the grantee to enlarge the raceway. *Butler Hard Rubber Co. v. Newark*, 61 N. J. L. 32, 40 Atl. 224.

Under a grant of an artificial water course together with the springs or streams of water flowing into or feeding it, the grantee is entitled only to the water flowing through the water course from the several springs and streams of water flowing into it, and cannot enlarge the channel so as to enable it to carry

off a greater amount of water than its capacity would have permitted at the time of the conveyance. *Taylor v. St. Helen*, L. R. 6 Ch. Div. 264, 46 L. J. Ch. N. S. 857, 37 L. T. N. S. 251, 25 Week. Rep. 885.

A grant of "so much of any land" as will conveniently convey water to grantee's mill conveys an easement for the race determined on by the parties at the time of grant to be necessary for the mill. *Merriman v. Russell*, 53 N. C. (2 Jones Eq.) 470.

One who is in possession, using a mill race under a contract by which he is entitled to its use in the place where the race now runs, although the width mentioned in the contract is 22 feet, is entitled to use it to the full width as it existed at the time of the purchase of an upper mill upon the race subsequent to making the contract, although that width was 28 feet. *Daniels v. Chaffin*, 28 Iowa, 327.

Where the owners of two pieces of land and a mill pond conveyed the upper piece together with one half of the mill pond, reserving the privilege of "conveying water from said dam through a conductor similar to the one now in use," for the purpose of supplying the lower mill, and at that time the water was being taken to the upper mill through a flume, and to the lower mill by means of a conductor inserted in the flume, it was held that the grantors retained the right of taking the water in the accustomed manner, and were not compelled to take it directly from the dam,—especially in view of the fact that the parties had placed a similar construction on the grant by their conduct for several years after the conveyance. *Kennedy v. Scovill*, 12 Conn. 317.

A conveyance by one owning land having thereon a saw, a grist, and a clothing mill supplied with water from a flume connected with the flume of the gristmill, of the clothing mill "and water privilege for said mill, flume, etc., as now enjoyed," does not confer the right upon the grantee to enter upon the premises belonging to the owner of the gristmill to repair or rebuild the flume then existing, so that it will be of different dimensions, or occupy a different location or draw more water than the original flume, even though the change might be more advantageous to the owner of the gristmill. *Dewey v. Bellows*, 9 N. H. 282.

A purchaser of a mill and mill pond with the right to run water through a raceway over adjoining land is not restricted to maintaining

flowed into the flume at all, and this the weir interfered with and entirely destroyed, or at least materially diminished. In these two respects the weir injuriously deprived the appellant of the full use and benefit of the water to which he was entitled. The engineer of the canal commissioners who devised the weir conceded that the weir would produce a "slight loss of head," but insisted that he had so designed the weir that the loss of head would be compensated for by an extra quantity of water which the weir would admit for that purpose. He also testified that the water in the flume between the weir and the feeder would have to rise to a depth of 3.2 feet before any water could pass over the crest of the weir into the penstock. Before the installation of the weir

the feeder would receive and convey the water at all times when the gates were raised, as the bottom of the flume and the bottom of the feeder were on the same level.

The adjudication created in the trespass case reached but a single question, namely, the quantity of water the assigns of Green and Stadden were entitled to receive from the feeder. The manner or mode in which they were entitled to take the quantity they had the right to receive was not brought in question in that action. Whether the weir permitted such assigns to receive the quantity in the mode and manner they were entitled to have it under the contract remained to be determined by the chancellor in this proceeding. The chancellor was called upon to determine, among other

the raceway as it was when purchased, but he may make necessary improvements in it to obtain the full enjoyment of the easement. And this will include the removal of deposits from the bed of the race to the land adjoining so as to restore it to its original depth, although it is thereby made deeper than it was when the purchase was made. *Beals v. Stewart*, 6 Lans. 408.

A grantor is not, for the purpose of conducting water to land sold, bound to deepen and widen a race into and through which at the date of the grant water did not and could not come and flow, but is only bound to keep that and another race in such order and repair as that the water may always continue to flow as freely therein as at the time of such grant, under a covenant by the grantor that the grantee shall have the right to the use and benefit of certain races on the unsold land as soon as they intersect a designated line of the land granted; that the grantor will permit water to flow therein without interruption to such line, he keeping the races in good order and repair through his tract; and giving the grantee free access to the sources of the races to increase the streams of water or do any other thing necessary for their improvement. *Carroll v. Cockey*, 3 Harr. & J. 282.

When a grantor deeds premises including a spring and cistern and an aqueduct between them, reserving all the waste water from the reservoir to use on his adjoining lands, with the right to go upon the demised premises and dig up and repair a conduit from the cistern to the adjacent land by paying all damages thereby occasioned,—the grantee is bound to maintain in its original efficiency the supply aqueduct from spring to tank, and if he omits doing so the grantor may restore any impairment, and is not liable for damage resulting from doing so; nor can the grantee thereafter avail himself of the benefit of repairs made at the grantor's expense. *Hill v. Shorey*, 42 Vt. 617.

A grant of the use of a stream of water, declaring that it shall flow in a free and uninterrupted course through a channel therein described into the grantee's land, operates as a grant of the easement of the water course therein described; and, inasmuch as the channel is specified, the grantor has no right to change it where it crosses his land, although no injury is thereby inflicted upon the grantee. 67 L. R. A.

Northam v. Hurley, 1 El. & Bl. 655, 22 L. J. Q. B. N. S. 183, 17 Jur. 872.

Under a conveyance of the privilege of constructing a ditch on the land of the grantor bounded by a river, in the most convenient place to convey the water from the river to lands therein conveyed to the grantee, for the purpose of carrying a mill or any other works that may be erected on said premises, the grantee is entitled to take the water of the river from a point at the upper line of the grantor's land, thereby getting the entire fall of the river,—especially where such fall is scarcely enough for one mill privilege, and the parties by their conduct have placed the same construction on the grant. *Brigham v. Ross*, 55 Conn. 373, 11 Atl. 294.

1. Right to convey; rescission.

The fact that a river is navigable will not prevent a riparian owner from acquiring a right to a power created by the erection of a dam, which he can sell so as to be bound by his deed in favor of a grantee, whatever his rights may be so far as the public is concerned. *Hamelin v. Bannerman* [1895] A. C. 237, 64 L. J. P. C. N. S. 66, 11 Reports, 368, 72 L. T. N. S. 128, 43 Week. Rep. 639, 60 J. P. 22.

One whose ordinary riparian rights have been changed to those of an owner in common with others of a mill pond can convey only an interest in riparian rights which pertain to land thus owned by himself and others, and which had previously been converted into a water power. *Fowler v. Kent* (N. H.) 52 Atl. 554.

The owner of an estate on a stream, entitled to share in the water power belonging to an upper privilege on the stream, cannot affect the rights of other owners in the privilege by a grant to an owner of a lower privilege. *Atlanta Mills v. Mason*, 120 Mass. 244.

An owner of a sawmill and box factory with the right to use a certain amount of water for power, but who is subsequently limited by an award to draw water for the box factory through a certain penstock, which he has enlarged from the original one, only when water is running over the wasteway, can convey only that right to a grantee of the box factory, and not the right he originally had as to both sawmill and box factory. *Horne v. Hitchins* (N. H.) 51 Atl. 651.

A grant of land subject to an easement of flowage for mill purposes entitles the grantee

things: (1) Whether, under the Green and Stadden contract, it was competent for the commissioners to so divert and control the flow of water from the feeder to the flume, as did the weir, that no water could flow into the flume of the appellant Merrifield except at times when there was more than 3.2 feet of water in the feeder; and (2) whether, under that contract, it was competent for the canal commissioners to so construct the weir as to prevent the water from flowing into Merrifield's flume from the bottom of the feeder at all times when he was entitled to have water under the contract. The provisions of the contract with Green and Stadden touching upon the propositions are as follows: "Agreeing that in the application or use of said fourth part, as aforesaid,

the same shall be drawn out of the said feeder within $\frac{1}{2}$ of 1 mile from the head of the guard lock, according as and in the manner to be directed by the said commissioners or other authorized agent. This reservation being subject to the farther limitation that it shall not at any time authorize the subscribers, even within the quantity of said proposition, to reduce the water of the said Illinois and Michigan Canal, during the season of navigation, below the depth of 6 feet, which, only, shall be done by the permission of some authorized agent, of the state." The contract, it will be observed, clothed the canal commissioners with authority and discretion in respect of these matters. Immediately after the execution of this contract of reservation by Green

to receive the rent payable therefor, notwithstanding an exception in the conveyance of the right to flow the land, since the reservation is invalid because appertaining to a thing which the grantor, having conveyed, had no right to grant, and because the thing reserved does not issue out of the thing granted in the deed. *Pollock v. Cronise*, 12 How. Pr. 368.

It is no defense to the specific performance of a contract for the purchase of real estate, including water power of a river dam, that such dam had been washed away at the date of the contract, and, if rebuilt of sufficient height to be of any value, it would overflow lands above the dam and on the opposite side of the river, the right to do which does not exist in the grantor, where such purchaser was acting on his own knowledge and that of his agent of the land and the water power and the value thereof at the time he made the purchase, and bought with the knowledge that the grantor had never seen the land, and knew nothing about it except as informed by his agent. *Jobbins v. Gray*, 34 Ill. App. 208.

Where a tenant in common conveys his undivided share in a mill estate "together with all the privileges and appurtenances thereto belonging or appertaining to the same," and afterwards purchases a lot of land on the stream below, he is estopped, as against his grantee, from making any claim for the diversion of the stream so long as the water is used at the mill in the manner that it was when the conveyance was made. *Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711.

A grant to a navigation company of power to sell in fee simple such water as is not required for navigation does not refer to quantity of interest in the water, but to the period of time in which the grant may be exercised. *Lehigh Coal & Nav. Co. v. Scranton Gas & Water Co.* 6 Pa. Dist. R. 291.

A hydraulic company whose duration and power to make leases was limited by its original charter is authorized to make permanent leases by a subsequent amendment of its charter repealing the provisions limiting its duration and restraining its power to make leases. *Beckett Paper Co. v. Hamilton & R. Hydraulic Co.* 18 Ohio C. C. 200.

A conveyance by three of four cotenants of an aliquot part of water power, together with a mill and mill seat owned entirely by them, is of no validity against subsequent grantees of 67 L. R. A.

all the proprietors, unless the interest in the water power had theretofore been made appurtenant to the lot. *Forrest Mill Co. v. Cedar Falls Mill Co.* 103 Iowa, 619, 72 N. W. 1076.

A grant of a right to use the water of a reservoir when the grantors, who were the owners of an undivided half interest therein, were not using it, is not void on the ground that it impairs the rights of cotenants. *Adams v. Manning*, 51 Conn. 5.

Conveyances made by the owners of lands, riparian rights and water powers in pursuance of an agreement entered into for the purpose of consolidating all interests in such water powers, and contemplating the formation of a corporation for that purpose, will be canceled where some of the signers refused and could not be compelled to convey and others did not own the lands scheduled in their names, so that the original purpose of the corporation could not be carried out and has been abandoned. *Mack v. Consolidated Water Power Co.* 42 C. C. A. 67, 101 Fed. 869.

g. Other matters.

One receiving a deed of a water power subject to the conditions and covenants in a lease thereof to a third person, who takes possession and receives the lands under the lease, will be liable on the covenants to repair. *Cargill v. Thompson*, 50 Minn. 211, 52 N. W. 644.

The grantee in a partition deed of that portion of an entire tract on which is located a distillery erected by the original owner of the tract, together with "the necessary and useful water privileges for the benefit" of the distillery, reserving to one of the grantors the use of the water in the race for his stock as heretofore, is entitled to have the water so used by such grantor as not to pollute it or divert it from its natural flow so as to make it unfit and interfere with its use for distillery purposes, since the incidental use thus reserved cannot be construed to defeat or interfere with the dominant right of the grantee to the beneficial use of the water for his distillery. *Price v. Lawson*, 74 Md. 499, 22 Atl. 206.

Where the lessee of a stream of water is entitled to it in its natural state, so that the turning of heated water into the stream is a violation of the lessor's covenant for quiet enjoyment, the lessee may restrain such action without showing the extent of his injuries where

and Stadden, the commissioners proceeded to construct the feeder and the flumes. The manner in which they caused the flumes to be made disclosed the views entertained by the commissioners as to the rights of Green and Stadden and their assigns in the mode and manner of the use of the water reserved under the contract. The commissioners caused the flumes to be built with the stone bottom of the flume and the bottom of the feeder on an exact level. They caused to be framed in the mouth of each flume two gates, which could be raised or lowered. These gates could be shut entirely down and made to rest on the bottom of the flume, thereby, if both gates were down, excluding all water from the flume; or the gates, or either of them, could be partially raised,

in which event the water would flow into the flume at the bottom thereof. The gates provided the means of controlling and directing the flow of the water from the feeder into the flume, and were placed there for that purpose when the flumes were constructed. If controlled by the gates, the water would enter the flume at the bottom whenever allowed to flow into it at all, and the water would always have a head of water in proportion to the depth of the water in the feeder. If the flumes thus operating should withdraw the water during the season of navigation to such an extent as to reduce the water in the canal to a depth of 6 feet or less, the commissioners could, in pursuance of the conditions of the reservation by Green and Stadden, close the gates

some injury must necessarily result from it. *Tipping v. Eckersley*, 2 Kay & J. 264.

IV. Limitation of rights.

a. As to use.

1. General rules.

In granting water rights the purpose for which they are to be used is frequently mentioned, and the question then arises as to whether or not the grant was limited to such use, so that upon its abandonment the right will revert to the grantor.

The grantor of an easement to use water is entitled to restrict such use to specified purposes, such as cabinet making and furnace operations. *Mandeville v. Comstock*, 9 Mich. 536.

But in grants of water rights where the construction is doubtful, that interpretation should be preferred which will give the grantee an unrestricted, rather than a limited, right to the quantity granted. *Fisk v. Wilber*, 7 Barb. 395.

When by the express terms of a deed an appurtenant right to use water is limited to particular purposes, not merely to a quantity measured thereby, and the grantor reserves the water for all other purposes, upon the permanent cessation of the designated enterprises the use of the entire water reverts to the grantor. *Clement v. Gould*, 61 Vt. 573, 18 Atl. 453.

The mere mention of the mills to be operated by water granted does not limit the water to such mills if the limitation is not made in terms. *Fisk v. Wilber*, 7 Barb. 395.

When the grant of an easement in the use of water is measured by the height of the dam, it is no objection to the assertion of the right that the capacity of the mill has been enlarged, so long as no more water is used than the dam affords. *Casler v. Shipman*, 35 N. Y. 533.

Conditions in a deed which relate to grantee's rights to the use of water at different conditions of the river do not relate to the manner in which, or the place from which, it should be taken, but have reference to the amount granted. *Hammond v. Woodman*, 41 Me. 177, 66 Am. Dec. 219.

The owner of a water power has a right to change his wheel and the manner of using the water, provided he uses no more than formerly; and it is immaterial that thereby the ready and easy way for determining the amount of water

used is destroyed. *Miller v. Lapham*, 46 Vt. 525.

In general neither a granted nor a reserved water privilege is restricted to the purposes expressly specified, but these are rather to be deemed measures of the quantity permitted to be used, unless the language employed evinces a clear intention to limit the use to particular purposes, and the actual use has been uniformly consistent with such limitation. *Adams v. Warner*, 23 Vt. 395.

Although one reason, to wit: That it is more favorable to the grantee, for construing a grant of water privileges for specified purposes, that such purposes measure the quantity rather than restrict the use, if controlling in the construction of a reservation expressed in similar terms, leads to the contrary conclusion,—really that rule is one of strict equivocation, applying only where the words employed bear either of two interpretations equally well, and there is no other legitimate mode of determining the equi-poise. *Ibid.*

The controlling reason for construing a grant or reservation of water privileges for designated purposes, that these measure the quantity that may be used, rather than limit the use, is because it is all important to the interests of business and to the owners of water power that there should be as little restriction upon its use as is consistent with the rights of other adjacent proprietors. *Ibid.*

Whenever the description in a conveyance of water power is in such terms as to leave it in doubt which species of grant is intended, the general rule is to interpret the deed so as to make the privilege conveyed a grant of a certain quantity of power, and not a power limited to a specific use. *Pratt v. Lamson*, 2 Allen, 275.

If it is doubtful from the terms of a grant whether the kind of mill or particular machinery mentioned therein, for which water is to be furnished, indicates the quantity of water and measures the extent of the power intended to be conveyed, or is referred to as a limit of the use to the particular kind of mill or specified machinery, the former construction will be favored. *Carleton Mills Co. v. Silver*, 82 Me. 215, 8 L. R. A. 446, 19 Atl. 154.

Where the grant is of a water power in terms described, and where the privilege itself is the principle subject, if it is left in doubt whether it is a grant of a sufficient quantity of water to

of the flumes and thereby retain the water in the feeder so far as might be necessary to maintain the requisite depth in the navigable channel of the canal. The flumes remained as originally constructed, the gates constituting the means of controlling the inflow of the water, and the owners of the Green and Stadden water powers were supplied with water in this manner during all the time after the construction of the canal until the weirs were installed. This was the condition and the mode of operation in force long before and at the time the Ottawa Hydraulic Company leased water rights from the canal commissioners, and so remained after the hydraulic company became interested in the quantity of water withdrawn from the feeder by these flumes until the

weirs were designed and installed,—a period of more than forty years. The contract between the hydraulic company and the canal commissioners was entered into in 1852, and from thenceforward until the weir was installed—a period of more than forty-eight years—the assigns of Green and Stadden continued to receive water from the feeder through the flumes in this manner. For a period of over sixty years the flumes have been maintained in the same condition, and those entitled to the water power have enjoyed such rights in the same beneficial mode and manner.

The manner of the construction of the flumes, the acts and conduct of the commissioners continuously since then, the uninterrupted enjoyment of the benefits thereof

carry a particular kind of mill, making reference to such mill to indicate and measure the quantity of water power intended to be conveyed, or whether it is a grant of the use of the water to carry such particular kind of mill only, the former construction will be most favored because in general it is most beneficial to the grantee, by allowing a latitude of choice in the use he may make of it without being more onerous to the grantor. *Ashley v. Pease*, 18 Pick. 268.

A deed which leaves doubtful whether a reservation of a certain quantity of water for certain purposes intended to prescribe the uses to which it was to be put will be construed as defining the quantity only; so that a reservation in a grant of "a sufficient quantity for two runs of stones in said gristmill" would retain to the grantor the quantity of water necessary for the purpose specified, which could be used in any manner or for any purpose convenient for him. *Dewey v. Williams*, 40 N. H. 222, 77 Am. Dec. 708.

Where the right to use water for a specific purpose is granted without being appurtenant to a grant of land, the presumption is strong that the grant is intended to be limited to the purpose named; but if the grant is appurtenant to the land conveyed by the same deed, unless the contrary intention is clear the use designated will be taken merely as the measure of the water granted which the grantee may use for that or for other purposes. *Garland v. Hodsdon*, 46 Me. 511.

A clause in a deed conveying a mill and water power to run the same, excepting and prohibiting the use of the water for any other purpose than to run the said mill, which is made in favor of a grantee of a mill on the same stream, is a mere prohibition of the use of the thing granted, and is void. *Craig v. Welles*, 11 N. Y. 315.

But a proviso in a grant conveying the right to draw water from a gristmill flume and pond at all times for the purpose of manufacturing every description of textiles, that in case the grantees draw more water than they previously had a right to then they shall not take the additional water so as to interfere with the privileges reserved to the gristmill, nor those belonging to the sawmill of a third party, is not an exception so inconsistent with the general grant as to be void. *Adams v. Warner*, 23 Vt. 395.

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2. Illustrations.

Express limitation.

The language may be such in any grant as to limit the grantee to the specified use.

If a grantee of a water right for use in a paper mill covenants that the water shall be used for no other purpose, he will not be permitted, against the objection of the grantor, to change the use to a cotton mill. *Wells v. Chapman*, 13 Barb. 561.

Under a grant of "a water privilege for tanning purposes in all its various branches," the grantee can use the easement in the water power created in the dam previously constructed by the grantor only for the specified purpose. *Deshon v. Porter*, 38 Me. 289.

The grant of a right to draw water from an upper dam "for the use of all tanning purposes" is a limitation to tanning purposes, and not a measure of power. *Rackliff v. Rackliff*, 96 Me. 261, 52 Atl. 839.

A grant of a water power may be limited to the carrying of the particular mill then standing, or one of the same kind and capacity which may replace it. *Ashley v. Pease*, 18 Pick. 268.

A water grant reciting that it is for the purpose of having a clothier's business where the grantor lives, and conveying a right to take water from his gristmill pond sufficient to run a fulling mill and shears, reserving enough, when the supply is scanty, for the gristmill, with habendum, so long as the grantee, his heirs and assigns, carry on the clothier's business and bear a sixth of the cost of repairing the dam and flume, does not authorize the use, even of no greater quantity of water, for any other purpose than that specified. *Shed v. Leslie*, 22 Vt. 498.

When a deed of a mill site, in unambiguous terms, declares that it is for the express purpose of erecting a gristmill and textile factory, with the right to draw from flume and dam enough water to grind grain and weave cloth, and "for these purposes only," with a reservation of the right to take water from the flume for a sawmill, or any other purpose not injurious to the grantee as a miller or manufacturer of cloth, the water privilege is limited to the particular uses specified, and these are not a mere measure of the quantity usable. *Clement v. Gould*, 61 Vt. 573, 18 Atl. 453.

A grant of land through which runs a stream of water with the privilege of building a fulling mill and of taking water "as much as shall

by the owners of the water, the knowledge and acquiescence on the part of the hydraulic company, constitute a practical exposition and construction by the parties of their rights under the Green and Stadden contract. In view of the great length of time, the uniform and continuous action and acquiescence of all the parties, the chancellor should have regarded the rights of all the parties as fixed by the construction which they have themselves placed upon the contract. They have determined and settled their respective rights by acts and conduct throughout so many years that the court should refuse to consider whether, under the contract, the commissioners have power to so change the flumes by weirs as to effectuate a radical change in the flow of

the water into the flumes, to the injury of the appellant Merrifield. It is a doctrine frequently declared in cases where the rights and powers of contracting parties are the subject of investigation that great weight will be given to such acts and conduct of the parties as are indicative of the construction they themselves have placed on their rights and powers under the contract, and not inconsistent with a fair and reasonable rendering of the contract itself. In 9 Cyc. Law & Proc. p. 588, it is said: "Where the parties to a contract have given it a particular construction, such construction will generally be adopted by the court in giving effect to its provisions; and the subsequent acts of the parties showing the construction they have put upon the agreement them-

be necessary to carry on a good, well-built, over-shot fulling mill at any time when the grantee shall have occasion to use the fulling mill," limits the right to use the water to that purpose, and it cannot be used for the purposes of an oil mill. The court says that a construction which would permit a change of use if no greater quantity were needed is founded in uncertainty, and must be pre-eminently a source of litigation. It is much preferable to let the parties explain themselves in explicit language, and at least not to assume voluntarily as a rule one that would be productive of controversy and probable injustice. *Strong v. Benedict*, 5 Conn. 210.

A reservation of sufficient water at all times for a gristmill then existing or such as may be erected in its stead, the quantity whereof shall be sufficient for two runs of stones, reserves water only for the use of a gristmill, and the grantee may use the water without restriction unless it is so applied by grantor. *Garland v. Hodsdon*, 46 Me. 511.

A lease of a building "for the purpose of carrying on the foundry business," "with the right to take water power from the wheel and shaft that now carries the fan bellows" in the lessor's adjoining shop "at all times when there is water sufficient to carry a fan bellows and blow for the stack in said foundry," gives the lessee no right to use the power for any other purpose than the fan bellows, so as to impede the use of the lessor's fan bellows. *Sibley v. Hoar*, 4 Gray, 222.

A devise of a furnace and "privilege of using water to blow with" will carry only the right to use the water for that purpose, although in the operation of the furnace it is also necessary to use power for drilling and grinding castings, and the devisee under lease from the devisor had used the power to some extent for that purpose, although the word "blow" is used by furnace men to cover all the operations of the furnace. *Lincoln v. Lincoln*, 110 Mass. 449.

A conveyance of water for purposes of a fulling mill and shearing machine, "but for no other purposes whatever," limits the right to use the water to those purposes. *DeWitt v. Harvey*, 4 Gray, 486.

Measure of power.

Conversely, the language may be such as plainly to indicate that a measure of power only was intended so that the use may be changed at any time.
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A reservation in a lease of water power of a prior right to use sufficient water to run a cotton factory of certain dimensions does not limit the use of the reserved water to a cotton factory, but it may be applied to any use requiring no more than the quantity reserved. *Biglow v. Battle*, 15 Mass. 313.

Under a grant of water sufficient to operate a sawmill at all times when there shall be more than enough to drive a gristmill with three run of stone, the grantor's right is not restricted to the particular use mentioned, but he may use that quantity of water for another purpose. *Cromwell v. Selden*, 3 N. Y. 258.

A grant of the privilege to draw water sufficient to carry a water wheel with 12 feet head and fall for two common blacksmith bellows, and, should the head and fall be less than that, sufficient to carry one bellows twelve hours in twenty-four, is a measure of the power conveyed, and not a limitation upon the use to which it can be applied,—especially where the grantee is the owner of the soil through which the water flows, so that he is entitled to the flow of the stream. *Tourtellot v. Phelps*, 4 Gray, 370.

Under a reserved water right sufficient for a gristmill with three run of stones, quantity, not use, is measured, and the water may be employed to drive any machinery in the mill the owner cares to apply it to. *Albee v. Huntley*, 56 Vt. 454.

A reservation in a grant of so much water as may be necessary to supply and work continuously a No. 5 hydraulic ram is not lost by the abandonment of the use of the ram, as a reservation of water power for certain machinery is not to be held as fixing the manner of its use, but as fixing the measure of the quantity of water reserved. *Walker v. Lillingston*, 137 Cal. 401, 70 Pac. 282.

A grant of water power limited merely to as much water as will flow through an aperture of 200 square inches under a head of 15 feet leaves the grantee at liberty to determine for himself the manner in which the water shall be used and the details in the construction of the machinery to use it. *Cummings v. Blanchard*, 67 N. H. 268, 36 Atl. 556.

A grant of a certain water privilege for the purpose of propelling a factory and its machinery and appurtenances, the building to be of a certain size with necessary appurtenances and machinery, will be construed to measure the

selves are to be looked to by the court, and in some cases may be controlling." The general principle there stated has been approved in many cases decided in this court, and cited in note 45 to the text, and also collected in 2 Ill. Cyc. Digest, 677.

The flumes as constructed and so long allowed to remain and be enjoyed by the owners of the water power, secured to such owners, at all times when they were entitled to receive water at all, such head of water as the depth of water in the feeder above the bottom of the flumes would afford. The weir practically deprived them of water and of this head at all times when there was less than 3.2 feet of water in the feeder; and when there was more than that depth of water in the feeder the weir de-

prived the appellant Merrifield of the head, and substituted therefor an additional quantity of water. It is not and cannot be contended that, under a proper construction of the contract, the owners of the Green and Stadden water power were not entitled to water at all times when there was no more than 3.2 feet of water in the feeder. During the season of navigation this depth of water in the feeder may be requisite to secure the necessary quantity in the canal for navigation purposes, but the weir operates on the theory that this arbitrary depth of water must be maintained at all times in the feeder, and, as a consequence, if installed, would deprive the appellant Merrifield of any water whatever unless there remained more than 3.2 feet in the feeder, whether

quantity of water, and will not limit the use of water to carry only such machinery as may be in the main building, if some of the machinery is in an annex and no more power is required to propel it than if it were in the main building, where it could all be placed. *Carleton Mills Co. v. Silver*, 82 Me. 215, 8 L. R. A. 446, 19 Atl. 154.

The quantity of water granted, and not the purpose to which it shall be applied, is referred to in a grant of water enough, applied to an overshot wheel, to run a gang of thirty marble saws, or a six-horse power. *Kaler v. Beaman*, 49 Me. 207.

Under a grant of sufficient water for certain mills and machines, grantee may take a quantity not exceeding that required for the machines mentioned in the grant. *Garland v. Hodsdon*, 46 Me. 511.

A grantee may use the water for any purpose except that against which he particularly covenanted, under a grant of a certain amount of water, or such amount as grantee might require to drive a cupola furnace fan, with the reservation that none of said water should be used for certain purposes. *Iszard v. Mays Landing Water Power Co.* 81 N. J. Eq. 511, Affirmed in 34 N. J. Eq. 556.

A grant of the right to use water from a pond for the purpose of carrying on certain works, in such quantity as will be sufficient for carrying on and working the furnace situated between the factory and the pond, and for which purpose said water is now used, and no further or greater quantity, provided always that the right so as aforesaid granted shall cease at all times whenever the furnace is in blast, is limited only as to the quantity of water, and not to the purpose of the use. *Hall v. Sterling Iron & R. Co.* 148 N. Y. 432, 42 N. E. 1056, Affirming 74 Hun, 10, 26 N. Y. Supp. 143.

A grant of the right to erect a mill on a stream, and of the use of the stream "so long as the grantee shall keep a gristmill there in good repair," is not defeated by the fact that while the mill is kept there in good repair part of the power is used for another purpose so that many persons are unable to have their grain ground at the mill. *Hadley v. Hadley Mfg. Co.* 4 Gray, 140.

A reservation in a grant of 1½ acres of land on which a tannery is erected, and of a certain well and water course laid down for the purpose of supplying the tannery with water, does not

limit the use of the well to the purposes of the tannery; but it may be applied to any use which the grantor desires. *Borst v. Emple*, 5 N. Y. 33.

Mention of particular use.

A mere mention of a particular use is not of itself sufficient to make that use exclusive.

The rule is stated in *Hartford Woolen Co. v. Bugbee* (Vt.) 56 Atl. 344, as follows: In a grant or reservation of a water right reference to an existing use will be considered as a measure of quantity, merely, unless a contrary intention is apparent from the language used or from the surrounding circumstances; and it was held that a grant with a grist mill of "sufficient water to carry the grist mill when in proper repair as it now is, to wit, to carry four run of stones, corn cracker, smutmill and two bolts," gave a right to draw a certain quantity of water without regard to the use.

A conveyance of land together with a grist-mill privilege, "being the first on the stream for two run of stone," does not limit the use of the water to the mill then standing, but may be used upon the land for any purpose. *Mudge v. Salisbury*, 110 N. Y. 413, 18 N. E. 249.

Reservation in a grant of a water privilege of so much water as is necessary for the use of a forge and two blacksmith's bellows does not limit the use of the water reserved to the sole object specified. *Olmsted v. Loomis*, 9 N. Y. 423, Affirming *Olmsted v. Loomis*, 6 Barb. 152, where it was held that water reserved for carrying a forge and two blacksmith's bellows may be applied to propelling a paper mill, where the objects mentioned simply designated the quantity.

A grant of a mill with the right to the race and privilege of taking water "with the exclusive privilege of grinding grain" does not limit the grantee's right to the grinding of grain, but gives him the exclusive right to such use as against the owners of other rights to water-power. *Hartwell v. Mutual L. Ins. Co.* 50 Hun, 497, 3 N. Y. Supp. 452.

A reservation in a grant of a water right of "water for carding machines and fulling mill," is not a limitation of the purposes to which the water may be applied; but a quantity of water equal to that used for those purposes at the time of the grant may be used by those claiming under the reservation, for any other manu-

such quantity was needed to maintain the necessary navigable depth in the canal or was otherwise necessary or useful for the purposes of the state. The contract reserves to Green and Stadden and their assigns the said one-fourth portion of the water in the feeder, diminished in just proportion by leakage, evaporation, etc., necessarily incident to a good and workmanlike dam and structure, etc., and useful to the state, "after the necessary quantity has been drawn out for the purposes of navigation," with the further limitation that the reservation should not authorize Green and Stadden or their assigns to so draw the water from the feeder during the "season of navigation" of the canal as to reduce the water in the canal to a depth of less than 6 feet. The weir retains in the feeder at all

times in each year, after the season of navigation has passed, water that the contract reserves to the use of the owners of the Green and Stadden water power, and even during the season of navigation may prevent the flume from receiving water that is reserved by the contract, and not needed to remain in the feeder in order to retain the requisite depth of water in the canal that may be needed for the purposes of navigation. The weir prevented the rightful passage of water into the flume, and injuriously deprived the appellant Merrifield of the full use and benefits of the water power to which he was entitled. The chancellor therefore erred in holding the commissioners had power to place and maintain the weir in the flume.

The decree will be reversed, and the cause

facturing purpose. *Wakely v. Davidson*, 26 N. Y. 387.

An owner of two adjoining tracts, who conveys one and reserves the right "to all water which the grantee shall not use" for a cistern on the granted premises, has no cause of complaint so long as the grantee's use is reasonable, although the manner of its use is changed, if the quantity appropriated is not increased. *Willcox v. Kendall*, 63 N. H. 609, 3 Atl. 633.

A grant of water privileges for the purpose of a sawmill measures the extent of the power intended to be granted, and not a grant of water to drive a particular mill, because it is most favorable to grantee without being more onerous to grantor. *Johnston v. Hyde*, 33 N. J. Eq. 632.

The grantor of a mill privilege reserving to himself the right to take water for the benefit of his mill has a right to change the mode in which he uses the water, and may make various changes and alterations in his machinery and gates, provided he takes no more water than was necessary to work his mill before he made the changes. *Johnson v. Rand*, 6 N. H. 22.

But a reservation in a grant of water rights of sufficient power to run machinery then in a factory, or which may thereafter be placed therein, is, as to the additional machinery, a limitation to that actually placed in such factory. *Groat v. Moak*, 94 N. Y. 115.

Although as to the machinery then in a factory it is a measure or limit to quantity merely, and the power may be used elsewhere. *Ibid.*

It requires very little in addition to the mention of a particular use, however, as already indicated by the cases cited supra, to limit the right to the water to that use. There is, however, a New Hampshire case which carries the doctrine that express mention of a use will not limit the grantee to that use rather farther than the other courts have sanctioned, and farther than the language of the limitation would seem to sanction.

A grant of water "for the benefit of clothing works only" is not a conditional limitation by which the grant is forfeited whenever the water is applied to a different purpose. *Dow v. Edes*, 58 N. H. 193.

It would seem that the language was as explicit as it could be made, and that when it was limited to that purpose "only" any attempt to use it for other purposes could receive no sanction.

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Present use.

A grant of a mill with the use of the water in the raceway "as the same is now used and enjoyed" is a limitation upon quantity, and not upon the manner of use; so that the character and location of the same may be changed provided more than the quantity of water used at the time of the grant is not required. *Terry v. Smith*, 47 Hun, 333.

A grant of the right to draw water "for the use of a mill as it now is," is a limitation as to the quantity of water granted; rather than as to the manner or place in which it is to be used. *Fowler v. Kent* (N. H.) 52 Atl. 554.

Where land is granted for a mill site together with the right to use the water of the stream for the mills situated thereon, these words are not considered as restrictive of the general right to use the water for a mill which may afterwards be erected there. *Ashley v. Pease*, 18 Pick. 268.

One purchasing a farm and an artificial water course flowing across it is not limited in the use of the water course to the uses to which it was put at the time of the grant, but acquires the right to it as it existed at that time, and to a continuance of the flow of the water. *Wardle v. Brocklehurst*, 29 L. J. Q. B. N. S. 145, 6 Jur. N. S. 321, 1 El. & El. 1085, 8 Week. Rep. 243, Affirming 1 El. & El. 1058, 6 Jur. N. S. 319, 8 Week. Rep. 214.

That the water power created by a dam and granted by a deed is to be used immediately for particular purposes is not inconsistent with a change of use, where no change is forbidden. *Hathaway v. Mitchell*, 34 Mich. 164.

General grant.

Under a grant of so much water as will operate a mill on premises conveyed, the grantee is entitled to use the water for any purpose he sees fit provided the quantity used is not increased and the change in use does not prejudice the rights of others. *Fountain v. Perth Amboy*, 60 N. J. L. 410, 38 Atl. 676.

A grantor may change the application, but not the extent, of his use of water power reserved in a grant of the use and benefit of water from his privilege, when it can be conveniently spared from his mill. *Hanna v. Clarke*, 81 Gratt. 86.

The grant of a mill site on a privilege being

will be remanded for such other and further proceedings consistent with this opinion as may to justice and equity appertain.

A petition for rehearing was denied on December 22, 1904, when **Wilkin, Cartwright, and Hand, JJ.**, handed down the following dissenting opinion:

The principal legal questions in dispute in this case are whether appellant Merrifield is entitled to draw from the feeder a certain proportion of all the water flowing in Fox river, or only of the water flowing in the feeder, and whether he has a prescriptive right to draw from the feeder as much water as was drawn therefrom by himself and his predecessors in title for a period of years. Both these questions are decided against him. It is held that the

rights of the parties were settled in the action at law, and that it became the duty of of the canal commissioners to take such steps as may be found proper to control and restrict the use of water by him to the proportion to which he is entitled. So far we concur in the foregoing opinion, but we do not understand that the commissioners are restricted to the use of gates because they were in use when Merrifield and his predecessors were permitted to take as much water as they chose, and took more than they were entitled to. In our opinion, the commissioners may adopt and install any device that will accomplish the desired result. What Merrifield is entitled to is a definite share of the water power supplied by the feeder, and, if he gets it in any way for practical use on his water wheels, he has

where a sawmill stands will not restrict the grantee from using the site for other purposes than a sawmill, provided, only, that he does not by a new use interfere with rights acquired by long-continued uninterrupted user, and the compacts of previous proprietors. *Hines v. Robinson*, 57 Me. 324, 99 Am. Dec. 772.

After the grant of a lower mill on a race with a joint interest in the water flowing therein, the owner of the upper mill cannot use the water flowing in the race for any purpose other than power, to the injury of the lower grantee. But such unlawful use will not work a forfeiture to the right of water which can be taken advantage of by a third person who has diverted the water from the stream. *Butler Hard Rubber Co. v. Newark*, 61 N. J. L. 32, 40 Atl. 224.

Application to other than power purposes.

A grantee of the right to use water for mill purposes, who is required to return it to the stream so that it will reach the canal of the grantor, is confined to the contemplated use in connection with his riparian property, and has no right to collect the water for any other purpose. *Hall v. Ionia*, 38 Mich. 493.

While the grant by deed of a mill privilege is not limited to the damming of waters of the stream for the purpose of running a sawmill, on the other hand, it does not include the right to withdraw all the water that collects in the pond and sell it to the inhabitants of a city for domestic purposes. *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977.

Where the question presented is as to the right to take any part of the waters of a spring for domestic purposes when the grant under which the right of use is claimed recites that the water is to be used for running a gristmill, the fact that the quantity of water taken is very small is immaterial. *Woodring v. Hollenbach*, 202 Pa. 65, 51 Atl. 318.

Acquiescence in change.

A water-power owner acquiesces in grantee's new application of his power when he receives the stipulated compensation and offers no objection thereto for two years. *Izard v. Mays Landing Water-Power Co.* 31 N. J. Eq. 511, Affirmed in 34 N. J. Eq. 556.
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b. As to premises.

One who grants to another the right to dig a race on his land and take water from a creek for mill purposes in consideration of the grantee's building a mill at a point where their lands join is entitled to a reconveyance of the right granted; and the grantee will be enjoined from setting up the deed as a defense to an action at law for diversion, where the grantee built the mill on other lands belonging to him, and took water directly from the lake instead of the creek which formed its outlet, and discharged the water into another stream without returning it to the bed of the creek. *Jacox v. Clark*, Walk. Ch. (Mich.) 508.

A grant of a right to draw from a canal seven mill powers of water "to be used upon the following described lots," or "upon such other lots or parcels of land" as the grantee shall designate, does not confer an absolute title to the quantity for use upon the designated lots. *Minneapolis Mill Co. v. Hobart*, 26 Minn. 37, 1 N. W. 45.

A grant of land "with the privilege of drawing water" from a reservoir does not annex the right to use the water to the land so granted so that the right is lost in case, for the improvement of the property, the dam is taken down and reconstructed so as to overflow the land granted. *De Witt v. Harvey*, 4 Gray, 486.

An exception in a deed of a mill with water privileges denying the use in times of low water when it is wanted for designated works across the stream, being a measure of the quantity required for the superior use, and not a restriction of such use to specified purposes or in a particular way, the dominant owner, by removing his works from their original site, and reconstructing them further down stream, carries his privilege with him, and does not lose the right to complain of an undue diversion of the water by the servient proprietor. *Rood v. Johnson*, 26 Vt. 64.

c. As to quantity.

A measure of the water granted is contained in a grant of water as now carried in the trunk or feeder, and equity will restrain grantee from taking a greater amount than the quantity carried in the trunk as it existed at the time of the grant. *Jaqui v. Johnson*, 27 N. J. Eq. 526, Confirmed in 27 N. J. Eq. 552.

no cause for complaint. The evidence shows that a proper distribution of the water power by means of gates operated by an individual is not practicable. The amount of water flowing through a given space under gates depends upon velocity as well as volume, and is governed largely by the head or pressure of the water above. The head is lowered by opening the gates and releasing a portion of the water, and it is constantly changing in some degree. To make and maintain a just apportionment would require the presence and personal attention of an expert. The hydraulic engineer employed by Merrifield testified for him that the theory or system adopted by the commissioners for an automatic distribution of the water according to the rights of the parties was sound and correct, but that the form of the weir should be different, and

present a vertical side to the flow instead of a sloping one. Perhaps the form was objectionable, but, according to the evidence, there never was a time when the water did not flow over it, nor when Merrifield did not get more water and water power than his just proportion. The crest of the weir was 3.56 feet below the crest of the dam, and the evidence did not show that there had been or would be a time when water would not flow over the weir. If there was some loss of head as compared with the use of gates, it was fully compensated for by the increased amount of water, and the full share of water power was furnished. If there was a better form of weir, it might properly be adopted, but Merrifield himself proved that a weir is the proper means of controlling the distribution of the power.

A limitation in a grant of water privileges that it shall not be used for any purpose which would in any manner interfere with grantor's mills, does not refer to quantity of water, but forbids competition in business. *Klaer v. Ridgway*, 86 Pa. 529.

A reservation in a grant of water power of sufficient water to run machinery in a factory does not limit the grantor to the dam at its then height, but he may increase the height of the dam in order to obtain the required power. *Groat v. Moak*, 94 N. Y. 115, affirming 26 Hun, 380.

A grant contains a measure of power, and is restricted substantially to the amount of water sufficient fully to operate a tannery at or about the time of the grant of "a right to draw water from the sawmill flume sufficient to carry on the business of tanning in said yard, . . . the grantee to make one fourth of all repairs necessary on the dam, . . . and grantee may use more water than aforesaid when there is waste water running over the dam, . . . said grantor retaining the right to . . . use all the water except that herein granted if he choose." *Covel v. Hart*, 56 Me. 518.

The grantee of a certain amount of water cannot obtain a prescriptive right to the excess thereof of which he may have had use. *Stearns v. Richmond Paper Mfg. Co.* 86 Va. 1034, 11 S. E. 1057.

A grant of a flouring mill together with the privilege of taking from the race 375 cubic inches of water under 13 feet head, "when there shall be so much water in the race," limits the grantee to that quantity under any head up to 13 feet. *Torrance v. Conger*, 46 N. Y. 340.

The right of the purchaser of lands and part of a bulkhead, with the privilege of drawing from his portion of such bulkhead as much water as he, his heirs, or assigns, "might need for whatever machinery might be erected on such premises," is not to be measured by the amount of water which could be drawn through a 9 ft. opening therein as it existed at the time of such grant, but by the necessities of the machinery thereafter to be erected. *Valley Pulp & Paper Co. v. West*, 58 Wis. 599, 17 N. W. 554.

d. Improved machinery.

A grant of sufficient water to run a certain
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number of stone will carry a right to water sufficient at the time of the grant, although by subsequent improvements the same quantity will operate a larger number. *Hartwell v. Mutual L. Ins. Co.* 50 Hun, 497, 3 N. Y. Supp. 452.

The grantee of an undivided half in land and a mill on one side of a stream "with a privilege to draw water . . . sufficient for one tub-wheel," etc., which has been carried off by a freshet but replaced at time of conveyance, acquires the right to use so much water as would be sufficient for a tub wheel of the capacity of the old one, although he is not restricted in the use of that quantity to this particular kind of wheel. *Loverin v. Walker*, 44 N. H. 489.

A reservation in a grant of water power of "the first and exclusive right of the use of sufficient water to carry a fulling mill and three breast wheels, each 12 feet in diameter and 15 feet in length, with the machinery which may be connected with them," does not limit the use of the water to breast wheels, but the same amount may be applied by means of a turbine wheel. *Coburn v. Middlesex*, 142 Mass. 264, 7 N. E. 849.

Under a deed which grants the right to take water for the operation of three runs of mill stones, together with the machinery ordinarily and necessarily used in running a flouring mill, and which defines in the habendum clause "a run of mill stones" as a power sufficient to grind 13 bushels of wheat per hour, or as 15 horse power if used for other purposes, and which further states that the entire power is divided into 66 runs of mill stones, none of which are to have priority against the other in low stages of water, the grantee is entitled to the maximum of 15 horse power per run of mill stones, although insufficient to grind 13 bushels of wheat per hour by the new machinery which he has put in; and in times of low water his right is limited to 3-66 of the existing power. *Powers v. Hibbard*, 114 Mich. 533, 72 N. W. 339.

A grant made to the owner of a paper mill of the right to water from a race or pond sufficient to propel four 300-pound engines contemplates an amount of water sufficient to operate such machinery as existed at the time of the grant; and the right to use such amount is not affected or impaired by the subsequent use of improved wheels, or by a change in the head or fall which

operated them. *Grisswold v. Hodgman*, 2 Hun. 97.

A grant of power sufficient to run a certain number of spindles "using a wheel as large in proportion to the head and flow as used" in a certain mill named "of the same construction, unless an improvement is made before the wheel shall be constructed," fixes the measure of power to which the grantee is entitled at the time of the construction of the wheel, and is not to be diminished by improvements in wheels or machinery since that time. *Agawam Canal Co. v. Southworth Mfg. Co.* 121 Mass. 98.

A right reserved to a dominant mill, of enough water to operate it, is controlled by the circumstances at its inception, and, after improved machinery which does the same work in half the time has been put in the mill, the owner is not justified in using, during a part of the time, a greater quantity of water than the old machinery required, on the excuse that by speedier and more efficient operation he used no more water in the whole twenty-four hours than the quantity measured by the reservation; because the servient mill owner is entitled to a steady power, and to know what he can rely on and forecast accordingly. *Miller v. Lapham*, 44 Vt. 416.

But when a deed of a mill site and water privileges provides that, "in case there is not at any time a full supply of water for the simultaneous operations of the works connected with the dam, a gristmill shall draw its requisite quantity of water exclusive of all other works," there is secured to such gristmill, not merely a right to use the water exclusively in the manner and for the time it was then customary to use it, but a right to use the water in quantity as it was used and for such time in seasons of scarcity, as the business of the mill required. And if a substituted wheel does the work in a third of the time and with less water than the one it replaced, there is no infraction of the covenants of the deed provided such work is the same in character as was done when the deed was made. *Howe Scale Co. v. Terry*, 47 Vt. 109.

Where a declaration alleged the demise to a mill owner of a sufficient supply of surplus water for four run of stone, and the wrongful and injurious diversion of a portion thereof by the lessor, a plea is not sufficient which sets forth an agreement by both parties to put in improved water wheels, acted upon by lessor only, and averring that, had lessee put in the improved wheels according to agreement, the water would have been sufficient to run his four run of stone, but which did not aver that lessor used less, or no more, water with his new wheels than he was entitled to use with the old ones under the lease. *Watts v. Robson*, 38 U. C. Q. B. 570.

e. As to time.

Parties have the right to run their factory as many hours a day as they consider proper where they have a grant of water for the purposes of their factory with no limitation therein upon the number of hours per day in which they can run it. *Carleton Mills Co. v. Silver*, 82 Me. 215, 8 L. R. A. 446, 19 Atl. 154.

A grant by one owning the right to flow a portion of land for a mill pond for the whole year, and an additional portion for part of the year, of a certain quantity of water for twelve hours per day, will, as against the grantor, give 67 L. R. A.

the right to use the power the whole time; but, as against third persons, that right is limited by the extent to which the land may be flowed. *Phelps v. Tourtellot*, 9 Gray, 102.

A grant between owners of a reservoir dam parcelling the right to use the water giving a right to use so many feet per second during working hours will be construed as referring to the working hours of the mills then located on the stream, and will not be extended so as to cover a use for a mill erected for the purpose of using the power both day and night. *Binney v. Phoenix Cotton Mfg. Co.* 128 Mass. 496.

The owner of a mill pond, who has granted to another a portion of the residue of the water power afforded by such pond remaining after he has reserved a certain quantity for his own use, is not entitled to draw his preferred water power from the pond at all times of day and night without being required to hold it even for a short time so as to afford a surplus for his grantee, in the absence of express stipulations in the grant giving him that right, but will be restricted to a reasonable use thereof so as not to prejudice or injure the other in the use of his residue; and such reasonable use is not to be measured alone by the necessities of his business, but also by the condition or stage of the water and the rights of the parties with reference to customs among mill owners above and below as to the use of the water power of such stream; and where there is a custom of such mill owners to shut down their gates by night to accumulate a head of water, if the grantor runs his mill by night so as to draw off the water in the pond leaving no head from which the grantee can take his portion during the daytime, such grantor cannot maintain an action against his grantee for taking and using of the water in the pond an amount equal to his portion if the same had been used in a proper and reasonable manner, even though it deprives such grantor of his preferred quantity. *Batavia Mfg. Co. v. Newton Wagon Co.* 91 Ill. 280.

V. Protecting rights.

a. By repairing works.

A grant of the right to draw water from a dam does not bind the grantor to maintain the dam for the benefit of the grantee, even though the deed runs to the latter and his heirs forever. *Trudeau v. Field*, 69 Vt. 446, 38 Atl. 162.

But an understanding in a lease of water power to a mill owner that the lessor is to keep the dam in such a state of repair as to insure to the lessee the power demised to him may be shown by the lessor's reservation of water rights in himself, and the retention by him of the title, possession, control, and use of the dam. *Crawford v. Parsons*, 63 N. H. 488.

Deeds poll of water rights in a milldam, providing for payment by the grantees of certain proportions of the expense of keeping the dam in repair, impose no obligations to contribute to the cost of building a new dam when the existing one decays or is destroyed. *Trudeau v. Field*, 69 Vt. 446, 38 Atl. 162.

A grant of the right to draw water from a milldam confers on the grantee no right to exact contribution toward the cost of rebuilding the dam from one succeeding to the interest of the grantor through deeds which did not impose such a liability, although his immediate grantor exacted it from him, for there is no privity between these two. *Ibid.*

A conveyance of land and certain water rights with a stipulation in the deed that the grantee should contribute to the keeping up of the dam belonging to the grantor in proportion to the amount of water used, imposes a burden which is a condition of the grant of the water, and runs with the land, and binds the subsequent grantees or mortgagees thereof. *Maxon v. Lane*, 102 Ind. 384, 1 N. E. 796.

Under a covenant by grantees to pay the ratable share of the expenses of keeping a dam and raceway in repair in proportion to the number of square inches of water by them owned or used, the ratio of contribution is the proportion the water owned or used bears to the whole amount of water used from the power by the proprietors and their several grantees and lessees, and not the proportion to the whole amount of water available,—especially where such was the contemporaneous construction thereof by the parties. *Woolscroft v. Norton*, 15 Wis. 198.

A conveyance, by the owner of waterworks, of land for mill purposes together with water power thereof of a specified quantity and force, with a condition that the grantee should contribute a certain proportion of the expense of keeping such works in repair, and that the grantor might enter such premises at any time for that purpose, does not, in the absence of express stipulations on the subject, impose upon the owner of such waterworks the duty to bestow more than ordinary care and diligence in keeping the same in repair for the protection of the property of the grantee, or to afford him a continuous supply of water power of the requisite force and quantity. *Sterling Hydraulic Co. v. Williams*, 66 Ill. 393.

A mortgage on land having certain water rights subject to the burden imposed by the original grant and running with the land, that the owner should contribute to the keeping up of the dam in proportion to the amount of water used, is not affected by a subsequent contract entered into between the mortgagors and the owner of the water power interpreting the extent of that burden, to which the mortgagees were not parties; and the fact that the principal owners of the stock of the mortgagor corporation were the owners of the note and mortgage at the time the contract was entered into, and acted for the company in consummating the contract, does not estop them or their assigns from controverting it, in the absence of fraud or unfair dealing. *Maxon v. Lane*, 102 Ind. 384, 1 N. E. 796.

One who is entitled under a contract to use a millrace, one side of which is formed by planking nailed to the posts of another mill, and is also entitled to keep the race in repair, may, after the washing away of his flood gates, construct new ones from 1 to 3 feet distant from the place where the old ones were situated, and, in order to fasten them securely, use the posts of the mill beside the race, provided no special damage results from the acts, when the mill owner whose mill forms the side of the race purchases it after the other's contract has been made. *Daniels v. Chaffin*, 28 Iowa, 327.

Under a conveyance of land and a felling mill, giving to the grantee the privilege of supplying himself with water from a mill pond whenever needed, he may enter upon and repair the dam, taking stones and earth from the bed of the pond for that purpose, if necessary. *Miller v. Scofield*, 12 Conn. 335.

A grant of a right to use the water, the dam,

and race appurtenant to a mill confers upon grantee the right merely to maintain the erections existing at time of grant. He may rebuild the dam on the same site, but may not erect other dams at other points on the creek, or increase the flowage. *Switzer v. McCulloch*, 78 Va. 777.

The grantee of a right to alter, repair, or renew the old feeder of water to which he acquires title may be restrained in equity from doing more than to maintain it in its present position with the capacity of carrying water as at the time of the grant. *Jaqui v. Johnson*, 27 N. J. Eq. 526, Confirmed in 27 N. J. Eq. 552, Affirming 25 N. J. Eq. 410, and Reversing 26 N. J. Eq. 321, where it was held that a grant of the right to take water from one pond to another "as now carried in the trunk or feeder," the grantee "to have the right at all times to enter upon the land of the grantor adjoining said trunk or feeder and alter, repair, or renew the same at his convenience," gives the right to change, not only the form, material, and size of the trunk, but its location, so far as necessary, to give the full benefit of the grant.

Where the lessee of a mill continues to go onto adjoining land to repair the banks of a stream that flows to his mill, after the expiration of his lease of such land, such conduct will be presumed to be under a claim of right, and not under the lease, and will be sufficient to establish such right by prescription. *Clay v. Thackerah*, 9 Car. & P. 47, 2 Moody & R. 244.

b. By action.

The grantor of a dam who has reserved the right to maintain a sluiceway "at or in" a certain place in grantee's dam may recover damages resulting from any wilful disturbance of that right by his grantee. *Hammatt v. Russ*, 16 Me. 171.

The grantor of a privilege of taking water for a specified purpose from a stream within the limits of a subsequent deed to another cannot sue for a misuser of the first grant. *Waahabaugh v. Oyster*, 18 Pa. 497.

A forfeiture of a grant of a dam and an appurtenant water right cannot be taken advantage of by assignees of the grantor's remaining interest, when such grantor in his assignment expressly excepted the rights of his grantees, and reserved water rights in himself, whenever any could be exercised without damage to his assignees. *Peaslee v. Tower*, 62 N. H. 434.

Equity has jurisdiction to grant relief against the diversion of water from a mill in violation of the terms of a deed, although the right has not been established at law. *Olmsted v. Loomis*, 9 N. Y. 423.

One who promised to release to another his right to use the waters of a lake in consideration of the latter's building a mill is not entitled to an injunction restraining the mill owner from taking the water from the lake by means of the race constructed, where he allowed the mill owner to construct his building and works at great expense, and did not notify him that he would not keep his promise until the works were nearly completed. *Payne v. Paddock*, Walk. Ch. (Mich.) 487.

But the successors in interest of a purchaser of laud and part of the bulkhead, with the privilege of drawing from his portion of the bulkhead as much water as might be needed for the machinery to be erected on the premises, are entitled to an injunction to restrain the original

grantor from obstructing, interfering with, impairing, or injuring any of the rights or privileges so secured, and especially from drawing any water through a conduit pipe or from such bulkhead, at any time, to such an extent as will in any way obstruct, diminish, or lessen the quantity of water which they have the right or privilege of drawing from their portion of such bulkhead. *Valley Pulp & P. Co. v. West*, 58 Wis. 599, 17 N. W. 554.

Waste of water by a grantor's wilfully opening the gates of a dam may be restrained by his grantee on the other side of the stream to whom the grantor has conveyed the right to draw from his pond all the water not needed for his use. *Fuller v. Daniels*, 63 N. H. 395.

Equity will not deny relief to a mill owner who waits four years before filing a bill alleging that his grantor of water power has unlawfully deprived him thereof. *Iszard v. Mays Landing Water Power Co.* 31 N. J. Eq. 511, Affirmed in 34 N. J. Eq. 556.

But equity has no jurisdiction to award damages for breach of a contract to supply a certain amount of water power, except such as are ancillary to a specific performance. *Ibid.*

A lessee of water power, entitled by the terms of the lease of a prior right to a designated quantity of water under a working head of a certain height, will be granted a temporary injunction, pending a final hearing, restraining a subsequent lessee, having full knowledge of and taking subject to the prior lease, from drawing water from the same race above so as to deprive the other of his full amount of water, thereby interfering with the operation of his mill; and the fact that the water wheels are so set as to cause a needless waste of water does not affect his legal right to the quantity purchased. *Home Electric Light & P. Co. v. Globe Tissue Paper Co.* 146 Ind. 673, 45 N. E. 1108.

Purchasers of property receiving water power for use therewith under a contract therefor made by their grantors are not entitled to have such contract canceled for failure to supply the stipulated water power, where the contract itself provides a remedy for such failure by deductions from the stipulated rent, and declaring the liability of the water power company for damages over and above rent so deducted. *Beckett Paper Co. v. Hamilton & R. Hydraulic Co.* 18 Ohio C. C. 200.

The loss of profits resulting from the enforced abandonment of a starch factory because of the unlawful interference by its lessor of the appurtenant water power included in the lease may be considered in determining the damages to be awarded for such injury, where the profit of the business is a large, if not the only, element of the rental value of the property. *Crawford v. Parsons*, 63 N. H. 438.

VI. Measurement.

A grant of 100 square inches of water conveys what will flow through an aperture of that size in the ordinary way, and the flowage cannot be increased artificially unless that was contemplated in the grant. *Schuykill Nav. Co. v. Moore*, 2 Whart. 477.

A grant of a right to draw from a canal as much water as will pass through an aperture of a given size and a given position in the side of the canal is substantially a grant of a right to take a certain quantity of water in bulk or weight. What that quantity is may be ascertained from the character and height of the

canal, the circumstances under which the water is to be drawn, and the state of things existing at the time the grant is made. *Chesapeake & O. Canal Co. v. Hill*, 15 Wall. 94, 21 L. ed. 64.

A grant of the right to draw 1 inch in diameter of water will be held to apply to a pipe discharging such quantity and placed in position about two years after the grant thereafter used for a period of fifty years, although its location does not conform exactly to the terms of the grant, rather than another pipe leading from the pond the use of which had been only occasional and the existence of which is not shown to have been known to the owner of the pond. *Smith v. Beach*, 5 App. Div. 624, 39 N. Y. Supp. 351.

A deed granting the right to take 800 inches of water from the grantor's raceway for the purpose of operating the mill and machinery of the grantee, and which further covenants that there shall be water in the race at all times for the grantee's use, does not grant power sufficient to run his mill, but merely grants water which is to be measured where it is taken from the race, and not at the mill at which it is used. *Palmer v. Angel*, 69 Hun, 471, 23 N. Y. Supp. 397.

A lease of the right to draw from a race at any place within a specified distance of the head gate as much water as will run through an aperture 2 feet square under a head of 4 feet from the top, provided the lessee shall require so much, and that in case he needs more he may take it at a proportionally increased rental, entitles the lessee to draw the specified volume of water emanating from the race under a pressure of 4 feet head, but not to such quantity of water as will flow through an aperture of the size mentioned under the pressure of the head indicated into an open space without the obstruction of any channel; that is, he has no right to such quantity of water independent of the mode of taking it. *Norris v. Showerman*, 2 Dougl. (Mich.) 16, Affirming *Walk. Ch. (Mich.)* 206.

A grantee of a right to water power measured by "the quantity which shall be discharged through an aperture of 200 square inches at the gate under 15 feet head" is entitled to the constant flow of that quantity, and no more, in all stages of the water; and equity on a bill to fix the respective water rights will direct that the size of the aperture be diminished or increased as the head rises above or falls below 15 feet. *Cummings v. Blanchard*, 67 N. H. 268, 36 Atl. 556.

A grant of a right to take water from a dam through "a gate 12 inches square, or equal to that," will not authorize grantees, either to place any device in the dam, or to take the water through any other device than "a gate 12 inches square, or equal thereto." *Drummond v. Hinkley*, 30 Me. 483.

One who, under a grant of the right to use water for power, is entitled to "the amount of the issue of the wheel" under an established mill, supposed to be 600 inches more or less, may not use more water than is thus specified, although the amount that would pass through that wheel may be used with a different wheel or wheels. *Doan v. Metcalf*, 46 Iowa, 120.

A grant of 150 square inches of water for propelling machinery to be taken from the side of a flume or race at an opening or openings between the bottom and top of the same, provided that no more water shall be taken by said openings than will be discharged by an aperture

of 150 square inches at a point as low as the surface of the river, conveys the right to draw all the water which will naturally flow through an opening of 150 square inches at the side of the main race or flume as low as the surface of the river, and does not grant as much water as will flow through the aperture into open space to be measured at the tall race. *Blanchard v. Doering*, 21 Wis. 477.

When, by an exception in a deed of water privileges, enough horse power up to a certain limit to drive described mills is reserved, and is to be determined by a designated wheel book, if there is more than one edition, differing in measurements, it must be shown which was in the minds of the parties, or alone in existence, when the exception was made. *Moore v. Wilder*, 86 Vt. 33, 28 Atl. 320.

The rule for determining the flow of water per second through a spout from a flume, as adopted in *Hartwell v. Mutual L. Ins. Co.* 50 Hun, 497, 3 N. Y. Supp. 452, was multiply the square root of the number of feet in the head by 8.025, and multiply this result by the square feet of the area of discharge, and the result is the cubic feet per second.

The term "inch of water" had not, prior to 1880, acquired any fixed, certain, and technical meaning. *Janesville Cotton Mills v. Ford* 82 Wis. 416, 17 L. R. A. 564, 52 N. W. 764. Nor even in 1882. And in 1892 in its opinion the Wisconsin supreme court says that the conclusion seems irresistible that the term "inch of water" has not acquired any fixed technical meaning which must control when used in a grant, although the testimony shows that the tendency among wheel venders and millmen for some years has been and is to attach to it the meaning of the theoretical inch; but it does not appear that such theoretical arbitrary meaning has yet crystallized so as to be controlling. *Jackson Milling Co. v. Chandos*, 82 Wis. 437, 52 N. W. 759.

The term "inch of water" as used in deeds of water power means so much water as will under a given head flow through a small orifice of a specified number of square inches of superficial area in the side of a flume, where to construe it as a stream of water with a cross section area at right angles with itself of one square inch moving with the velocity of a given head would take nearly all the water the canal afforded, and it appears that the grantor intended to run a mill of twice the capacity of the grantee's, and that the grantee for the purpose of using his water power constructed openings with a superficial area within a few inches of the number of inches granted. *Ibid.*

The term "square inch of water" as used in deeds of water power which at the time of the first grants had no technical meaning will be construed to mean a stream of water with a cross section area of one square inch measured at right angles with its flow, measuring with the velocity of whatever head is acting upon it, where subsequently such construction was placed upon the term for several years by the consent of all those then interested therein. *Janesville Cotton Mills Co. v. Ford*, 82 Wis. 416, 17 L. R. A. 564, 52 N. W. 764.

VII. Loss of rights.

A grant of water privilege is not lost through nonuser without intention to abandon it, although at times the raceway is dilapidated, and 67 L. R. A.

for about one year the mill lies idle because of a disagreement between the owner and his tenants. *Johnston v. Hyde*, 33 N. J. Eq. 632.

The right to use water for mill purposes is not lost by the mere neglect to assert, use, and enjoy it for the period of twenty years, where the easement was created by a perpetual and unconditional grant. *Day v. Walden*, 46 Mich. 575, 10 N. W. 26.

No part of a grant of all the water power on grantor's land will be lost by nonuser for twenty-one years. *Nitzell v. Paschall*, 3 Rawle, 76.

A reservation in a grant of flowage rights that a mill on a certain other privilege shall not be injured thereby is not lost by nonuser of the reserved privilege for more than twenty-one years. *Butz v. Ihrie*, 1 Rawle, 218.

A right to take water from a stream, acquired by deed, is not lost by nonuser for thirty-two years. *Pennsylvania R. Co.'s Appeal*, 125 Pa. 189, 17 Atl. 478.

An easement to take water from the lands of another for mill purposes, granted as an appurtenance to the building, and not to the land upon which it stands, is extinguished where the mill is burned down and not rebuilt. *Day v. Walden*, 46 Mich. 575, 10 N. W. 26.

The destruction by fire, without fault of the owner, of a mill, the machinery of which was utilized to transmit water power for the operation of an adjoining elevator, does not destroy an easement in the land on which such mill was situate for a perpetual water power and the transmission thereof to the elevator where the reason for the easement did not cease by the destruction of the mill, and was attached to the land, and not the mill and machinery *in esse*, and could be enjoyed by means of other appliances. *Hottell v. Farmers' Protective Asso.* 25 Colo. 67, 53 Pac. 327.

Under a deed reserving to the grantor the privilege of drawing water from the grantee's ditch, for the accommodation of the grantor's mill, and providing that the grantee keep a spout 10 inches square at the bottom of said ditch, for the purpose of enabling the grantor to draw such water, the right to compel the grantee to put in the spout was a part of the easement to draw water from the ditch, and was not barred by a period of time less than that necessary to bar the entire easement. *Randall v. Latham*, 36 Conn. 48.

The condition subsequent in a deed of lands for the purpose of building a raceway for water power and an embankment or tow path, to such extent as may be necessary, with reversion to the grantor if used for other purposes, is not broken so as to forfeit the estate so long as the same is primarily used for the granted purposes, even if incidentally used for other purposes; and a subsequent deed by the grantor of adjacent lands bounded by the tow path is an admission that all the land to that boundary is necessary for the granted purposes. *McKelway v. Seymour*, 29 N. J. L. 321.

Where the owner of a water power conveys a parcel of land with a portion of the power under the express provision that it shall not be used for any purpose other than paper manufacturing, after which both parcels are mortgaged and, subject to the mortgage, come into the possession of a single owner, the estates do not, as against the mortgagees, become merged so that he can alter the use of the water power contrary to the terms of the covenant, although his attempt to do so will not work a forfeiture

of the right to the power. *Wells v. Chapman*, 4 Sandf. Ch. 312.

Where the owner of two tracts of land, one at the outlet of the pond, having on it a dam, and the other farther down on the stream flowing from the pond, having on it a sawmill and gristmill, who was also entitled to the use of the water flowing in the stream for the operation of the mills, conveyed both tracts of land and water rights to the owners of a tract situated on the stream between the pond and the mills, and such owners partitioned the three tracts, the right of the mill property to the use of the water was not lost, or the right of the shop on the intermediate tract increased, by a clause in the deeds of partition conveying separately the grist and sawmill, which granted to each mill one half of the privilege of the fall of the water from the trip-hammer shop to the gristmill. *Tucker v. Jewett*, 11 Conn. 311.

Where dominant and servient characters are respectively impressed on separate mills afterwards acquired by a single owner, his subsequent conveyance of the mill formerly dominant, even without express references to the water privileges, but only generally with all the privileges and appurtenances thereof, and the passing of the formerly servient mill by virtue of a mortgage antedating the common ownership and under a description referring to the old deed which created the servitude, will revive the respective easements as before. *Albee v. Huntley*, 56 Vt. 454.

If the right to the water is restricted to its use in connection with specified property an attempt to transfer the use to prohibited property will terminate the water right, and the owner can confer on third persons no greater rights than he possesses.

Where after the construction of a reservoir and flume to convey water to a mill the mill is sold, together with a right to use the water of the reservoir for the mill upon condition that if the mill is not kept in use the water privilege and right of dower shall revert to the grantor, and the mill owner subsequently contracts for land of the grantor lying along the flume between the reservoir and the mill, in which contract no mention is made of the water right, and erects a new mill upon it, abandoning the old mill, he will by his acts abandon the water right; and the fact that before the reservoir is destroyed and before the deed to the new property is delivered, the mill owner sells his right to a third person with the water right visibly attached to the new mill, to whom the deed is delivered, is immaterial, since the original grantor did not create the artificial arrangement and the contract of sale relates back to the time when it was made, and not when it was consummated. *Simmons v. Cloonan*, 47 N. Y. 3, *Reversing 2 Lans.* 848, where the recovery was in favor of the assignee on the ground that the deed included the appurtenances and the conveyances merged the prior agreements, and it was evident that the assignee of the contract bought the premises intending to use them for milling purposes, and that the original grantor knew of the purpose for which they were designed and had been used when he delivered the deed to the assignee.

VIII. Compensation.

A contract to pay for water power as it is developed at so much per horse power per annum, and then only when it is in actual use, 67 L. R. A.

should be construed so that the user need only pay for the fractional parts of a year in which it is used. *Columbus R. Co. v. City Mills Co.* 110 Ga. 273, 34 S. E. 581.

Purchasers of land and assignees of a permanent lease of water power for use in connection therewith, whether they are liable or not for the stipulated annual rent under such lease, which makes no provision for the payment of rent by the assignee thereof, are bound to pay such rent in order to discharge the lien on the land for the payment thereof created by the contract for such water power, subject to which they took, so long as the contract remains in force. *Beckett Paper Co. v. Hamilton & R. Hydraulic Co.* 18 Ohio C. C. 200.

Where the owner of a lower mill from which water had been wrongfully diverted by an upper mill owner granted to him the free use and benefit of the water course for a term of years, after which the grantor's mill was destroyed and the grantee continued to enjoy the water course paying the rental for it, a person claiming under the grantee and continuing the use of the water after the expiration of the term is liable for the value of such use to the person succeeding to the grantor's title. *Davis v. Morgan*, 4 Barn. & C. 8, 6 Dowl. & R. 42.

A purchaser of water power for mining and milling purposes, under a contract for a term of years, is not liable therefor after a sale of the mine and mill, where the right to make such sale is expressly recognized in the contract, and a provision thereof attempts to bind his successor in interest to take and use the water during the term at the agreed price,—especially in view of the practical construction put thereon subsequent to the sale by the furnishing of water to the purchaser of the premises and the receipt of pay for it in accordance with the terms of the contract. *Table Mountain & S. A. Water Co. v. Chavanne*, 70 Cal. 616, 11 Pac. 678.

Power furnished by water, pumped through a main, by power developed on a dam, and distributed through a pipe system to a village about a mile distant, and there furnished to various parties who used it in water motors for driving small machinery; and also by electricity developed by the power at the dam and transmitted to the village and there used for heating, lighting, and propelling electric motors,—is within the provisions of a contract by which a water company agreed to pay the town each year one half the net income derived from the sale or lease of power on said dam; and it is not necessary that the power leased or sold by the water company should be used upon its dam in order that the company should be liable to the town for one half of the net proceeds derived therefrom. *Caribou v. Caribou Water Co.* 96 Me. 17, 51 Atl. 287.

IX. Covenants.

a. In general.

Most grants of water power contain express covenants as to the amount granted and the conditions under which it may be enjoyed. Such stipulations should be inserted in the contract, for a mere statement by the vendor of a mill to the vendee that "a stream will furnish water to run a mill day and night eight months in the year" is not a warranty, but a mere expression of opinion, upon which the vendee is not authorized to rely. *Clark v. Ralls*, 50 Iowa, 275.

Whereas a covenant, and not a condition, is created by a clause in a lease of water power,—“it being understood and agreed that the lessees, their heirs and assigns, are not to make any waste of the water or suffer any to be made through their carelessness or negligence.” *Gould v. Bugbee*, 6 Gray, 371.

So, an undertaking of a grantor is not a condition in the grant of a water privilege if it is a self-imposed duty to which no forfeiture is specifically attached, and its performance was not necessary to or demanded by the grantee during twenty-four years. *Paschall v. Passmore*, 15 Pa. 295.

A provision in a lease of water power that the same is subject to the interruptions provided for in a certain other lease is not an exception, but a mere proviso, allegation or proof of which is not essential to a recovery by the lessee in an action of covenant for failure to furnish the water power as agreed, but is a matter of defense, the burden of proof as to which is upon the lessor. *La Point v. Cady*, 2 Chand. (Wis.) 202, 2 Pinney (Wis.) 515.

Where one seised in fee of upper and lower mills leases the lower with the stream thereto appertaining and covenants for quiet enjoyment, and afterwards leases the upper, and the lessee covenants not to divert or pen up the said stream to the prejudice of the lower mills, the lessee of the lower mills is entitled to the benefit of the covenant, and on its breach may bring a bill for an injunction without first bringing an action of trespass. *Martin v. Stiles*, Mosely, 145.

A remote grantee of mill property cannot maintain an action against the original grantor for breach of covenant of the right to maintain the dam at the height it was when the original conveyance was made, where the immediate grantees could maintain no action therefor because they had fraudulently raised the height of the dam prior to the conveyance, so that the deed was executed in ignorance of the fact of such increased height, as the remote grantee's rights do not rise above those of such immediate grantees through whom he derives title. *Scott v. Stetler*, 128 Ind. 385, 27 N. E. 721.

Purchasers of land with water rights from one holding the land by deed with warranty against the claims of all other persons take subject to the equities existing between the warrantors and their grantor, where there had been a conveyance by the grantor to the warrantors and a reconveyance from them to him, and cannot recover for a breach of the warranty by the destruction of the dam by legal proceedings at the instance of the owners of other lands overflowed by the backlog of water from the dam, where the warrantors held under a deed from their grantor containing the same warranty, and the cause of the breach existed at the time of his deed to the warrantors, although the consideration of the retransfer to him was larger than he received from such warrantors. *Fields v. Willingham*, 40 Ga. 344.

In an action to recover instalments due on the purchase money of a water power conveyed by instrument under seal, a breach of a covenant therein that a corporation from which the seller derived title should fulfil its covenant to build a canal of specified width cannot be set up as a counterclaim, where the purchaser knew that for twenty years previously the seller had rested content with the canal as originally

constructed by the corporation. *Doty v. Lawson*, 14 Fed. 892.

The owners of sawmill property are not estopped to deny the right of a lower gristmill owner, who purchased from the estate to which both properties belonged, to the flow of water from the sawmill dam at all times the same whether the sawmill is running or not, although one of their grantors was so estopped by her covenants, where the owners of the remainder of such estate were in no way bound thereby. *Mable v. Matteson*, 17 Wis. 1.

The purchaser of a part of a milling privilege with covenant by the grantor to maintain the works so as to secure to the purchaser his water power cannot enforce the covenant against a purchaser on foreclosure, if the creditors and assignee in bankruptcy joined in the deed, but not in the covenant, the covenant, therefore being a mere personal undertaking. *Stanton v. Sauk Rapids Co.* 74 Minn. 286, 77 N. W. 1.

A complaint for breach of covenant in a grant of an easement to use water from a mill pond is not sustained by proof of a tort in wrongfully interfering with the easement without showing any covenant. *Beard v. Yates*, 2 Hun, 466.

In an action to enforce the unpaid purchase money of a mill and dam with all appurtenances, the record of a judgment in a suit pending against the vendor at the date of the sale, wherein it was adjudged that the height of the dam must be reduced, is competent as showing an eviction from part of the property conveyed, so as to enable the purchaser to recover for breach of covenant of a right to maintain the dam at a greater height; and the fact that the judgment has been appealed from does not destroy its competency. *Scheible v. Slagle*, 89 Ind. 323.

b. *Runs with the land.*

Whenever the covenant is incorporated into a conveyance of land it will run with the land, although it relates to water power merely.

Thus, when an agreement to furnish water power is in terms between the parties, their executors, administrators, and assigns, and where it affects real estate and the value thereof, if the conveyance of the water rights and real estate recites that the grant is taken subject to the agreement, the agreement constitutes a covenant running with the land. *Witherbee v. Meyer*, 84 Hun, 146, 32 N. Y. Supp. 537.

A covenant in a deed that the grantor of mill property had a right to maintain a dam connected therewith at the height it was at the time of the conveyance runs with the land and vests in a remote grantee the right to maintain an action for its breach. *Scott v. Stetler*, 128 Ind. 385, 27 N. E. 721.

Covenants as to increase of water power, raising of a dam, and renewal, in a lease of water to be taken from a dam in a water power of the lessors and by the latter conveyed in a flume to the lessees' mill, run with the land, as such agreement is not a lease of water distinct from the land, but vests in the lessee an interest in the dam and water power of the lessors; and a purchaser of such land with notice of the lease takes subject to the easement and is bound by such covenants. *Noonan v. Orton*, 4 Wis. 335, 27 Wis. 300.

Where a covenant was the owner of land upon a creek embracing a water-mill privilege,

the covenantor, a water company, proposing to take water from a lake out of which the creek flowed, and the covenant was to maintain such a stage and volume of water in the lake that the quantity flowing in the creek should not be diminished by the diversion, the covenant runs with the land of the covenantee, and is continuing, so that damages for its breach and the right of action therefor accrue to him who holds the property when the breach occurs. *Shaber v. St. Paul Water Co.* 30 Minn. 179, 14 N. W. 874.

An instrument under seal calling itself an indenture, leasing the right to take and use sufficient water to run a cheese factory, and "to have the use of any water so long as same shall be used for the purpose of running a cheese factory," will not be personal to the grantee, but will run with the land so long as the conditions of the grant are performed. *Whitney v. Richardson*, 59 Hun, 601, 13 N. Y. Supp. 861.

A covenant made by a lessor, in a demise of property to be used for mill purposes, runs with the land, and binds the assignee of the reversion at the suit of the assignee of the lessee, where it provides that it shall be lawful for the lessee, his heirs, and assigns, during the continuance of the demise, to make use of a conduit made for carrying off waste and superfluous water from the canal of the lessor to the demised premises, and to take, use, and enjoy such superfluous water for their own use. *Athol v. Midland G. W. R. Co.* Ir. Rep. 3 C. L. 333.

A mortgagee of mill property is entitled to avail himself of the mortgagor's right to set off, against a prior mortgage to secure water rentals, a claim for damages arising from the failure to furnish water according to the contract, where the property is insufficient to pay both mortgages. *Gordon v. Constantine Hydraulic Co.* 117 Mich. 620, 76 N. W. 142.

In case property owners convey to each other an interest in their several contributions to a common water privilege, covenants to construct and maintain canals and a dam will run with the land, since they are connected with the subject of the grant, and enter into the value of the same. *Nye v. Hoyle*, 120 N. Y. 195, 24 N. E. 1.

A covenant in a deed of a water lot whereby the grantee agrees to pay a certain proportion of the expense of improving a dam and canal or reservoir for water-power purposes runs with the land, and makes such proportion of the expense a permanent charge on such lot unto whomsoever the title thereto may be conveyed or assigned. *Howard Mfg. Co. v. Water Lot Co.* 53 Ga. 689.

A covenant in a grant by the owner of a water power operating two mills, of one of the mills, together with the first use of the water power, that he would at all times be at equal expense in keeping up and repairing the dam for the mutual benefit of the mills, will run with the land into the hands of a subsequent grantee of the other mill. *Denman v. Prince*, 40 Barb. 213.

Covenants in a deed conveying a mill together with water power from a dam belonging to the grantor, necessary to run the mill, by which the grantor binds himself to keep the milldam in repair so as to enable the grantee, his heirs, and assigns, fully to use and enjoy the water granted, and giving such grantee the right to enter upon and repair the same at the grantor's

expense in case of his failure to do so after a certain time, such grantee binding himself to pay a certain fraction of the expense of keeping the same in repair, are covenants running with the land, and may be enforced by the assignee of the mill against the assignee of the milldam. *Fitch v. Johnson*, 104 Ill. 111.

A covenant in a deed of a mill site and water power that the grantee will pay, for keeping a dam and raceway in repair, his ratable share in proportion to the number of inches of water owned or used by him, runs with the land and water granted. *Woollscroft v. Norton*, 15 Wis. 198.

A covenant in a deed conveying land upon a stream with the use of half of the water power afforded by a dam on such stream, whereby the grantor undertakes to keep the dam in repair, and giving the grantee that right at the grantor's expense in case of his neglect to do so, is a covenant running with the land, and may be enforced by the assignee of such grantee, but not by a remote grantee of a part of the premises and a fraction of the water power, to whom no right is conferred to enter upon the dam and make repairs. *Batavia Mfg. Co. v. Newton Wagon Co.* 91 Ill. 230.

A deed which conveys a portion of land, together with sufficient water to turn a shaft and portable machinery to be kept in good condition by the grantee, who is to contribute *pro rata* towards the expense of maintaining the power, creates mutual easements between the land conveyed and that retained; and a subsequent grantee may enforce the easement as against one who succeeded to the interest of the original grantor in the premises retained, with notice of the covenant, although it did not in express terms bind the grantor's heirs and assigns. *Gould v. Partridge*, 52 App. Div. 40, 64 N. Y. Supp. 870.

But a conveyance of a privilege of drawing water from a pond is not a conveyance of land, so that a covenant respecting the privilege can be said to run with the land. *Wheelock v. Thayer*, 16 Pick. 68.

So, an agreement by each of several persons interested in a water power for himself and his assigns, to pay his share of the expense of improving the power, is not a covenant running with the land so as to bind his grantee; nor does it create a charge upon the respective estates in favor of the other parties to the agreement which can be enforced after the estates have passed into the hands of third persons. *Clarke v. Sibley*, 13 Met. 210.

And a covenant by the grantee of water power as to the repair of a dam, contained in a separate instrument executed after the conveyance of such water power, does not run with the land so as to charge a subsequent grantee of such covenantor, where the conveyance of the water power and the agreement for repair do not constitute one transaction, as the burden of a covenant cannot be imposed upon land so as to run with it where there is no privity of estate between the covenantor and the covenantee at the time of the making thereof. *Wheeler v. Schad*, 7 Nev. 204.

So, an agreement between owners of a water power on one side of a stream, who have purchased land on the other side for the purpose of controlling the water power for use on the side where they originally owned their property, that the purchaser shall be entitled to use the water on that side of the stream, contains no grant or transfer of anything from one to

the other, so that the covenants for use do not run with the land on that side, but remain personal, and will not result in stripping purchasers of the land on the other side to which the water rights pertain of its natural rights. *Lawrence v. Whitney*, 115 N. Y. 410, 5 L. R. A. 417, 22 N. E. 174.

A condition in a grant of right of way to a railroad company that it shall build a dam over a brook crossing the land to furnish a water power for the grantors, their heirs and assigns, and that the grantee shall repair all damages which the dam shall sustain, is a condition subsequent, and the title vests in the grantee subject to be defeated by the neglect to repair; but the condition cannot be enforced by assignees, since the condition is not a covenant running with the land. *Underhill v. Saratoga & W. R. Co.* 20 Barb. 455.

A conveyance of land with the privilege of drawing off from mill race on adjoining land, which also belonged to the grantor, a certain quantity of water for purposes specified, leaving always sufficient to supply a mill on grantor's land, as covenanted by grantee for himself, his heirs, executors, and assigns, is a covenant running with the land, upon which grantor may maintain an action against the grantee's assignee. *Warren v. Munroe*, 15 U. C. Q. B. 557.

c. Breach.

The question whether or not there has been a breach of covenant involves the further question of the existence of a covenant. Under statutes providing that no covenants shall be implied, the question has arisen whether or not a grant of a dam on water power in its existing condition involved a covenant that the subject of the grant had a rightful existence. Obviously in many instances it would be a fraud on the grantee if it had no existence, and he had no redress. On the other hand, the question arises as to the scope of the statute abolishing implied covenants. If there is a covenant of warranty it will include whatever is an essential part of the grant.

Thus, a covenant of warranty in a grant of a mill with a water power and dam will cover the right to maintain the dam at that height and flow the land of an adjoining proprietor sufficiently to maintain it there. *Adams v. Conover*, 87 N. Y. 422, 41 Am. Rep. 381, Affirming 22 Hun, 424.

This case distinguishes *Green v. Collins*, 86 N. Y. 246, 40 Am. Rep. 531, on the ground that in the latter case the deed did not cover the right to drain across the neighbors' land, the loss of which was the subject-matter of the action.

The lease of a water lot and mill privilege which contains no covenant of quiet enjoyment will not, where the statute provides that no covenant shall be implied in any conveyance of real estate, sustain an action for breach of covenant of quiet enjoyment upon the cutting by the lessor of a drain which lowers the water in the mill pond. *Kinney v. Watts*, 14 Wend. 38.

Under a statute providing that no covenant shall be implied in any conveyance of real estate, whether such conveyance contains special covenants or not, in a deed whereby a mill lot and right to draw a certain amount of water from a race are granted with the condition that grantee shall make one third of all necessary repairs upon the dam and race, no covenant can, in the absence of express words, be con-

strued out of the deed that grantor shall make the remaining two thirds of the repairs. *Koch v. Hustis*, 113 Wis. 599, 87 N. W. 834.

It has been held that a purchaser of a mill site, who accepts a deed without a covenant for his protection as to the height of the dam, is without remedy in case he is compelled to lower the dam. *Hopper v. Lutkins*, 4 N. J. Eq. 149.

But the right to maintain a dam at the height at which it existed at the time of a conveyance of mill property is of itself property and a part of the thing sold, and the covenants of the deed extend to and cover the right to maintain the dam at such height as an incident to the estate and necessary to its enjoyment; and, if a grantee is deprived of such right because the grantor had no right to maintain it at the height covenanted, he is entitled to compensation for the loss. *Scott v. Michael*, 129 Ind. 250, 28 N. E. 546.

A covenant of seisin in a deed granting mill property with the privilege of raising water to a certain height is broken where such privilege cannot be exercised without flowing lands which the grantor had no right to flow. *Hall v. Gale*, 20 Wis. 292; *Walker v. Wilson*, 13 Wis. 522; *Hall v. Gale*, 14 Wis. 54.

Where the height of a milldam adds materially to the value of the property, the right so to maintain it must be considered a part of the thing purchased; and, if the purchaser be deprived of it because his vendor did not possess it, he may treat the case as one of partial failure of title, and, without surrendering possession, maintain a defense against an action for the recovery of the unpaid purchase money. *Schellie v. Slagle*, 89 Ind. 323.

A purchaser of mill property, including the water power afforded by a milldam, is entitled to damages for breach of a covenant on the part of the grantor that he was lawfully seised of the right to raise the milldam to a certain height, whereas he had no right, title, or authority to raise it beyond the height at which it was when conveyed. *Traster v. Snelson*, 29 Ind. 96.

The grantee of mill property can maintain an action for breach of warranty contained in the deed conveying it "together with all privileges, water powers, flowage, and appurtenances of every kind whatsoever thereunto belonging" where he has been deprived of the right to maintain the dam at the height it was at the time of the conveyance because the grantor had not the right to maintain it at that height. *Scott v. Michael*, 129 Ind. 250, 28 N. E. 546.

One conveying a tract of land containing a mill seat with a dam under covenants of warranty as to the mill seat, pond, and appurtenances is liable on such warranty where, after the grantee had erected a mill, it transpired that the pond as maintained at the time of the sale and which both parties supposed flowed only the land conveyed, in fact covered land belonging to a third person, who compelled the grantee to lower the pond so as to flow only the land conveyed, which left it insufficient to turn a mill.—the purpose for which the land was purchased. *Lide v. Thomas*, 2 Brev. 334, 4 Am. Dec. 581.

The grantor of a mill privilege who conceals from the grantee knowledge that the dam is then higher than it can lawfully be maintained, is liable to an equitable reduction in the purchase price. *Light v. Stoeve*, 12 Serg. & R. 431.

A covenant to maintain a dam at the height of 10 feet for the purpose of enabling a grantee to draw water from the pond is broken at the time it is made when the grantor has a right to maintain the dam at the height of only 6 feet, so that it is not subject to assignment. *Wheelock v. Thayer*, 16 Pick. 68.

In an action for a breach of covenant of a right to maintain a milldam at a certain height, parol evidence is admissible to show at what height the dam was being maintained when the deed was made, where the height was not fixed in the conveyance, but was described as a certain mill property "together with the mill race and dam and all the ways, appurtenances, and privileges to said property belonging," and the right to maintain it at that height is what was warranted. *Scheible v. Slagle*, 89 Ind. 323.

Fraudulent representations on the part of the grantor of a mill that he had a right to maintain the milldam at a certain height when in fact his right was limited to a less height, and from which the purchaser suffered injury, will entitle the latter to recoup his damages against the unpaid purchase-money notes, in an action by the grantor to enforce their payment. *Ibid.*

A right, not existent by grant or prescription at the time of the conveyance, to overflow land belonging to a third party, is not included under the general habendum in a deed, "with the appurtenances," containing warranty against encumbrances and covenant to defend against all claims and demands. *Swazey v. Brooks*, 34 Vt. 451.

A contract for the sale of land including one half the water power of the river as controlled by a dam does not contain an implied warranty that the purchaser shall have the right to raise the dam high enough to throw the water back upon and submerge other lands above the dam. *Jobbins v. Gray*, 34 Ill. App. 208.

A covenant of seisin in a grant of mill property with the privileges and appurtenances "thereto belonging" is not broken by reason of there being in the grantor no right to flow certain other premises by back water, where such right is not necessary to the useful operation of the mill property in the manner in which it had existed and had been used previous to the grant, but the necessity therefor is created by the grantee's enlargement of the capacity of the mill. *Jackson v. Trullinger*, 9 Or. 393.

A covenant in a deed to a mill pond, the title to the shores and bed of which remained in the grantor and others, providing that, as an appurtenance thereto, such mill pond "shall be and continue a mill pond, appropriated to the use of the mill and the site whereon it stands, as it now is, forever," provided the same should never be raised above its present height, is not such a covenant as would protect a subsequent purchaser against a future abatement of such mill pond as a nuisance, by the acts of the government. *Oldham v. Kennedy*, 3 Humph. 260.

A covenant in a deed of a water lot, that the vendor will so finish all the eyes in a canal or reservoir as to "furnish and contain" in said canal water in sufficient quantity to propel the machinery placed and erected on that lot, is to be construed to refer to the capacity of the canal, on a proper completion of the works, to furnish and contain water sufficient to propel the machinery if it receives it from the river, and not as a covenant against general drought or unusual or excessive low stages of water in the river. *Water Lot Co. v. Leonard*, 30 Ga. 560.

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The diversion of water from a ditch by the tortious acts of third persons is not a breach of a covenant to warrant and defend the title to an exclusive water right sufficient to operate a specified plant. *Poley v. Lacert*, 35 Or. 166, 58 Pac. 37.

A deed conveying a tract of land with the privilege of erecting a dam across a river, and of making a raceway across the land of the grantor, and making all necessary embankments, walls, and troughs to convey as much of the water from said river to said piece of land as the grantee shall choose, did not convey the right to use the water so as to make the grantor liable on his covenants of warranty, upon a riparian proprietor below the raceway subsequently evicting the grantee from the right of using the water. *Griswold v. Allen*, 22 Conn. 89.

In a grant, containing full covenants of warranty, of a certain amount of water from a race, subject to a prior grant of a certain amount, but not expressing in the warranty clause any exception as to the prior grantee, the exception in the granting clause applies to the warranty clause also. *Koch v. Hustis*, 113 Wis. 604, 89 N. W. 838.

When the successors of a lessee of water power operate said lessee's mill a contract similar in terms to that between the original lessor and lessee will be implied so long as it is left to mere implication to determine whether the occupation is with the assent of the owner and in submission to the legal title. *Page v. McGilinch*, 63 Me. 472.

Liability for breach of a covenant for water power in a conveyance of land and water power is not confined to the result of acts done subsequent to the conveyance, but may extend to the diversion of water to the injury of the grantee after such conveyance by a mill constructed without authority of law, but with the permission of the grantor prior to the conveyance. *Hollingsworth v. Dunbar*, 5 Munf. 199.

The lessor's covenant for quiet enjoyment of a demised water course is not broken by persons taking the water under contracts made with the lessor prior to the execution of the lease. *Blatchford v. Plymouth*, 3 Bing. N. C. 691, 4 Scott, 429, 3 Hodges, 86.

d. Damages.

The measure of damages for the breach of covenants in a deed of a water lot, which require the performance of work for the betterment of a canal to the use of which for water-power purposes the vendee is entitled, is the interest on the vendee's investment, or such part thereof as he could not employ on account of such breach, for the time that such part of the whole could not be so employed. *Water Lot Co. v. Leonard*, 30 Ga. 560.

The expense to a mill owner of putting in a new wheel cannot be recovered against one from whom he procured his water power, although the latter advised him to put in such wheel in order to operate his mill with a decreased amount of water, such decrease being due to his inability to furnish the required amount. *Moline Water Power Co. v. Waters*, 10 Ill. App. 159.

The measure of damages for breach of covenants in deed to water rights warranting title and for quiet enjoyment is the value of the rights at the time the conveyance was made, with interest, costs, and reasonable expense incurred in defending the title, and does not include the value of improvements made by the

vendee, notwithstanding the language of the deed and the nature of the property conveyed showed a knowledge on the part of the vendor that it was necessary, and the intention of the vendee to expend money in the construction of a ditch necessary to carry the water to the place indicated. *Taylor v. Holter*, 1 Mont. 688.

The measure of damages for the breach of a covenant of seisin in a deed of mill property granting the privilege of raising the water to a certain height, but which could not be so raised without flowing lands which the grantor had no right to flow, is the difference in the value of the mill at the time of the purchase, with the privilege of raising the water to the specified height, and with only the right to raise it so as not to overflow or damage such lands. *Hall v. Gale*, 20 Wis. 292.

The measure of damages for a breach of covenant of the right to maintain a milldam at a certain height from which the purchaser had

been evicted by a judgment decreeing that the dam must be reduced, is the value of the right from which he was evicted, measured by ascertaining the proportion it bears to the whole purchase price. *Schieble v. Slagle*, 89 Ind. 323.

Loss of profits cannot be recovered for breach of a covenant to repair a milldam. *Thompson v. Shattuck*, 2 Met. 615.

A judgment against the grantor of a mill and dam, in an action pending at the date of conveyance, adjudging that the dam must be reduced from the height at which the grantor had covenanted that he had a right to maintain it, binds his grantee and fixes his right to maintain the dam; and he has a right to treat the judgment as an eviction of a part of the premises, and, without rescinding the contract, may maintain an action for damages for the partial failure of title, without proof of the enforcement of the judgment by a ministerial officer. *Schieble v. Slagle*, 89 Ind. 323. H. P. F.

CALIFORNIA SUPREME COURT.

Re William B. KENNEDY.

(144 Cal. 634.)

The sufficiency of the evidence before a grand jury to warrant an indictment cannot be inquired into by habeas corpus proceedings to obtain the release of accused from custody consequent upon the indictment, and it is immaterial that, by statute, the evidence offered before the grand jury may be taken down and a copy of it delivered to the accused, so that the proceedings before that body are no longer incapable of proof.

(September 10, 1904.)

APPPLICATION by petitioner for a writ of habeas corpus to obtain his release from custody to which he had been committed to await trial upon an indictment for murder. *Writ discharged.*

The facts are stated in the opinion.

Messrs. William H. Schooler and A. S. Newburgh for petitioner.

Mr. I. Harris for respondent.

McFarland, J., delivered the opinion of the court:

This is a petition to this court in behalf of William B. Kennedy for his discharge on habeas corpus. The writ issued, and upon the return of the sheriff who holds Kennedy the matter was heard and submitted. The petition sets forth a large number of arrests of Kennedy on various charges, and subsequent discharges from such arrests by

superior-court judges on habeas corpus; but, while these various proceedings may tend to support the contention that these prosecutions were somewhat in the nature of persecutions, they are irrelevant to this present case. Kennedy is now held under a warrant of arrest regularly issued upon an indictment found against him by a grand jury charging him with murder. There is no question of the regularity of the formation of the grand jury, or that the requisite number of jurors acted on the indictment, or as to any other matters touching the general jurisdiction of the grand jury to find the indictment here in question, or that it does not charge a public offense, or as to any deficiency of the indictment in the matter of form or substance. His claim to a discharge is founded on these facts: He was once before tried on a former indictment for the same alleged crime as the one charged in the present indictment. On the former trial he was convicted, but the superior court granted him a new trial on the ground of the insufficiency of the evidence to warrant the verdict, because there was no evidence supporting the charge except the uncorroborated testimony of an accomplice. The people took an appeal from the order granting a new trial, and this court affirmed the order, deciding that the only direct testimony against Kennedy was that of an accomplice, and that there was no sufficient corroborating evidence, and inti-

NOTE.—For a case in this series holding that on habeas corpus proceedings the court has jurisdiction to examine into the sufficiency of the complaint to charge a criminal offense and the sufficiency of the evidence, see *State ex rel. Durner v. Iluegin*, 62 L. R. A. 700.

As to right to examine into legality of *de* 67 L. R. A.

facto grand jury finding indictment, see *State ex rel. Dunn v. Noyes*, 27 L. R. A. 776.

For a case holding that it is the duty of the court on habeas corpus to see that at least a prima facie case of guilt is supported by the evidence against accused, see *Com. ex rel. Wadsworth v. Shortall*, 65 L. R. A. 193.

mating that the testimony of the accomplice himself would not have been sufficient even if the law did not require corroborating evidence. After the remittitur had gone down, the prosecution not being able to state its ability to furnish additional evidence, the court dismissed the indictment under § 1385 of the Penal Code, and ordered Kennedy discharged from custody. Afterwards the grand jury found and returned the said indictment under which he is now held. The testimony introduced before the grand jury upon which the last indictment was found was, on demand of the district attorney, taken down and written out by a stenographer, under § 925 of the Penal Code, as amended in 1897 (Stat. 1897, chap. 142, p. 204), which provides that the testimony should be so taken if the district attorney demands it, and that a copy of it shall be given to the defendant upon his arraignment. This testimony is made part of the petition in this present proceeding, and it is contended by petitioner that it is the same testimony that was given at the former trial, which was held by this court to be insufficient to support a verdict of guilty, and that, therefore, it was insufficient to justify the grand jury in finding a second indictment. And this is the sole ground on which the discharge of Kennedy is asked for on this present proceeding.

We think it clear that upon habeas corpus the sufficiency of the evidence before a grand jury to warrant an indictment is not a proper subject of inquiry. If it could be inquired into in this case, it could be in any case, and the writ of habeas corpus would, for this purpose, be turned into a writ of review for the purpose of inquiring whether the grand jury committed an error reversible on appeal, and an entirely new field of litigation in criminal cases would be opened up, and few indictments would come to trial without this preliminary contest. But there is no such appeal, and no provision for reviewing the action of a grand jury in finding an indictment. Upon habeas corpus we can look only to the matters hereinbefore indicated. We cannot look to the sufficiency of the evidence on which it acted, for as to that matter its action is conclusive. There are no cases decided by this court which are directly in point, this being the first time, within our knowledge, where the validity of an indictment has been attacked upon mere ground of insufficiency of evidence to support it; although in *People v. Tinder*, 19 Cal. 539, 81 Am. Dec. 77, it was held that for the purpose of determining whether an indicted party should be admitted to bail the evidence taken before the grand jury could not be considered, and in *Ex parte Starnes*, 82 Cal. 245, 23 Pac. 38, 47 L. R. A.

although the point was not necessarily involved, it is correctly stated in the opinion of Mr. Justice Fox that an indictment is a charge "made by a judicial body," and that it is held so conclusive that for centuries, until an information was recently allowed in this state, all courts have been powerless to put a man on trial for felony except upon indictment, "or to dismiss one without trial who had been in proper form so charged." But in other jurisdictions the question has been directly raised, and we are satisfied that the law always has been and is as stated in *Bishop on Criminal Procedure*, § 872, that the court cannot inquire into the sufficiency of proof, or the mode of examining witnesses, to invalidate an indictment. See *State v. Boyd*, 2 Hill, L. 288, 27 Am. Dec. 376; *Smith v. State*, 61 Miss. 759; *Hight v. United States*, Morris (Iowa) 407, 43 Am. Dec. 111; *United States v. Reed*, 2 Blatchf. 437, Fed. Cas. No. 16,134; *Hammond v. State*, 74 Miss. 214, 21 So. 149, and cases there cited. In *United States v. Reed*, 2 Blatchf. 437, Fed. Cas. No. 16,134, it is said: "No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence for the purpose of determining whether or not the finding was founded upon sufficient proof;" and in *Hammond v. State*, 74 Miss. 214, 21 So. 149, it is said: "The doctrine appears to be general that the court cannot inquire into the sufficiency of the proof . . . to invalidate an indictment." There are many other authorities to the same point. The statutes of the states where the decisions above referred to were made do not differ materially on the subject of grand juries and indictments from those of this state.

The fact that § 925 of the Penal Code now allows the district attorney, if he so desires, to have the testimony given before a grand jury taken by a stenographer, does not affect the rule as above stated. It is true that judges and text writers, when stating the rule, have sometimes alluded to the secrecy of proceedings before the grand jury, and the difficulty of proving what the evidence before a grand jury was; but the rule itself does not rest upon these considerations. An indictment is a record of the action of a judicial body, and such action is final when there is no appeal therefrom and no other method provided for revising it; and there is no method for revising it on the ground that there was not sufficient evidence to support it. The provision that a party who has been "committed" without probable cause may be discharged refers to the preliminary commitment by a magistrate. See *Ex parte*

Sternes, 82 Cal. 245, 23 Pac. 38. The provision of § 925 is evidently for the benefit of the district attorney,—probably for the purpose of preventing witnesses of a certain character from safely giving testimony before the trial jury different from that which they have given before the grand jury; but the district attorney need not have a stenographer before the grand jury, and clearly the provision does not change the rule as above stated. The provision of § 921 of the Penal Code that a grand jury “ought to” find an indictment upon certain evidence is “plainly only matter of advice to the jury.” *State v. Boyd*, 2 Hill, L. 288, 27 Am. Dec. 376. The case of *Ex parte Jenkins*, 2 Wall. Jr. 521, Fed. Cas. No. 7,259, cited by petitioner, is not in point. That case involved a conflict between Federal and state courts under the fugitive slave law. A law of Congress provided that judges of Federal courts should have the power to issue writs of habeas corpus where prisoners were confined “on, or by any authority of law, for any act done or omitted to be done in pursuance of

a law of the United States, or any order, process, or decree of any judge or court thereof.” In that case the prisoners were held under an indictment in the state court which merely charged them with riot and assault to kill, and contained no intimation that the parties indicted were officers of the United States, and did the things alleged while acting in pursuance of an act of Congress and the Federal court merely held that the act of Congress could not be evaded by the artifice of an indictment in the state court which did not disclose the facts which brought the case within the operation of the law of Congress. That law included cases where Federal officers were held under “any authority of law,” whether by the interposition of a grand jury or otherwise.

Said Kennedy is remanded to the custody of the sheriff, and *this writ is discharged.*

We concur: **Beatty, Ch. J.; Shaw, J.; Angellotti, J.; Van Dyke, J.; Lorigan, J.**

IOWA SUPREME COURT.

IOWA PIPE & TILE COMPANY v.

James CALLANAN, Impleaded, etc.

(.....Iowa.....)

1. An assessment for construction of a sewer upon a strip of property fronting on the street, which is only 8 feet deep, at the same front-foot rate as is applied to full-sized lots, is so manifestly unequal and unjust that it violates the constitutional provisions against taking property without due process of law.
2. Tender of a portion of the assessment for a local improvement is not a condition to equitable relief from an invalid assessment if there is nothing to show that some amount at least is due, but it appears that the entire assessment is illegal.
3. A provision in a contract for a municipal improvement that the contractor shall receive assessment certificates against the abutting property in full compensation

for his labor without recourse to the municipal corporation does not relieve the city from liability in case it makes an assessment which is invalid and unenforceable.

4. Notice of an assessment for a sewer improvement is not insufficient because the same document notices other and different improvements.

(October 25, 1904.)

CROSS APPEALS from a judgment of the District Court for Polk County in a suit to foreclose assessment certificates which resulted in a judgment in plaintiff's favor; the plaintiff appealing from so much of the judgment as refused to hold the city liable for the amount due; and defendant Callanan appealing from so much as held him personally liable for the amount of the assessment against his property. *Reversed on both appeals.*

NOTE.—For other cases in this series as to necessity of special benefits as basis for assessment for public improvement, see *Re Madera Irrig. Dist. Bonds*, 14 L. R. A. 755, and *note*; *Raleigh v. Peace*, 17 L. R. A. 330, and *note*; *Davis v. Litchfield*, 21 L. R. A. 563, and *note*; *Asberry v. Roanoke*, 42 L. R. A. 636; *Weed v. Boston*, 42 L. R. A. 642; *Rolph v. Fargo*, 42 L. R. A. 646; *Sears v. Boston*, 48 L. R. A. 834; *Hutcherson v. Storrie*, 45 L. R. A. 289; *Schroder v. Overman*, 47 L. R. A. 156; *Kersten v. Milwaukee*, 48 L. R. A. 851; *Adams v. Shelbyville*, 49 L. R. A. 797; *Shank v. Smith*, 55 L. R. A. 564; *Ramsey County v. Robert P. Lewis Co.* 53 67 L. R. A.

L. R. A. 421; *Barber Asphalt Paving Co. v. French*, 54 L. R. A. 492; *King v. Portland*, 55 L. R. A. 812; *Webster v. Fargo*, 56 L. R. A. 156; *People ex rel. Scott v. Pitt*, 58 L. R. A. 372; *Smith v. Worcester*, 59 L. R. A. 728; and *Sears v. Street Comrs.* 62 L. R. A. 144.

As to effect of contract to take assessments as mode of compensation for public improvement upon failure of the assessments, see *Barber Asphalt Paving Co. v. Harrisburg*, 29 L. R. A. 401, and *Pontiac v. Talbot Paving Co.* 48 L. R. A. 326.

As to refusal of city to make assessments, see *Weston v. Syracuse*, 43 L. R. A. 678.

Statement by **Sherwin, J.:**

Suit in equity to foreclose three assessment certificates issued by the city of Des Moines for the construction of a sewer on Tenth street, and asking a personal judgment against the appellant Callanan and a judgment against the city of Des Moines. The undisputed facts in the case are substantially as follows: The appellant Callanan was the owner of lot 9 in blocks 1, 2, and 3 in an addition to the city of Des Moines. The lots were originally each 33 feet wide and 100 feet long. After his purchase thereof, the city condemned 25 feet in width off of the west side of each of the lots for the purpose of opening Tenth street, leaving three strips of ground each 8 feet wide, and each abutting said street their full length, 100 feet. Thereafter a sewer was built on Tenth street, and the lands abutting thereon were assessed to pay for it according to the frontage of the lots. Before the assessment was made, however, Mr. Callanan sold a strip 5 feet wide off of the east side of one of the lots. Each of these three strips of ground was assessed on the basis of its frontage on the street, each an equal amount, and each the same amount per front foot that was assessed to lots on the same street having a depth east and west of from 120 to 175 feet. The answer of Mr. Callanan alleges that the strips of ground are not and cannot be benefited by the sewer; that they were assessed as though they were full lots, equal in value to other full-sized lots along the street benefited by the sewer; that such assessment is inequitable and unjust, and in violation of the Constitution of the United States, in that his property is taken without due process of law. There was a trial, and a personal judgment against Mr. Callanan for the full amount claimed, with interest, and the suit against the city was dismissed. Mr. Callanan and the plaintiff appeal.

Mr. A. F. Chamberlain for appellant Iowa Pipe & Tile Company.

Messrs. Dudley & Coffin, for appellant Callanan:

The assessment certificates are void for want of notice.

Coggeshall v. Des Moines, 78 Iowa, 235, 41 N. W. 617, 42 N. W. 650; *Bucroft v. Council Bluffs*, 63 Iowa, 646, 19 N. W. 807; *McNamara v. Estes*, 22 Iowa, 246; *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112 Iowa, 300, 51 L. R. A. 763, 83 N. W. 1074; *Reed v. Toledo*, 18 Ohio, 161; *Hager v. Burlington*, 42 Iowa, 661; *Starr v. Burlington*, 45 Iowa, 87; *Augusta v. Murphey*, 79 Ga. 101, 3 S. E. 326; *Little Rock v. Fitzgerald*, 59 Ark. 494, 28 L. R. A. 496, 28 S. W. 32.

The rule followed is unjust, unequal tax-

ation, and is so oppressive and burdensome that it should now be rejected and set aside.

Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; *Warren v. Henly*, 31 Iowa, 31; *Burlington v. Quick*, 47 Iowa, 222; *Amery v. Keokuk*, 72 Iowa, 701, 30 N. W. 780; *Ford v. North Des Moines*, 80 Iowa, 626, 45 N. W. 1031; *Farwell v. Des Moines Brick Mfg. Co.* 97 Iowa, 286, 35 L. R. A. 63, 66 N. W. 176; *Dewey v. Des Moines*, 101 Iowa, 416, 70 N. W. 606.

Mr. W. H. Bremner for City of Des Moines.

Sherwin, J., delivered the opinion of the court:

The assessment in this case is so manifestly unequal and unjust, and is so clearly governed by the rule announced by the Supreme Court of the United States in *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187, that we are constrained to hold it invalid. This court has uniformly upheld the frontage rule of assessment, regardless of the special benefit to the property, the latest pronouncement on the subject being in *Hackworth v. Ottumwa*, 114 Iowa, 467, 87 N. W. 424; and, were it not for the controlling force of the *Norwood-Baker Case*, we should perhaps feel bound to follow the rule in this case. It should be said, however, that in no case involving this question upon which we have heretofore passed, have the facts been similar to those before us now, and hence we have never before been called upon to determine the precise question involved here. It is true that we have sustained front-foot assessments regardless of benefits, and justified the power on the ground of the right of taxation for the public good. *Warren v. Henly*, 31 Iowa, 31, and cases following the rule there announced. But in none of the cases was there such a showing of inequality in the assessment as to make it clearly appear that the assessment could not possibly be just. On the contrary, in none of the cases, as we now recall them, was there a showing of any special inequality, or at least no greater inequality than would inevitably exist under any rule of taxation. In *Amery v. Keokuk*, 72 Iowa, 703, 30 N. W. 780, the only question was whether the lot-owner was entitled to notice of the assessment of the tax, but in a general discussion of the case it was said that "all that was required . . . was the lineal measurement of the front of the lots . . . abutting on the street. . . . There was no authority . . . to institute an inquiry as to how far back from the street the rights of the abutting owners extended." There was, however, no showing of inequality in

that case. The lots in question were originally of such size as to be valuable for business or residence purposes, but, after the city had taken therefrom 25 feet for street purposes, the remaining strips of ground manifestly had no value for purposes of improvement, and could only be used in connection with the lots adjoining them on the east; and, if the adjoining owners did not want them, they would be useless, and practically without any market value. It is doubtful whether the legislature, in conferring upon municipalities the power to assess lots and parcels of land for such improvements, ever intended it to be exercised arbitrarily, and in utter disregard of the principles of equality and justice upon which our laws are supposed to be founded. But, however this may be, and whatever independent conclusion we might reach in this particular case in view of our former holdings, is of little consequence if it be true that this case is controlled by the *Norwood-Baker Case*. The profession is familiar with the issues and facts in that case, but there may be some question as to the extent to which the opinion of the majority goes. In the second edition of Elliott on Roads and Streets, § 558, it is said, speaking of the *Norwood-Baker Case*: "But the Supreme Court of the United States has recently held that an assessment in substantial excess of the special benefit is invalid, and that the power of the legislature in such matters is not unlimited. The actual decision in the case . . . does not go so far as it has sometimes been supposed to go. . . . We think it is clearly an authority to the effect that a particular assessment is invalid where it is in substantial excess of the benefits, and there is no right to a hearing on which it can be changed, especially where it is physically impossible that the particular property can be benefited to such an extent." And the author adds: "But it does not necessarily follow that the statute itself is unconstitutional merely because it lays down a general rule for determining the special benefits in the first instance, whether by frontage or by any other proper system." In the *Norwood-Baker Case* it is said: "The plaintiff's suit proceeded upon the ground, distinctly stated, that the assessment in question was in violation of the 14th Amendment, providing that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, as well as of the Bill of Rights of the Constitution of Ohio." The land taken for the street in the *Norwood-Baker Case*, as in this case, was taken under the power of eminent domain, but in that case valuable tracts of land were

still owned by Mrs. Baker on both sides of the street, while here practically nothing was left to the owner. Speaking of the power of the legislature in that case, Mr. Justice Harlan said: "But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go, consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired if it were established as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made, or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

In *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625, there is a general review of the adjudications on the subject, and the following quotation from 2 Dill. Mun. Corp. 4th ed. § 752, is cited with approval, and may be said to express the view of the majority of the

court: "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. . . . Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency." This rule, it will be seen, fully recognizes the principle that the assessment must be made on the theory of special benefits to the property assessed, whether all property benefited be assessed or not. This is apparent, not only from the language used, but from the same author's views expressed in § 761 of the same work, where he says: "Special benefits to the property assessed—that is, benefits received by it in addition to those received by the community at large—is the true and only just foundation upon which local assessments can rest, and to the extent of special benefits it is everywhere admitted that the legislature may authorize local taxes or assessments to be made. When not restrained by the Constitution of the particular state, the legislature has a discretion commensurate with the broad domain of legislative power in making provisions for ascertaining what property is specially benefited, and how the benefits shall be apportioned. This proposition, as stated, is nowhere denied; but the adjudged cases do not agree upon the extent of legislative power. The courts which have followed the doctrine of the leading case in New York (*People ex rel. Griffin v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266) have asserted that the authority of the legislature in this regard is quite without limits; but the decided tendency of the later decisions, including those of the courts of New Jersey, Michigan, and Pennsylvania, is to hold that the legislative power is not unlimited, and that these assessments must be apportioned by some rule capable of producing reasonable equality, and that provisions of such a nature as to make it legally impossible that the burden can be apportioned with proximate equality are arbitrary exactions, and not an exercise of legislative authority."

In the *French Case* the majority opinion distinguishes it from the *Norwood-Baker Case* as follows: "It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a

person of his life, liberty, or property without due process of law. And such, in the opinion of a majority of the judges of this court, was the nature and effect of the proceedings in the case of *Norwood v. Baker*. But there is no such a state of facts in the present case. Those facts are thus stated by the court of Missouri: "The work done consisted of paving with asphaltum the roadway of Forest avenue in Kansas City, 36 feet in width, from Independence avenue to Twelfth street, a distance of $\frac{1}{2}$ a mile. Forest avenue is one of the oldest and best-improved residence streets in the city, and all of the lots abutting thereon front the street and extend back therefrom uniformly to the depth of an ordinary city lot to an alley. The lots are all improved and used for residence purposes, and all of the lots are substantially on the grade of the street as improved, and are similarly situated with respect to the asphalt pavement. The structure of the pavement along its entire extent is uniform in distance and quality. There is no showing that there is any difference in the value of any of the lots abutting on the improvement.'"

As we have heretofore said, we are of opinion that this case is ruled by *Norwood v. Baker*, rather than by *French v. Barber Asphalt Paving Co.*, and, following the former case, as we are bound to do, we must hold the assessment in this case invalid.

It is contended, however, that, even if the assessment be invalid, the court can grant no relief, because the owner of the property has made no tender of the amount which he should pay. This contention is also best answered in the *Norwood Case*, where it is said: "The present case is not one in which—as in most of the cases brought to enjoin the collection of taxes or the enforcement of special assessments—it can be plainly or clearly seen from the showing made by the pleadings that a particular amount, if no more, is due from the plaintiff, and which amount should be paid or tendered before equity would interfere. It is rather a case in which the entire assessment is illegal. In such a case it was not necessary to tender, as a condition of relief being granted to the plaintiff, any sum as representing what she supposed, or might guess, or was willing to concede, was the excess of cost over any benefits accruing to the property. She was entitled, without making such a tender, to ask a court of equity to enjoin the enforcement of a rule of assessment that infringed upon her constitutional rights." The appellant Callanan claims that the land in question is valueless, and that it was physically impossible for it to be benefited by the sewer. It may be that he is in error on both of these questions, but, under the cir-

cumstances, we do not think he was bound to tender any sum before asking relief from the unjust imposition on his property. The judgment against him was wrong, and it is reversed.

The city issued to the plaintiff certificates for the amount assessed against the strips of ground, and the plaintiff contends that, if the assessment was illegal as to the land and its owner, the city is liable for the value of the work. There is no question as to the facts in the case. The work was properly done under a contract with the city, which was authorized by law and by its ordinances, and the city has received all the benefits of the work. The contract between the plaintiff and the city contained these provisions: "Said cost is to be assessed as provided by the ordinances of said city, against the private property fronting or abutting on the street or streets upon which said improvement is made, and said assessment shall be payable within the time and in the manner as provided by an ordinance of the city relating to making contracts for paving and curbing streets and alleys, and the construction of sewers, and providing for the manner of making and collecting assessments and issuing certificates for the payment thereof, passed February 22, 1889. And it is further agreed that the said assessment certificates shall be received by said Lennan & O'Brien in full payment and compensation for all work done by them under this contract and without recourse to the city of Des Moines." And while we do not understand from the appellee's argument that it seriously denies the liability of the city in case the assess-

ment is held invalid, there is a suggestion therein that the stipulation that the assessment certificates shall be received in full payment for all work done without recourse on the city relieves the city from all liability on account of its invalid assessment. This position is not tenable, however. The ordinance under which the work was done provided that the cost thereof might be taxed against the private property abutting on the street, and for making and collecting assessments, and for issuing certificates in payment therefor. The contract provided that the cost was to be assessed and paid as provided in the ordinance, but it was not contemplated by either party thereto that the city would make an assessment against abutting property which could not be enforced, and we think it must be held that the latter clause of the contract means nothing more than the acceptance of certificates which are legal, and representing an assessment valid and enforceable. Such was the holding, in substance, in *Ft. Dodge Electric Light & P. Co. v. Ft. Dodge*, 115 Iowa, 568, 89 N. W. 7, where the question was quite fully considered, and we think that case controlling here, and that the city is liable for the amount of the certificates. See also *Bucroft v. Council Bluffs*, 63 Iowa, 646, 19 N. W. 807; *Scofield v. Council Bluffs*, 68 Iowa, 695, 28 N. W. 20.

The amendment to the abstract shows that the notice of the assessment in question related solely to a sewer, and we know of no reason why other and different improvements may not be legally noticed in the same document.

The case is reversed on both appeals.

KENTUCKY COURT OF APPEALS.

ADAMS EXPRESS COMPANY, *Appt.*,
v.
I. L. WALKER.
(.....Ky.....)

1. The courts of one state will not enforce the provisions of a contract made in another state as to the time in which actions shall be brought on it, which

are contrary to the provisions of the local statute of limitations.

2. Negligence on the part of the carrier will be presumed where three dogs are delivered to it for transportation securely crated, and but two reach their destination, without any account being given of the missing one.

3. Courts will not take judicial notice of the laws of another state.

4. A demurrer admits the truth of a

NOTE.—The general subject of the conflict of laws with respect to carrier's contracts is discussed in the note to *Hughes v. Pennsylvania R. Co.* 63 L. R. A. 513. It will be observed, upon referring to that note, that the general principle of private international law upon the subject is that, in the absence of an express stipulation as to the governing law, or of circumstances indicating a contrary intention of the parties, the validity of a stipulation limiting the carrier's common-law liability is to be 67 L. R. A.

determined by the law of the place where the contract is made and the transportation commences, without reference to the law of the place of destination, or to the law of the place where the alleged breach of contract or loss or damage occurs. The effect of this general principle, when it would otherwise operate to uphold such a stipulation, may, however, be defeated in a particular case upon the ground that the enforcement of the stipulation is contrary to the distinctive policy of the forum.

plea that the provision for limitation of defendant's liability was valid according to the law of the state where the contract was made, in an action to recover the value of the property lost while in possession of a carrier for transportation.

5. In case of a breach of a carriage contract in a state whose Constitution prohibits the carrier from contracting to limit its common-law liability, the carrier cannot, in the courts of that state, have the benefit of a contract valid where made in another state limiting such liability.

(November 22, 1904.)

APPEAL by defendant from a judgment of the Circuit Court for Kenton County in plaintiff's favor in an action brought to recover the value of a dog lost while in defendant's possession for transportation. *Affirmed*.

The facts are stated in the opinion.

Messrs. Maxwell & Ramsey, with **Mr. John B. Schindel**, for appellant:

The declaration of appellee's agent that the value of each dog was \$25 was a fraud upon the carrier, which estopped appellee from claiming any greater amount.

4 Elliott, Railroads, § 1510; *Tyly v. Morrice*, Carth. 485; *McCance v. London & N. W. R. Co.* 7 Hurlst. & N. 477; *Hayes v. Wells, F. & Co.* 23 Cal. 185, 83 Am. Dec. 89; *Shackl v. Illinois C. R. Co.* 94 Tenn. 658, 28 L. R. A. 176, 30 S. W. 742; *Chicago & A. R. Co. v. Shea*, 66 Ill. 471; *Chicago & A. R. Co. v. Thompson*, 19 Ill. 578; *Harvey v. Terre Haute & I. R. Co.* 74 Mo. 538; *Scammon v. Wells, F. & Co.* 84 Cal. 311, 24 Pac. 284; *Louisville & N. R. Co. v. Frazee*, 24 Ky. L. Rep. 1273, 71 S. W. 437.

What the law of a foreign state is, is a question of fact, not of law.

Gebhard v. Garnier, 12 Bush, 321, 23 Am. Rep. 721.

The validity of the contract is to be determined by the law of Ohio,—the law of the place where it was made.

The enforcement of such a stipulation, though valid by the law of the place where the contract was made and the transportation commenced, may conceivably be contrary to the distinctive policy of the forum whether the breach of contract or loss occurs at the forum or elsewhere. though, as a matter of fact, it was held in *Cleveland, C. C. & St. L. R. Co. v. Drulen*, 26 Ky. L. Rep. 103, 80 S. W. 778, that it is not contrary to the distinctive policy of Kentucky to enforce such a stipulation, valid by the law of the place where it was made and the transportation commenced, if the breach of contract or loss did not occur in Kentucky. It is obvious, however, that when, as in *ADAMS EXPRESS CO. v. WALKER*, the breach of contract and loss occur at the forum, there is greater reason for applying the exception based upon the distinctive policy of the forum; and the decision in this case seems to rest upon the ground that it is contrary to the distinctive policy of Ken-

Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 445, 447, 458, 32 L. ed. 788, 793, 794, 798, 9 Sup. Ct. Rep. 469; *McDaniel v. Chicago & N. W. R. Co.* 24 Iowa, 412; *Hazel v. Chicago, M. & St. P. R. Co.* 82 Iowa, 477, 48 N. W. 926; *Grand v. Livingston*, 4 App. Div. 589, 38 N. Y. Supp. 490; *Wald v. Pittsburg, C. C. & St. L. R. Co.* 60 Ill. App. 460; *Fairchild v. Philadelphia, W. & B. R. Co.* 148 Pa. 527, 24 Atl. 79; *Fonseca v. Cunard S. S. Co.* 153 Mass. 553, 12 L. R. A. 340, 25 Am. St. Rep. 660, 27 N. E. 665; *O'Regan v. Cunard S. S. Co.* 160 Mass. 356, 39 Am. St. Rep. 484, 35 N. E. 1070; *Dyke v. Erie R. Co.* 45 N. Y. 113, 6 Am. Rep. 43; *China Mut. Ins. Co. v. Force*, 142 N. Y. 90, 40 Am. St. Rep. 576, 36 N. E. 874; *Pennsylvania Co. v. Fairchild*, 69 Ill. 280; *Western & A. R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, 2 L. R. A. 102, 7 S. E. 916; *Talbot v. Merchants Despatch Transp. Co.* 41 Iowa, 247, 20 Am. Rep. 589; *Ohio & M. R. Co. v. Tabor*, 98 Ky. 503, 34 L. R. A. 685, 32 S. W. 168, 36 S. W. 18.

Appellant is not a common carrier of live stock.

Michigan S. & N. I. R. Co. v. McDonough, 21 Mich. 165, 4 Am. Rep. 466; *Baker v. Louisville & N. R. Co.* 10 Lea, 304; *Heller v. Chicago & G. T. R. Co.* 109 Mich. 53, 63 Am. St. Rep. 541, 66 N. W. 667; *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329, 12 Am. Rep. 275; *Louisville, C. & L. R. Co. v. Betz*, 7 Ky. L. Rep. 606; *Louisville & N. R. Co. v. Harned*, 23 Ky. L. Rep. 1651, 66 S. W. 25; *Louisville & N. R. Co. v. Wathen*, 23 Ky. L. Rep. 2128, 66 S. W. 714; *Louisville, C. & L. R. Co. v. Hedger*, 9 Bush, 645, 15 Am. Rep. 740.

Negligence must be alleged and proved in order to render a carrier of live stock liable under the common law of Kentucky.

Louisville, C. & L. R. Co. v. Betz, 7 Ky. L. Rep. 606; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. ed. 465;

tucky, in view of the constitutional provision upon the subject, to enforce such a stipulation when the loss occurs in Kentucky. The decision is, therefore, not an authority against the general principle which refers the validity of such a stipulation to the law of the place where the contract is made and the transportation commences irrespective of the law of the place where the breach of contract and loss occur. If the action upon exactly the same state of facts had been brought in Ohio or in a third state, it would not have been inconsistent with the position taken in this case for the court of Ohio or of the third state to have referred the validity of the stipulation to the law of Ohio. In other words, the decision is not to the effect that the stipulation was invalid, but merely to the effect that, in view of the distinctive policy of Kentucky, it would not be enforced or given effect in the courts of that state. G. H. P.

Louisville & N. R. Co. v. Harned, 23 Ky. L. Rep. 1651, 66 S. W. 25.

Messrs. Charlton Brice Thompson and S. D. Rouse, for appellee:

The contract was to be performed in Kentucky. Therefore the validity of the contract is to be tested by the laws of Kentucky.

Western U. Teleg. Co. v. Eubanks, 100 Ky. 591, 36 L. R. A. 711, 66 Am. St. Rep. 361, 38 S. W. 1068; *Pittsburgh, C. C. & St. L. R. Co. v. Sheppard*, 56 Ohio St. 68, 60 Am. St. Rep. 732, 46 N. E. 61; *Ohio & M. R. Co. v. Tabor*, 98 Ky. 503, 34 L. R. A. 685, 32 S. W. 168, 36 S. W. 18; *Goddin v. Shipley*, 7 B. Mon. 575; *Tyler v. Trabue*, 8 B. Mon. 306; *Story, Conf. L. 8th ed. § 280*; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Andrews v. Pond*, 13 Pet. 65, 10 L. ed. 61; *Bell v. Bruen*, 1 How. 169, 11 L. ed. 89; *Junction R. Co. v. Bank of Ashland*, 12 Wall. 226, 20 L. ed. 385; *Miller v. Tiffany*, 1 Wall. 298, 17 L. ed. 540; *Hughes v. Pennsylvania R. Co.* 202 Pa. 222, 63 L. R. A. 513, 97 Am. St. Rep. 713, 51 Atl. 990.

The common-law liability attaches to the carriage of live stock.

Kinnick Bros. v. Chicago, R. I. & P. R. Co. 69 Iowa, 665, 29 N. W. 772; *Wilson v. Hamilton*, 4 Ohio St. 723; *Clarke v. Rochester & S. R. Co.* 14 N. Y. 570, 67 Am. Dec. 205; *Evans v. Fitchburg R. Co.* 111 Mass. 142, 15 Am. Rep. 19; *Hall v. Renfro*, 3 Met. (Ky.) 51; *Louisville, C. & L. R. Co. v. Hedger*, 9 Bush, 645, 15 Am. Rep. 740; *Ohio & M. R. Co. v. Tabor*, 98 Ky. 503, 34 L. R. A. 685, 32 S. W. 168, 36 S. W. 18; *Cincinnati, N. O. & T. P. R. Co. v. Graves*, 21 Ky. L. Rep. 684, 52 S. W. 961; *Illinois C. R. Co. v. Radford*, 23 Ky. L. Rep. 886, 64 S. W. 511.

Valuation clauses are efforts to relieve the carrier of part of its common-law liability within the meaning of § 196 of the Constitution.

Louisville & N. R. Co. v. Frazee, 24 Ky. L. Rep. 1273, 71 S. W. 437; *Ohio & M. R. Co. v. Tabor*, 98 Ky. 503, 34 L. R. A. 685, 32 S. W. 168, 36 S. W. 18; *Cincinnati, N. O. & T. P. R. Co. v. Graves*, 21 Ky. L. Rep. 684, 52 S. W. 961; *Illinois C. R. Co. v. Radford*, 23 Ky. L. Rep. 886, 64 S. W. 511.

Hobson, J., delivered the opinion of the court:

Appellee, Walker, was the owner of an English setter bitch. On November 13, 1902, he delivered her, securely crated with two other dogs, to the Adams Express Company at Wooster, Ohio, to be carried to Vanceburg, Kentucky, and there delivered to J. C. Walker, his agent. When the crate reached Vanceburg, the bitch was missing, 67 L. R. A.

and he filed this suit to recover of the express company \$250, her alleged value. The defendant, by its answer, denied that it was a common carrier of live stock, or that the bitch was lost by its negligence, or was of value exceeding \$25. It also pleaded as follows: "Prior to the delivery of said dogs to the defendant, it notified plaintiff that its charges for carrying the same would be based upon the value of the dogs,—said value being unknown to defendant,—and requested plaintiff to declare the value thereof, in order that defendant might fix its charges; that its charges would be \$2.70 if the value of each dog did not exceed the sum of \$50, and proportionately greater if the value of the dogs exceeded \$50 each; and the plaintiff, in pursuance of said notice and request, then well knowing the value of said dogs, and their value being wholly unknown to the defendant, declared to the defendant that the true value of said dogs did not exceed the sum of \$50 each, and on the faith of said declaration, and in consideration of said charge of \$2.70, based upon said valuation of said dogs, the plaintiff and defendant entered into an agreement in writing, which was valid by the laws of Ohio, whereby the defendant agreed to carry said dogs from Wooster, Ohio, to Vanceburg, Kentucky, for the sum of \$2.70, and the plaintiff agreed to, and did, release and discharge the defendant from all liability for loss of said dogs from any cause whatsoever, unless such loss should be caused by the negligence of the agents or employees of the defendant, and that the defendant should not be liable to the plaintiff, in any event, in excess of \$25 on account of the loss of any of said dogs. Said agreement further provided that no suit should be brought against the defendant for recovery for the loss of said dogs unless commenced within six months next after such loss should have occurred, and that, if any suit should be commenced against the defendant after the expiration of said six months, lapse of time should be taken as conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding." The court sustained a demurrer to this part of the answer. On the trial of the case the following agreed statement of facts was filed: "By consent of parties a trial by jury is waived, and the following facts are agreed to: That the bitch in the petition described was shipped as alleged in the petition; that her value was unknown to the defendant; that a special contract of shipment was signed by the parties; that the defendant held itself out as a carrier of live stock only under the conditions of said special contract, a copy of which is filed as a part of this agreed statement; that the

bitch was properly crated; that she escaped from the custody of the defendant somewhere between Wooster, Ohio, and Vanceburg, Kentucky; and that her value was two hundred (\$200) dollars." The circuit court entered judgment in favor of the plaintiff, and the defendant appeals.

In *Western U. Teleg. Co. v. Eubanks*, 100 Ky. 591, 36 L. R. A. 711, 66 Am. St. Rep. 361, 38 S. W. 1068, a telegram was sent from Atlanta, Georgia, to Franklin, Kentucky. One of the conditions printed on the back of the message was that no action should be brought for damages unless commenced within sixty days after the message was sent. The court, after laying down the rule that public policy forbids that a carrier should by any contract exempt itself from damages resulting from its own negligence, said in reference to the contract limitation of sixty days for the bringing of the action, that it is the province of the law-making power to prescribe the time in which an action may be brought, and that the limitation of sixty days, if not an attempt to vary the statute of limitation, would, if enforced, have that effect. This case was approved in *Davis v. Western U. Teleg. Co.* 107 Ky. 527, 92 Am. St. Rep. 371, 54 S. W. 849, where the court again said as follows as to the limitation of sixty days contained in the contract: "That such a provision, as respects telegrams, is contrary to public policy, and will not be upheld, seems to be indicated in *Smith v. Western U. Teleg. Co.* 83 Ky. 104, 4 Am. St. Rep. 126, and the rule is authoritatively so announced by this court in *Western U. Teleg. Co. v. Eubanks*, 100 Ky. 591, 36 L. R. A. 711, 66 Am. St. Rep. 361, 38 S. W. 1068. It was error to hold that the stipulation presented a valid defense."

It is insisted for appellant that, the contract here having been made in Wooster, Ohio, it must be governed by the laws of Ohio, and that by the laws of Ohio such a limitation is valid. Limitation is governed by the law of the forum in which the suit is brought, and the courts of this state will not, as a matter of comity, enforce a contract made in Ohio as to the time when the suit shall be brought, for this is regulated by our statutes.

From the agreed facts, negligence on the part of the defendant may be inferred, for, if three dogs were delivered to it securely crated, and two remained in the crate when delivered at Vanceburg, no account being given by the defendant of the missing dog, clearly it should be presumed that the defendant or some of its agents converted the dog, or by negligence allowed it to escape. We are referred to decisions of the supreme court of Ohio holding that a common car-

rier cannot by contract protect itself from its own negligence, and that this rule applies to the carriage of animals. *Wilson v. Hamilton*, 4 Ohio St. 723; *United States Exp. Co. v. Backmun*, 28 Ohio St. 144; *Pittsburgh, C. C. & St. L. R. Co. v. Sheppard*, 56 Ohio St. 68, 60 Am. St. Rep. 732, 46 N. E. 61. But we cannot take judicial notice of the law of Ohio. The demurrer admits the truth of the plea. In *Cleveland, C. C. & St. L. R. Co. v. Druen*, 26 Ky. L. Rep. 103, 80 S. W. 778, this court had before it the question by what law a contract of carriage is governed where the contract is made in another state, and the goods are to be delivered in this state. The rule was there laid down that, where the contract is valid in the state where it is made, the law of that state governs it, so far as it is to be performed outside of this state, but that the law of this state governs it so far as it is to be performed in this state. In the case of *Western U. Teleg. Co. v. Eubanks*, 100 Ky. 591, 36 L. R. A. 711, 66 Am. St. Rep. 361, 38 S. W. 1068, it was not pleaded that the contract was valid under the law of Georgia, or that the loss occurred there; and the court seems to have had in mind, in what it said in that case, only the limitation of the action to sixty days. The same is true of the case of *Cincinnati, N. O. & T. P. R. Co. v. Graves*, 21 Ky. L. Rep. 684, 52 S. W. 961. The cases of *Illinois C. R. Co. v. Radford*, 23 Ky. L. Rep. 886, 64 S. W. 511, and *Louisville & N. R. Co. v. Frazee*, 24 Ky. L. Rep. 1273, 71 S. W. 437, involved contracts made in this state. Section 196 of the Constitution governs such contracts. Its language is, "No common carrier shall be permitted to contract for relief from its common-law liability." The Constitution of Kentucky has no extraterritorial effect, and this provision does not govern contracts made elsewhere which are lawful by the law of the place where they are made. It governs contracts made in Kentucky, and these, being unlawful at the place where they are made, are void everywhere; but contracts that are made elsewhere, and are valid where made, will be governed here by the law of the place where they are made, so far as they are not performed here. Under this rule, the court properly sustained the demurrer to the defendant's plea of the law of Ohio, as it did not show that the dog was lost in Ohio; and, to protect itself under the Ohio law, it should have shown, not only that the contract was valid under the law of Ohio, but that the nonperformance of the contract occurred there.

It remains to determine what are the rights of the parties under the law of Kentucky. In *Orndorff v. Adams Exp. Co.* 3 Bush, 194, 96 Am. Dec. 207, a contract limi-

tation similar to the one relied on here was considered by the court, and it was held that a common carrier could not by such a contract exempt itself from losses by negligence. This case was followed in *Louisville, C. & L. R. Co. v. Hedger*, 9 Bush, 645, 15 Am. Rep. 740, which was, like this, a case where damages were sought for the carriage of animals. To the same effect are *Rhodes v. Louisville & N. R. Co.* 9 Bush, 688; *Louisville & N. R. Co. v. Brownlee*, 14 Bush, 590; *Louisville & N. R. Co. v. Owen*, 93 Ky. 201, 19 S. W. 590; *Baughman v. Louisville, E. & St. R. Co.* 94 Ky. 150, 21 S. W. 757. The precise question here raised was made in *Cincinnati, N. O. & T. P. R. Co. v. Graves*, 21 Ky. L. Rep. 684, 52 S. W. 961, where it was alleged that the stock was undervalued, and thereby the defendant was misled as to its value. The plea was held bad. That shipment was made from Cincinnati, Ohio, to Lexington, Kentucky. The same question was again made in *Illinois C. R. Co. v. Radford*, 23 Ky. L. Rep. 886, 64 S. W. 511, where the shipment was from Hopkinsville,

Kentucky, to Evansville, Indiana, and *Louisville & N. R. Co. v. Frazee*, 24 Ky. L. Rep. 1273, 71 S. W. 437, where the contract was also made in Kentucky. While the exact question here made was presented in only one of these cases, and there are expressions in some of the opinions limiting them to the particular facts before the court, still the reasoning in all the cases is against the validity of such contracts, and we regard them as settling the rule in this state under our constitutional provision. In the absence of a special contract, it would not be maintained that the defendant is not liable for the value of the dog lost. But our Constitution declares the contract limiting this liability void. So the contract is as though it had not been made, and the defendant is liable, unless sufficient facts are shown independently of the special contract to avoid the contract for fraud, or to create an estoppel at common law.

Judgment affirmed.

Petition for rehearing overruled.

MAINE SUPREME JUDICIAL COURT.

Thomas DYER
v.

MAINE CENTRAL RAILROAD COMPANY.

(99 Me. 195.)

1. A clause in a statute making a railroad company liable for losses by fire set out by its engines, which gives it the benefit of any insurance on the property, applies only to cases where the liability is imposed by the statute, and not to those where it is liable because of its own negligence; so that in the latter case it is not entitled to the benefit of the insurance on the property.
2. The burning of buildings near a railroad right of way may be found to have been caused by sparks from an engine where no fire existed before the passage of the engine, which was emitting a large quantity of smoke and fire, and shortly after its passage fire was discovered in the grass, which communicated to and consumed the buildings.
3. Negligence on the part of a railroad company will be presumed when fire is

communicated by its engines to property abutting on its right of way.

(Emery, J., dissents.)

(August 27, 1904.)

REPORT by the Supreme Judicial Court for Cumberland County for the opinion of the full bench of an action brought to hold defendant liable for the value of buildings alleged to have been destroyed by fire negligently set out by its engine. *Judgment for plaintiff.*

The facts are stated in the opinion.

Messrs. Clifford, Verrill, & Clifford, for plaintiff:

In the absence of any testimony tending to show that a fire caught in any other way, a jury is justified in finding that a fire was started by a spark from a locomotive.

Hagan v. Chicago, D. & C. G. T. Junction R. Co. 86 Mich. 618, 49 N. W. 509; *Union P. R. Co. v. De Busk*, 12 Colo. 294, 3 L. R. A. 350, 13 Am. St. Rep. 221, 20 Pac. 752.

The fact that a fire starts soon after a lo-

NOTE.—As to effect on liability under statute making railroad companies absolutely liable for fires set by them, of insurance on the property, where nothing is said in the statute about right to insurance, see, in this series, *Peter v. Chicago & W. M. R. Co.* 46 L. R. A. 224.

For a case holding valid a statute giving a railroad company the right to offset against its statutory liability for fires communicated by 67 L. R. A.

its engines the benefit of any insurance on the property, see *Leavitt v. Canadian P. R. Co.* 38 L. R. A. 152.

As to constitutionality of statute making railroad companies absolutely liable for damages by fire set by them, see *Matthews v. St. Louis & S. F. R. Co.* 25 L. R. A. 161, and *note*; also *Campbell v. Missouri P. R. Co.* 25 L. R. A. 175.

comotive passes, and there is no other evidence of a fire, despite the fact that the engine was equipped with a spark arrester and was not known as a spark thrower, warrants the finding that the fire was set by a locomotive.

Wild v. Boston & M. R. Co. 171 Mass. 245, 50 N. E. 533; 2 Thomp. Neg. § 2291; *Smith v. London & S. W. R. Co.* L. R. 6 C. P. 14; *Pittsburgh, C. O. & St. L. R. Co. v. Indiana Horseshoe Co.* 154 Ind. 322, 56 N. E. 766.

Where damage is caused by fire which is proved to have escaped from the engines of a railroad company, a presumption of negligence on the part of the company arises, which casts the burden of proof upon it to show affirmatively the absence of negligence.

Karsen v. Milwaukee & St. P. R. Co. 29 Minn. 12, 11 N. W. 122; *Missouri P. R. Co. v. Texas & P. R. Co.* 33 Fed. 361; *Spaulding v. Chicago & N. W. R. Co.* 30 Wis. 110, 11 Am. Rep. 550; 2 Thomp. Neg. § 2285; *Dunning v. Maine C. R. Co.* 91 Me. 87, 64 Am. St. Rep. 208, 39 Atl. 352; *Piggot v. Eastern Counties R. Co.* 3 C. B. 229; *Scott v. London Dock Co.* 3 Hurlst. & C. 596; *Donnelly v. Booth Bros. & H. I. Granite Co.* 90 Me. 110, 37 Atl. 874; *Illinois C. R. Co. v. Mills*, 42 Ill. 410; *Bass v. Chicago, B. & Q. R. Co.* 28 Ill. 9, 81 Am. Dec. 254.

The fact that fire or sparks in unusual quantities escaped from an engine will of itself warrant the presumption that the appliances for preventing the escape of fire were inadequate and ineffective.

Chicago & N. W. R. Co. v. McCahill, 56 Ill. 28; *Field v. New York C. R. Co.* 32 N. Y. 339; Thomp. Neg. § 2285.

Messrs. Nathan Cleaves, Henry B. Cleaves, and Stephen C. Perry, for defendant:

This defendant corporation was entitled to the benefit of the insurance upon the property destroyed, effected by this plaintiff, less the premium and expense of recovery.

Leavitt v. Canadian P. R. Co. 90 Me. 153, 38 L. R. A. 152, 37 Atl. 886; *Boston Excelsior Co. v. Bangor & A. R. Co.* 93 Me. 58, 47 L. R. A. 82, 44 Atl. 138; *Lyons v. Boston & L. R. Co.* 181 Mass. 551, 64 N. E. 404; *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 62 Fed. 908; *St. Louis & S. F. R. Co. v. Matthews*, 165 U. S. 17, 41 L. ed. 617, 17 Sup. Ct. Rep. 243.

Powers, J., delivered the opinion of the court:

This is an action at common law, brought for the benefit of the Liverpool, London, & Globe Insurance Company, to recover the amount of insurance paid by it to the plaintiff upon his buildings in Freeport, alleged 67 L. R. A.

to have been destroyed by fire communicated by sparks escaping from the locomotive engine of the defendant, through its negligence in the construction, equipment, management, and operation of the same. The defendant has already paid to the plaintiff the full amount for which it is liable under Rev. Stat. 1883, chap. 51, § 64, as amended by chap. 79, p. 77, Pub. Laws 1895, and insists that it is under no further liability. That statute is as follows: "When a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury, and it has an insurable interest in the property along the route, for which it is responsible, and may procure insurance thereon. But such corporation shall be entitled to the benefit of any insurance upon such property effected by the owner thereof less the premium and expense of recovery. The insurance shall be deducted from the damages, if recovered before the damages are assessed, or, if not, the policy shall be assigned to such corporation, which may maintain an action thereon, or prosecute, at its own expense, any action already commenced by the insured, in either case with all the rights which the insured originally had."

Independently of any statute, and prior to the enactment of chap. 9, § 5, p. 6, Laws 1842, the owner of property had the right at common law to recover damages sustained by fire communicated from a locomotive engine through the negligence of the railroad company using it. The act of 1842, which continued unchanged until 1895, broadened the liability of a railroad company, so that it was made to embrace all cases of fire communicated from its locomotive engine. It was no longer necessary to allege and prove negligence in the use of the engine, and the statute in effect made the railroad company an insurer. If the property damaged was insured, the insurance company was entitled to subrogation. In such case, the owner might collect of either party that he saw fit. If from the insurance company first, then that fact constituted no defense for the railroad company, and any sum collected by him in excess of what was necessary, with the insurance, to compensate him for his full loss, he held in trust for the insurance company. If, on the other hand, he collected from the railroad first, he thereby diminished to the same extent his claim against the insurance company. Both were insurers, the insurance company by virtue of its voluntary contract, and the railroad company by force of the statute which imposed the liability upon it. The liability of the railroad company was, however, primary, and that of the insurance company

secondary, not in point of time, but in point of ultimate liability. *Hart v. Western R. Corp.* 13 Met. 99, 46 Am. Dec. 719.

In this state of the law the statute was amended by chap. 79, p. 77, Pub. Laws 1895, giving to the railroad the benefit of any insurance upon the property, and providing that the insurance should be deducted from the damages if recovered before they were assessed, or, if not, that the policy should be assigned to the railroad corporation, which might then maintain an action thereon with all the rights of the insured. This amendment had special and particular reference to the adjustment of the liability of the two insurers—the insurance company and the railroad company—in those cases falling under the section which was amended, and in which it was necessary for the owner to invoke the statutory liability of the defendant corporation in order to recover against it. The legislature might well deem it just that, as between the voluntary insurer by contract and the one who, without fault on its part, is made such by law, the latter should have the preference. To go further and say that in a case where the railroad company is liable because of its own fault and negligence, and not as an insurer, it should have the benefit of any insurance effected by the owner upon such property, would be a manifest injustice. The consequence of the defendant's negligence would then fall, not upon itself, but upon the insurance company; not upon the guilty, but upon the innocent. We cannot believe that a result so repugnant to justice could have been within the legislative intention. This action, therefore, may be maintained notwithstanding the amendment of 1895. That act is limited in its application to those cases in which the section amended makes the railroad company an insurer; in other words, to those cases in which the liability of the defendant is created by that section, and not by its own negligent act.

The result here reached is not in conflict with *Leavitt v. Canadian P. R. Co.* 90 Me. 153, 38 L. R. A. 152, 37 Atl. 886. In that case it was admitted that fire was communicated without fault or negligence on the part of the defendant, thus clearly presenting a state of facts under which the railroad was chargeable, not at common law, but solely because of its statutory liability. We are aware, also, that the right of subrogation was denied to the insurance company under a similar statute in *Lyons v. Boston & L. R. Co.* 181 Mass. 551, 64 N. E. 404; but that, like *Leavitt v. Canadian P. R. Co.* 90 Me. 153, 38 L. R. A. 152, 37 Atl. 886, appears to have been an action based upon the statutory liability of the de-

fendant, and the questions here decided were not raised or considered.

This case comes before the court upon report, and the defendant contends it is not liable upon the facts. The undisputed facts are that on the date in question the defendant's locomotive engine, sending out an unusual amount of smoke and cinders, passed over its road through the plaintiff's farm, and about 300 feet from his buildings. There was no fire seen before the train passed, but it was discovered shortly after in the grass near the railroad track, extending from the banks of the railroad to the plaintiff's buildings, which it consumed. No attempt is made to account for the fire at this time or place upon any other hypothesis, and we think it is a fair inference that the fire was communicated by sparks from the defendant's locomotive. *Gibbons v. Wisconsin Valley R. Co.* 66 Wis. 161, 28 N. W. 170; *Chicago & A. R. Co. v. Esten*, 178 Ill. 192, 52 N. E. 954; *Smith v. London & N. W. R. Co.* L. R. 5 C. P. 98; 13 Am. & Eng. Enc. Law, 2d ed. 513.

The plaintiff must still prove that the defendant's negligence was the cause of the fire, and there is no evidence of any negligence on the defendant's part, unless negligence in the construction, equipment, or management of its locomotive engine can be inferred from the fact that the fire was communicated by sparks from it. On the question whether that fact alone is sufficient to make out a prima facie case of such negligence, there appears to be an irreconcilable conflict of authority. The most respectable courts, after careful consideration, have arrived at directly contrary conclusions. On the one hand, it has been held that no such presumption arises, because, first, the defendant is carrying on a lawful business in a lawful manner, and, second, that sparks and coals may escape notwithstanding all the safeguards have been adopted which modern science can suggest, and the greatest skill and care are employed in the operation of the engine. On the other hand, we may well presume that the defendant is not running locomotives over its road, the natural and probable effect of which would be to communicate fire to the property along its route if the locomotives were properly equipped and carefully managed, and when fire is so communicated the natural presumption is that it is due to negligence. More than that, such a presumption has its foundation in the necessities of the case. The locomotives of railroad companies by night and day rush with great velocity through the land. They are here to-day, and to-morrow may be hundreds of miles away. They are within the control of the defendant. The method of their equipment

and manner of their operation are known to its employees, who are always present with the engine, and evidence touching this subject is easy of production on its part. The owner of the property destroyed has no such opportunities of knowledge. It may be often exceedingly difficult, if not impossible, for him to even identify the engine which has caused the injury, or to obtain the names of those who know about its equipment or its use. He is frequently absent, and, if present at the time and place of the fire, he can obtain but a momentary view of the locomotive. He has no opportunity for inspection, and knows nothing of its equipment and management. He can judge only by the result, and can often obtain no other proof as to whether the injury which he suffers has been caused by negligence. It is similar to those cases in which the burden of proof is cast upon him who best knows the facts. In this state the question is a new one. We are at liberty to adopt that rule which seems to us most consonant with reason and justice, and we think that negligence in the construction, equipment, or management of the defendant's locomotive engine may fairly be inferred from the fact that the fire was communicated by sparks from it, and that, there being no evidence or circumstances to rebut that inference, it is sufficient to enable the plaintiff to make out a prima facie case of negligence, and maintain this action. This view is amply supported by the following among many authorities: *Chicago, B. & Q. R. Co. v. Beal* (Neb.) 94 N. W. 956; *Illinois C. R. Co. v. Mills*, 42 Ill. 407; *Spaulding v. Chicago & N. W. R. Co.* 30 Wis. 110, 11 Am. Rep. 550, 33 Wis. 582; *Gulf, C. & S. F. R. Co. v. Benson*, 69 Tex. 407, 5 Am. St. Rep. 74, 5 S. W. 822; *Clemens v. Hannibal & St. J. R. Co.* 53 Mo. 366, 14 Am. Rep. 460; *Burke v. Louisville & N. R. Co.* 7 Heisk. 451, 19 Am. Rep. 618; *Hull v. Sacramento Valley R. Co.* 14 Cal. 387, 73 Am. Dec. 656; *Louisville & N. R. Co. v. Marbury Lumber Co.* 132 Ala. 520, 90 Am. St. Rep. 917, 32 So. 745; *Louisville & N. R. Co. v. Reese*, 85 Ala. 497, 7 Am. St. Rep. 66, 5 So. 283. "In the case of railroad engines it has been repeatedly decided that the fact that fire had been communicated by them to the premises of individuals is sufficient to raise a presumption that the railroad company was not employing the best known contrivances to retain the fire, and to make out a prima facie case of negligence." Cooley, *Torts*, 2d ed. 702. In the closely analogous case of *Dunning v. Maine C. R. Co.* 91 Me. 87, 64 Am. St. Rep. 208, 39 Atl. 352, this court felt the necessity of applying to locomotives a somewhat more liberal rule of evidence than is applied in other cases.

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Lowney v. New Brunswick R. Co. 78 Me. 479, 7 Atl. 381, is not an authority to the contrary. That case differed from the present in two all-important particulars: First, there does not appear to have been any sufficient proof that the fire was in fact communicated by the defendant's locomotive engine; and, second, the defendant introduced evidence tending to show that there was no negligence in either the equipment or operation of the locomotive. After stating that it might be doubted whether there was sufficient proof that the fire was communicated by the locomotive, the court says: "The negligence must be proved. Its relation as the efficient cause of the fire must also be proved. . . . In this case we find no evidence of such negligence, nor of its causal relation. It is urged in the argument for the plaintiff that the dampers were probably open or warped, or that ignited coals may have been blown out of the ash pan, or that the smoke-stack might not have had proper appliances to arrest sparks. We do not find the evidence of them, however. Indeed, what evidence there was upon these points seems to negative the plaintiff's suggestions." If there was no sufficient proof that the fire was communicated by the defendant's locomotive, the question of negligence could not arise. If there was such proof, then the evidence negated the claim of the defendant's negligence. The question whether, when the fire is in fact communicated by the locomotive, and there is no evidence as to its manner of construction, equipment, and operation, negligence in one of those particulars may fairly be inferred from the escape of the sparks in such quantity and manner as to cause the fire, was not before the court in that case.

The value of the property destroyed was \$2,800, and the defendant has paid to the plaintiff \$1,120.

Judgment for plaintiff for \$1,680, and interest from the date of writ.

Emery, J., dissenting:

While a steam locomotive of the defendant railroad company was in lawful operation, drawing a train of cars, sparks escaped from it, setting fire to the plaintiff's property. Despite the able reasoning of the majority opinion and the citations in support of it, I am unable to assent to the proposition that this escape of sparks, nothing further appearing, is sufficient evidence to establish negligence in the equipment or operation of the locomotive. I think there is danger in the proposition, justifying me in attempting to show reasons against it.

1. Apart from authority, the proposition seems to be based on the assumption that locomotives are ordinarily so equipped and

managed as not to set fire to property along the route. The argument seems to be that the setting of fires by sparks from a passing locomotive is exceptional, and therefore indicates some fault in equipment or operation. I deem the argument faulty, in that it deals with the setting of fires instead of the escape of sparks; confounds the consequences, which may or may not ensue, with the act which is the subject under consideration. While the setting of fires by them may be very exceptional, the escape of sparks may nevertheless be of daily and hourly occurrence. Sparks may or may not set fires after their escape, according to events and conditions entirely outside of the railroad company's sphere of action or duty, as high winds, severe droughts, etc. Whether a given act or omission is negligent is not determined by its consequences. So whether a primary result is evidence of negligence is not determined by a secondary result. The negligence of the defendant, if any, was in the act or omission through which the sparks escaped, not in the escape itself. Hence, while the setting of fires may be evidence of the escape of sparks, it is not evidence of the cause of the escape, whether from accident or negligence.

It would seem to follow that the assumption, however indisputable, that locomotives are ordinarily so equipped and operated as not to set fires, does not sustain the proposition that the escape of sparks from a passing locomotive indicates fault in equipment or operation.

I think, to sustain the proposition, the assumption must be as broad as this, *viz.*, that locomotives can be so equipped with known appliances and so operated in known modes that sparks will not ordinarily, or often, escape from them while in operation. There being no evidence whatever in the case upon this point, the assumption must be, from common, conceded knowledge, so common and undisputed that the court can act upon it without evidence. If the assumption has not this foundation, it must fall, and the argument with it.

Is it common knowledge, and undisputed, that such appliances exist, and that such modes of operation are known? I must confess my own ignorance of them. I do not understand it is claimed to be knowledge so common and undisputed: and whoever will observe the mass of cinders strewing the sides of railroad tracks, and will observe the smokestacks of locomotives running at night, will find, I think, much evidence to the contrary.

2. As to authorities, it is frankly admitted in the opinion that no case in this state has gone so far. It is also frankly admitted that eminent courts hold adversely to 67 L. R. A.

its views, while claiming support in the decisions of many other courts. Cases are cited in such support from Illinois, Wisconsin, Texas, Missouri, Tennessee, Alabama, and California. I will not stop to inquire how far these decisions may have been influenced by the statutes of those states or by other circumstances, nor will I burden the reader with citations of cases the other way, for I think the proposition is in conflict with the declarations and even decisions of our own court. In *Sturgis v. Robbins*, 62 Me. 289, a case of fire escaping and causing injury, the court said, on page 290: "It is not to be presumed that an act lawful in itself was not done at a suitable time and in a careful and prudent manner." In *Nason v. West*, 78 Me. 253, 3 Atl. 911, the court said, on page 256, 78 Me., page 912, 3 Atl.: "Presumption of negligence from the fact alone that an accident has happened will not do, for, if there is any presumption in such a case, it is that the defendants have complied with those obligations which rest upon them equally with other men." In *Pellerin v. International Paper Co.* 96 Me. 388, 52 Atl. 842, the court, on page 391, 96 Me., page 843, 52 Atl., quoted the above expression from *Nason v. West*, and added: "No presumption of such negligence arises from the mere fact that an accident happened." In *Leach v. French*, 69 Me. 389, 31 Am. Rep. 296, the court said, on page 393, 69 Me., page 298, 31 Am. Rep.: "Negligence and misdoing are not to be presumed; there must be positive evidence of them." In *Lounney v. New Brunswick R. Co.* 78 Me. 479, 7 Atl. 381, a case of fire communicated by a locomotive, the court said, on page 480, 78 Me., page 382, 7 Atl.: "The burden upon the plaintiff, therefore, was to prove, not only that the fire was communicated by the engine, but also that the defendants were guilty of negligence, and their negligence was the cause of the communication of the fire. The communication of the fire alone does not import negligence." This seems quite an explicit declaration, and intentionally made. It is sought to distinguish the two cases, but I think the reader of both opinions will be convinced that the court in the *Lounney Case* was pressed with the same proposition, and considered it and intentionally pronounced against it. It will hardly be suggested that the concurring justices would have permitted such an explicit declaration to pass them unchallenged if they did not fully agree with it.

But, further, I think the court has also expressly and necessarily adjudicated upon the principle involved. *Bachelder v. Heagan*, 18 Me. 32, was, like this, a case of escaping fire, where fire lawfully upon the land of the defendant, but which he was by law

bound to carefully guard and manage to prevent its escape to the lands of others, did escape to land of the plaintiff and set fire there. It was stoutly contended in that case, as in this, that the escape of the fire alone, if unexplained, was evidence of the defendant's negligence in the premises. The court squarely held that it was not. *Sturgis v. Robbins*, 62 Me. 289, was a similar case. The fire set by the defendant on his own land had escaped therefrom and set fire to property of the plaintiff. The plaintiff's counsel in effect advanced the same proposition, to wit, that the mere escape of the fire indicated that the defendant was in fault either in the time or manner of building his fire, which he must disprove or be held liable. The court held directly the contrary.

I do not find that either of these cases has since been questioned, though the escape of fire from lands and locomotives has been of frequent occurrence. They seem to me not distinguishable in principle from the case at bar. The defendant company had the right (as good as that of the farmer) to build and maintain fires in its locomotives as they lawfully passed by and near the plaintiff's buildings. In this particular case it was not bound as an insurer, but only bound to use due care to prevent the escape of the fire. If the escape of fire from the land of the farmer does not indicate fault in him which he must disprove, I do not see how the escape of sparks from the running locomotive of a railroad company indicates fault on its part which it must disprove.

3. But the majority opinion seems to be also based on the difficulty of the plaintiff in such cases as this in finding any other sufficient evidence of the defendant's negligence. It seems to be urged that, as it is so much easier for the defendant to prove that it was careful than for the plaintiff to prove that it was careless, it should be required to do so. Is not this in effect equivalent to saying that, whenever the plaintiff cannot prove the defendant's fault in a matter, that fault should be assumed, and the burden be put upon the defendant to prove his innocence? How can this doctrine be limited, without obnoxious discrimination, to actions against railroad companies? Why is it not equally applica-

ble to every case where the court thinks it easier for the defendant to prove his innocence than for the plaintiff to prove the fault or wrong? Is it not destructive of the presumption of innocence which has hitherto protected persons accused of negligence or any other tort or crime?

I think this court has never before intimated any approval of such a doctrine as applicable to a case where fault is necessary to be shown. In the case of *Dunning v. Maine C. R. Co.* 91 Me. 87, 64 Am. St. Rep. 208, 39 Atl. 352, cited in the opinion, no fault was to be proved. The company was an insurer. It was not only necessary to prove the communication of fire from the locomotive. Here it was necessary to prove that, and also the defendant's fault in the matter. On the other hand, the court seems to have been pressed at times with the argument that, when circumstances render affirmative proof of some essential element in the plaintiff's case difficult or impossible, the court should assume it to exist unless disproved; yet the court, while sometimes recognizing the hardship, has never dispensed with the proof. *McLane v. Perkins*, 92 Me. 39, 43 L. R. A. 487, 42 Atl. 255, and the cases already cited.

The legislature, upon whom such arguments should be urged rather than upon the court, can meet the difficulty by imposing liability as insurer instead of mere liability as wrongdoer. It has done so in the case of fires communicated by locomotives, and has thus relieved persons injured by such fires from the burden of proving the fault of the owner or operator. It is competent, and I think expedient, for the legislature to do so; but it seems to have left this plaintiff, under the circumstances of this case, to prove the fault of the company as prerequisite to recovery of damages from it. I think, therefore, the court should continue to hold in this case, as it held in *Bachelor v. Heagan*, 18 Me. 32, and *Sturgis v. Robbins*, 62 Me. 289, and as it at least declared in *Lowney v. New Brunswick R. Co.* 78 Me. 479, 7 Atl. 381, that the mere escape of fire, lawfully upon the defendant's property, serving him in a lawful business, is not evidence of his fault; that the difficulty of proving his fault does not cast upon him the burden of disproving it.

MASSACHUSETTS SUPREME JUDICIAL COURT.

John OBERTONI, by Next Friend,
v.
BOSTON & MAINE RAILROAD.

(180 Mass. 481.)

1. **A railroad company is not liable for injuries to a boy from a torpedo** which he picks up near the track merely upon evidence that a brakeman tossed it to a flagman, who threw it back, and, upon the brakeman's failure to catch it and letting it fall to the ground, no attempt was made to recover and remove it to a safe place; since there is nothing to show that the employees were acting within the scope of their employment.
2. **The presence of a signal torpedo upon the planking where a highway crosses a railroad track** is not of itself evidence of negligence on the part of the railroad company in failing properly to care for the torpedo.

(October 18, 1904.)

EXCEPTIONS by defendant to rulings of the Superior Court for Berkshire County made during the trial of an action brought to recover damages for personal injuries alleged to have resulted from the negligence of defendant's employees, for which it was liable, which resulted in a verdict in plaintiff's favor. *Sustained*.

The facts are stated in the opinion.

Mr. Dana Malone, for defendant:

The torpedo was thrown to carry out some whim of the brakeman in accordance with some impulse of his own, and not for the purpose of carrying out or accomplishing the purposes for which he was then and there employed.

Howe v. Newmarch, 12 Allen, 49; *Hankinson v. Lynn Gas & Electric Co.* 175 Mass. 271, 56 N. E. 604; *Brown v. Boston Ice Co.* 178 Mass. 108, 86 Am. St. Rep. 469, 59 N. E. 644; *McCarthy v. Timmins*, 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038.

At the time of the injury the plaintiff was at his own home, and not at the crossing, and, therefore, was entitled to no protection against such possibilities of harm to himself.

Gay v. Essex Electric Street R. Co. 159 Mass. 238, 21 L. R. A. 448, 38 Am. St. Rep. 415, 34 N. E. 186; *Holbrook v. Aldrich*, 168 Mass. 15, 36 L. R. A. 493, 60 Am. St. Rep. 364, 46 N. E. 115; *Hughes v. Boston & M. R. Co.* 71 N. H. 279, 93 Am. St. Rep. 518,

NOTE.—As to liability of railroad company for injury to small boy by explosion of torpedo picked up by him from railroad track, see also, in this series, *Cleveland Terminal & Valley R. Co. v. Marsh*, 52 L. R. A. 142, 67 L. R. A.

51 Atl. 1070; *Mangan v. Atterton*, L. R. 1 Exch. 239; *Hughes v. Maofie*, 2 Hurlst. & C. 744; *Carter v. Columbia & G. R. Co.* 19 S. C. 20, 45 Am. Rep. 754.

The true inquiry is whether the injury sustained was such as, according to common experience and in the usual course of events, might reasonably be anticipated.

McDonald v. Snelling, 14 Allen, 290, 92 Am. Dec. 768.

The act was directly caused by the boy himself in taking the torpedo home and pounding it until it exploded.

McGuinness v. Butler, 159 Mass. 233, 38 Am. St. Rep. 412, 34 N. E. 259; *Mangan v. Atterton*, L. R. 1 Exch. 239.

The action of the boy in striking the torpedo with a stone would indicate that he had some knowledge of its properties, and the injury should be ascribed to misfortune attributable to his childish ignorance and inexperience, and not to any actionable fault of the defendant.

Gay v. Essex Electric Street R. Co. 159 Mass. 238, 21 L. R. A. 448, 38 Am. St. Rep. 415, 34 N. E. 186; *Hughes v. Boston & M. R. Co.* 71 N. H. 279, 93 Am. St. Rep. 518, 51 Atl. 1070.

The torpedo must have been picked up from the location by the plaintiff, and, if so, he was a trespasser and was not entitled to recover.

Daniels v. New York & N. E. R. Co. 154 Mass. 349, 13 L. R. A. 248, 26 Am. St. Rep. 253, 28 N. E. 283; *Carter v. Tourne*, 98 Mass. 569, 96 Am. Dec. 682.

Mr. John H. Mack, for plaintiff:

The defendant is liable for having placed a dangerous obstruction in the highway.

Lane v. Atlantic Works, 111 Mass. 136; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451.

The question of the plaintiff's due care in handling the torpedo as he did was one of fact for the jury.

Lynch v. Smith, 104 Mass. 52, 6 Am. Rep. 188; *Lovett v. Salem & S. D. R. Co.* 9 Allen, 557.

Loring, J., delivered the opinion of the court:

The evidence in this case warranted a finding that the plaintiff, a boy eight years of age, found a signal torpedo on the planking of the railroad at a grade crossing of a highway; that he took it home, and, not knowing the danger, cracked it with a rock, and was hurt. In addition, there was the testimony of one Paris that "a brakeman threw the torpedo to the flagman at the crossing,

and it dropped at his feet, as he did not catch it: that the flagman threw it back to the brakeman, and he did not catch it, and the torpedo dropped to the ground;" that, "after the train went by, the flagman went back to his covered station without picking it up." The defendant contends that there was no evidence of negligence on its part, and we are of opinion that in this contention it is right. The plaintiff's position is that, if the story told by Paris was believed, the defendant was liable; and he relies on *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451, in support of that contention, to which may be added the subsequent case of *Pittsburgh, C. & St. L. R. Co. v. Shields*, 47 Ohio St. 387, 8 L. R. A. 464, 21 Am. St. Rep. 840, 24 N. E. 658, as cases of the highest court of another state. But we are of opinion that, if the torpedo came to and was left on the planking in the way testified to by Paris, the defendant is not liable, and for the reason that the jury were not warranted in finding that the brakeman and flagman, in throwing the torpedo back and forth, and leaving it on the crossing, were acting in the course of their employment. There is nothing in the evidence in this case, or in the common knowledge of mankind as to railroad signal torpedoes, which would make it the duty of a brakeman to throw a torpedo to a flagman. All that was declared as to the use of railroad torpedoes in evidence in this case was that "signal torpedoes were used by railroads in signaling, being fastened upon the rails and containing an explosive." There was nothing in the evidence showing that it belonged to a flagman at a railroad crossing to signal trains by torpedoes or otherwise. Much less is that within the common knowledge of mankind. If the use of railroad torpedoes is a fact within such common knowledge at all, the flagman has nothing whatever to do with signaling trains or with torpedoes. The case comes within the rule laid down in *Howe v. Newmarch*, 12 Allen, 49, which was applied in *Hankinson v. Lynn Gas & Electric Co.* 175 Mass. 271, 56 N. E. 604, and *Brown v. Boston Ice Co.* 178 Mass. 108, 86 Am. St. Rep. 469, 59 N. E. 644. See also *McCarthy v. Timmins*, 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038. The two cases from Ohio relied on by the plaintiff in the case at bar are entitled to great consideration as cases of the highest court of another state, but, after a careful consideration of them, we are of opinion that they are not in accordance with the settled law of this commonwealth, and should not have been followed by the judge presiding at the trial.

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The remaining question is whether the plaintiff was entitled to go to the jury on the fact that the torpedo was found on the planking. A witness put upon the stand by the defendant contradicted the entire story told by Paris. That entitled the plaintiff to raise the question whether the presence of the torpedo on the planking was sufficient evidence that it was there through negligence on the part of the defendant or its servants, and that the defendant was liable on that ground if Paris's story was not believed. The case comes within *Casady v. Old Colony Street R. Co.* 184 Mass. 156, 63 L. R. A. 285, 68 N. E. 10, which goes on the same principle as *Winship v. New York, N. H. & H. R. Co.* 170 Mass. 464, 49 N. E. 647, where the opposite conclusion was reached, and not within *Buckland v. New York, N. H. & H. R. Co.* 181 Mass. 3, 62 N. E. 955, and *Galligan v. Old Colony Street R. Co.* 182 Mass. 211, 65 N. E. 48. But we are of opinion that the presence of the torpedo on the planking is not evidence which, by the common experience of mankind, justifies the inference that it would not have been there but for the negligence of the railroad or its servants in the course of their employment. The fact that it was a railroad signal torpedo warranted the inference that it was left on the crossing by someone who took it from the defendant railroad, but did not warrant the further inference that it came there through some negligent act of the defendant, or of its employees in the course of the business of the defendant. It is equally probable that it was taken from the railroad by a stranger or by an employee for some purpose of his own, outside his duty as an employee. The burden is on the plaintiff to prove that it came there by act of the defendant or of its employees in the course of its business. We are of opinion that, from its presence on the planking, the jury were not warranted in inferring that it was there through the act of an employee, done in the course of the defendant's business. The nearest case where it has been held that such an inference could be drawn is the case where a pail of sand fell from a railroad bridge, coupled with evidence that no one was to be seen on the bridge immediately after the accident. *Louner v. New York, N. H. & H. R. Co.* 175 Mass. 166, 55 N. E. 805. The last case in which it was held that *res ipsa loquitur* did not apply was *Wadsworth v. Boston Elev. R. Co.* 182 Mass. 572, 66 N. E. 421. Some of the earlier cases are collected in that opinion.

Under these circumstances, it is not necessary to consider the other questions argued. *Exceptions sustained.*

MICHIGAN SUPREME COURT.

PEOPLE of the State of Michigan
v.

Calvin BIRD, Appt.

(.....Mich.....)

Furnishing liquor to a minor as an act of hospitality in one's home is not a violation of a provision, making it unlawful for any person to give such liquor to a minor, which is embraced within a statute the title to which states that it is to provide for the taxation and regulation of the business of selling, furnishing, and giving liquors.

(October 18, 1904.)

APPEAL by defendant from a judgment of the Circuit Court for Ionia County convicting him of giving liquor to a minor. *Reversed.*

The facts are stated in the opinion.

Mr. A. A. Ellis, for appellant:

The courts cannot enlarge the scope of the title. They are vested with no dispensing power. The Constitution has made the title the conclusive index to the legislative intent as to what shall have operation.

Cooley, Const. Lim. § 149; *Callaghan v. Chipman*, 59 Mich. 614, 26 N. W. 806; *Re Hauck*, 70 Mich. 403, 38 N. W. 269; *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105; *People v. Soule*, 74 Mich. 255, 2 L. R. A. 494, 41 N. W. 908; *Overall v. Bezeau*, 37 Mich. 506; *Northwestern Mfg. Co. v. Chambers*, 58 Mich. 383, 55 Am. Rep. 693, 25 N. W. 372.

The title of this act is necessarily restrictive, because it applies to nothing more than "the business."

5 Am. & Eng. Enc. Law, p. 72; *People v. Soule*, 74 Mich. 255, 2 L. R. A. 494, 41 N. W. 908; *Goddard v. Chaffee*, 2 Allen, 395, 79 Am. Dec. 796; *Hacheny v. Leary*, 12 Or. 44, 7 Pac. 329; *Hoagland v. Segur*, 38 N. J. L. 237; *State v. Boston Club*, 45 La. Ann. 585, 20 L. R. A. 185, 12 So. 895; *Snow v. Sheldon*, 126 Mass. 334, 30 Am. Rep. 684; *McCoy v. Brennan*, 61 Mich. 362, 1 Am. St. Rep. 589, 28 N. W. 129; *Sherlock v. Stuart*, 96 Mich. 197, 21 L. R. A. 580, 55 N. W. 845; *Robison v. Miner*, 68 Mich. 552, 37 N. W. 21.

Mr. William K. Clute, for appellee:

The statute is valid.

NOTE.—For a case in this series holding that a statute making it unlawful for any person to furnish, by sale or otherwise, intoxicating liquor to a minor or a person of known intemperate habits is not confined to dealers, but is directed against any person, see *Altenburg v. Com.* 4 L. R. A. 545.
67 L. R. A.

Com. v. Sellers, 130 Pa. 35, 18 Atl. 541; *Faulks v. People*, 39 Mich. 200, 33 Am. Rep. 374; *People v. Gobles*, 67 Mich. 475, 35 N. W. 91; *People v. Garrett*, 68 Mich. 487, 38 N. W. 234; *People v. Welch*, 71 Mich. 550, 1 L. R. A. 385, 39 N. W. 747; *People v. Neumann*, 85 Mich. 98, 48 N. W. 290; *People v. Hughes*, 86 Mich. 180, 48 N. W. 945; *People v. Curtis*, 129 Mich. 3, 95 Am. St. Rep. 404, 87 N. W. 1040; *People v. Hamilton*, 101 Mich. 87, 59 N. W. 401.

Regulations like this are in the proper exercise of the police power.

Snow v. State, 50 Ark. 557, 9 S. W. 306; *Walker v. People*, 5 Colo. App. 37, 37 Pac. 29; *State v. Marion*, 14 Mont. 458, 36 Pac. 1044; *State v. Hogan*, 30 N. H. 268; *State v. White*, 7 Baxt. 158; *Ashurst v. State*, 79 Ala. 276; *Barnes v. State*, 49 Ala. 342; *State v. Hampton*, 77 N. C. 526.

It is no defense, in making such sale not in accordance with the law, that it is for medicinal purposes.

State v. McBrayer, 98 N. C. 619, 2 S. E. 755; *People v. Hamilton*, 101 Mich. 87, 59 N. W. 401.

And it is immaterial whether the seller is authorized to sell for lawful purposes or not.

Altenburg v. Com. 126 Pa. 602, 4 L. R. A. 543, 17 Atl. 799; *Johnson v. People*, 83 Ill. 431; *Fitzenrider v. State*, 30 Ind. 238; *Johnson v. State*, 74 Ind. 197; *State v. Cowgill*, 75 Ind. 599; *State v. Hamilton*, 75 Ind. 238.

As the purposes of these statutes is to prevent the evil effects which would result to the persons of the particular classes intended and others by reason of their drinking intoxicating liquor, it has generally been held criminal to procure and furnish liquor to such persons, even though the person furnishing is not a seller, but an agent for the buyer.

Burnett v. State, 92 Ga. 474, 17 S. E. 858; *State v. Best*, 108 N. C. 747, 12 S. E. 907; *Walton v. State*, 62 Ala. 197; *Foster v. State*, 45 Ark. 361; *State v. Hubbard*, 60 Iowa, 466, 15 N. W. 287; *Black, Intoxicating Liquors*, § 227; *Provo City v. Shurtliff*, 4 Utah, 15, 5 Pac. 302; *Portland v. Schmidt*, 13 Or. 17, 6 Pac. 221.

The constitutionality of such laws could scarcely be assailed with any show of reason.

Allen v. State, 52 Ind. 486; *Goldsticker v. Ford*, 62 Tex. 385; *Altenburg v. Com.* 126 Pa. 602, 4 L. R. A. 543, 17 Atl. 799; *United States v. Holliday*, 3 Wall. 407, 18 L. ed. 132; *State v. McGinnis*, 30 Minn. 48, 14 N. W. 256; *State v. Hyde*, 27 Minn. 153, 6 N.

W. 555; *Johnson v. People*, 83 Ill. 431; *Fitzenrider v. State*, 30 Ind. 238.

The section defining the offense is general in its terms, and there is nothing in the act to which this section belongs limiting its operation. The section can be violated as well by an unlicensed as by a licensed retailer.

State v. Lawrence, 97 N. C. 492, 2 S. E. 367; *Flower v. Witkovsky*, 69 Mich. 371, 37 N. W. 364; *Altenburg v. Com.* 126 Pa. 610, 4 L. R. A. 543, 17 Atl. 799.

Moore, Ch. J., delivered the opinion of the court:

Respondent was convicted of violating the provisions of the so-called liquor law, contained in § 5391, Comp. Laws. He has brought the case here by appeal.

The record on the part of the people discloses that respondent is not a saloon keeper or druggist, but is a laboring man. At the solicitation of his wife he obtained three bottles of beer, and brought them home. The money to buy the beer was furnished by the respondent's father, William Bird. After the beer was brought to the dwelling house of respondent, the respondent, his wife, his father, and one Mattie White, who was about sixteen years old, sat about a table. Mrs. Bird poured the beer out into glasses. After she had done so, respondent handed a glass of it to Miss White, who drank it. Afterwards another glass of the beer was handed to her by respondent, part of which she drank. It is also claimed Mrs. Bird, in the presence of her husband, mixed some alcohol with water, and gave it to Miss White. The question involved is whether this was a violation of the law. It is the claim of the people that it is not lawful for any person except a druggist to give to any minor beer, wine, or spirituous liquor. It is the claim of the respondent that the law relates to a business, and does not preclude one in exercising the hospitality of his home from giving to one of his guests beer, wine, or spirituous liquors, even though the guest is under the age of twenty-one years. It is stated by the prosecuting attorney that the question involved has never been passed upon by this court. The title to the act relating to the question involved reads: "An Act to Provide for the Taxation and Regulation of the Business of Manufacturing, Selling, Keeping for Sale, Furnishing, Giving, or Delivering, Spirituous and Intoxicating Liquors, and Malt, Brewed, or Fermented Liquors and Vinous Liquors in This State, and to Repeal All Acts or Parts of Acts Inconsistent with the Provisions of This Act." Section 5391, Comp. Laws, so far as it is material to this action, reads: "It shall not be lawful for any person, except a druggist, who shall

be governed by § 2 of this act, to sell, furnish, or give any spirituous, malt, brewed, fermented, or vinous liquors, or any beverage, liquor, or liquids containing any spirituous, malt, brewed, fermented, or vinous liquors, to any minor, to any intoxicated person. . . . The fact of selling, giving, or furnishing any liquid in any place where intoxicating liquors are sold or kept for sale, to any minor, or to any intoxicated person, . . . shall be prima facie evidence of an intent on the part of the person so selling, giving, or furnishing such liquid, to violate the law." Many of the cases cited on the part of the people, like *State v. Best*, 108 N. C. 747, 12 S. E. 907, are cases where the liquor was furnished to the minors by a saloon keeper. Others are where the minor furnished the money to pay for the liquor, and do not afford much light upon the question involved here. In one of the cases cited—*Johnson v. People*, 83 Ill. 431—it is said: "It is not necessary to now determine whether a person would incur the penalty of this section by giving it as an act of hospitality at his house, as that question is not before the court." In *Altenburg v. Com.* 126 Pa. 602, 4 L. R. A. 543, 17 Atl. 799, it is said: "The general provisions of the act of 1887 [Laws 1887, p. 108, No. 53] relate to and are designed to regulate the sale of liquors by the various classes of vendors known to the law. They are not directed against the use of such liquors by the individual citizen, and they do not interfere with his right to supply his table with them, or furnish them to his family or his guests." In the case of *Com. v. Davis*, 12 Bush, 240, cited by counsel, the respondent and one Rison, a minor, contributed money to purchase whisky. The respondent procured the whisky, and gave part of it to Rison, who drank it. It was held this was a violation of the statute; the court saying of the statute: "The object was to make it unlawful for any person other than the father or guardian of a minor to place such liquor in his hands," etc. It will be seen this case does not meet the one under consideration. In *Black on Intoxicating Liquors*, § 407, it is said: "The provisions of the liquor laws being aimed at the suppression of an illicit or injurious traffic in intoxicants, it is considered that a person is not liable to indictment for furnishing liquor to a friend or guest at his private residence as an act of kindness or hospitality," citing several cases. If the contention of the people is true, while a father might furnish at his own table for his wife and all his children who had attained the age of twenty-one years wine to drink, if he gave it to a son or daughter

under twenty-one years of age he would be liable to the penalties of the law. And if one of his guests was under twenty-one years of age he would also be liable. The title of the act and all its provisions should be read together. When this is done we cannot persuade ourselves that such a case as

was made against the respondent brings him within its provisions.

The conviction is reversed, and a new trial ordered.

Grant, J., did not sit. The other Justices concurred.

GEORGIA SUPREME COURT.

Pomp WALKER, *Plff. in Err.*,
v.

STATE of Georgia.

(116 Ga. 537.)

*1. In making a statement the accused is not under examination as a witness, and his counsel has no right to ask him questions. If, in continuing his statement, the prisoner refers to the subject-matter of a suggestion or question which his counsel has made, and prior to such reference the accused has been notified by the judge that if he answered the suggestion or question he would subject himself to cross-examination, he is not even then lawfully subject to such examination. The right to make such

*Headnotes by LITTLE, J.

NOTE.—*Homicide resulting from injuries by different persons acting independently.*

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I. Scope.

This note is confined to cases in which several injuries are inflicted, and death results, when the persons inflicting the injuries acted independently in every sense of the word, including neither conspirators, principals, and accessories, nor aiders and abettors, though acting without previous concert. The only cases considered are those in which each acted entirely in his own behalf, and upon his own motives, without regard to the acts or motives of the other.

II. Responsibility when joint.

If two or more persons conceive the intention at the same time of striking another, without previous concert, and defendant strikes him without knowing the intention of the others, and death results, each is responsible for his own acts, but not for those of the others. *Wilson v. State* (Tex. Crim. App.) 24 S. W. 409.

Two persons, both of whom inflicted a wound upon another at different times, cannot both be guilty of murdering him, if they had no connection with each other, and both wounds were not

a statement as he may deem appropriate is by law given to a prisoner on trial, and, unless he consents thereto, he cannot be compelled to answer questions on cross-examination.

2. The manner of conducting a trial of one charged with a criminal offense is largely within the discretion of the judge presiding, and when, after the evidence of both sides has been closed, the trial judge suspends the progress of the trial for a limited time, for the purpose of procuring the attendance of an important witness, such discretion is not abused.
3. No evidence appears in the record which authorized a charge in relation to threats.
4. The evidence was sufficient to authorize the judge to instruct the jury as to the law of conspiracy.
5. When it appeared on a trial for

actually operating to produce death when it occurred. *People v. Lewis*, 124 Cal. 551, 45 L. R. A. 783, 57 Pac. 470.

And one who struck another upon the head with a rock at the same time that a third person stabbed the person struck, after which death occurred, cannot be held responsible therefor, where he shows that the wound inflicted by him did not materially contribute to the death. *Wilson v. State* (Tex. Crim. App.) 24 S. W. 409.

Death must have ensued as the result of the act of the person sought to be charged. *WALKER v. STATE*.

But, although a man cannot be killed twice, two persons, acting independently, may contribute to his death, so that each will be guilty of a homicide. *People v. Lewis*, 124 Cal. 551, 45 L. R. A. 783, 57 Pac. 470.

And a person may be criminally responsible for homicide when death resulted from the joint negligence of himself and another. *Queen v. Ledger*, 2 Fost. & F. 857, *dictum*.

It is no defense in a case of manslaughter that the death of the deceased was caused by the negligence of others as well as that of the accused. If caused partly by the negligence of the accused, and partly by the negligence of others, both the accused and the others are guilty of manslaughter. *Queen v. Ledger*, 2 Fost. & F. 857; *Reg. v. Haines*, 2 Car. & K. 368.

So in *Fisher v. State*, 10 Lea, 151, it was held that an instruction, in a prosecution against two persons for homicide, that, if the death of the deceased was caused by the joint effect of the blows inflicted by each of them, both would be guilty regardless of whether they were acting in concert, or in pursuance of a previous conspiracy, is not error as against the one who struck the last blow.

And in *Jordan v. State*, 82 Ala. 1, 2 So. 460,

murder that the deceased was shot and wounded by the defendant, using a shotgun, and another person, using a pistol; that one of the wounds inflicted by the pistol was certainly mortal, and probably one or more of the wounds inflicted by the shotgun were so,—a charge to the effect that, if the jury should believe that no conspiracy existed between the parties doing the shooting, yet, if they should believe that the defendant inflicted on the deceased a wound that would have produced death, they were authorized to convict the defendant, provided the other elements of murder existed when he shot, was error. To sustain a conviction of murder in such a case, the evidence must be such as to authorize the jury to find that death ensued as the result of the act of the defendant on trial.

(November 12, 1902.)

It was held that, where one of two persons stabs a third person as the third is advancing to attack the other, and immediately after the other shoots and kills the third person, each is equally guilty of the homicide, without reference to whether or not a common purpose was previously formed. But the ruling seems to have been made upon the ground that they were aiding and abetting each other.

III. Individual responsibility.

a. The general rule.

The general rule is that, where two different persons inflicted wounds upon another at different times, and death afterwards resulted, if the second wound aggravated the first, and the first wound, thus aggravated, produced death, the one who inflicted it is the murderer; but, if the last wound produced death, and the first, though it supplied the occasion for the second, did not contribute to the death, the person who inflicted the second is guilty. *People v. Lewis*, 124 Cal. 551, 45 L. R. A. 783, 57 Pac. 470.

b. For act nearest to time of death.

Though an assault or an injury inflicted, followed by death, was subsequent and nearer in point of time to death than other injuries received from other sources, the assailant or person inflicting such injury is not guilty of homicide, unless such assault or injury actually contributed to death.

Thus, one who fires a shot necessarily fatal, in self-defense, is not guilty of homicide because he afterwards fires another shot, which also would be fatal, after the other party has abandoned the conflict, where the last shot does not contribute to or hasten death, though he might be found guilty of an assault. *Rogers v. State*, 60 Ark. 76, 31 L. R. A. 465, 46 Am. St. Rep. 154, 29 S. W. 894.

And if a woman was given poison in one state for the purpose either of killing her or producing an abortion, and was then taken into another state, where another person cut off her head for the purpose of destroying the chances of identification, a verdict of conviction against the person cutting off the head is not authorized in a prosecution for the homicide, unless she was at that time in fact alive. *Jackson v. Com.* 100 Ky. 239, 66 Am. St. Rep. 336, 38 S. W. 422, 1091.

One who kills a person is not relieved from 67 L. R. A.

ERROR to the Superior Court for Sumter County to review a judgment convicting defendant of murder. *Reversed.*

The facts are stated in the opinion.

Messrs. Blalock & Cobb for plaintiff in error.

Messrs. J. A. Ansley, Jr., F. A. Hooper, and Boykin Wright, Attorney General, for the State.

Little, J., delivered the opinion of the court:

Walker and Jones were jointly indicted for the murder of Holton. Walker was separately placed on trial, and convicted. He submitted a motion for a new trial, which being overruled, he excepted. We reverse

the guilt of the murder, however, by the fact that the person killed had previously been mortally wounded by another. *People v. Ah Fat*, 48 Cal. 61; *Tidwell v. State*, 70 Ala. 35; *State v. Matthews*, 38 La. Ann. 795; *State v. Scates*, 50 N. C. (5 Jones, L.) 420.

Though a person is already mortally wounded by the act of one, if another inflicts an injury upon him which hastens the termination of his life, it is a sufficient killing by the latter to warrant a conviction for homicide. *State v. Matthews*, 38 La. Ann. 795; *Fisher v. State*, 10 Lea. 151.

And this is the rule though he would not have died from the subsequent injury had not the previous one operated with it. *State v. Matthews*, 38 La. Ann. 795.

And this is so though the fact that death was accelerated grew out of the condition the deceased was in when he received the second injury. *Fisher v. State*, 10 Lea, 151.

And the rule that where a person is mortally wounded by one, and afterwards another injures him, which latter injury hastens the termination of his life, it is homicide on the part of the latter, is not limited to cases of conspiracy and concurrent injuries inflicted by several persons, but applies to other contributing causes of death of whatever nature. *State v. Matthews*, 38 La. Ann. 795.

Thus, where one person knocks another down, and a third person kicks the latter, from which kick death results, the one who does the kicking is responsible for the homicide. *People v. Elder*, 100 Mich. 515, 59 N. W. 237.

And where one person stabs another, and a third person strikes him upon the head with a rock, the latter is responsible for his death if the blow with the rock contributes materially thereto. *Wilson v. State* (Tex. Crim. App.) 24 S. W. 409.

And where one person shot another, and a second person afterwards struck the injured person blows with a gun, though the second may not have participated in the shooting, and though the wound inflicted by the shooting would not cause death, yet, if the death was hastened by the blows with the gun, the person giving them is guilty of murder, or other criminal homicide according to the circumstances of the case, since his act accelerated the termination of life, and in such case it is not permitted to the offender to apportion his wrong. *Tidwell v. State*, 70 Ala. 33.

the judgment of the court below overruling the motion for a new trial on the ground that the evidence, as it appears in the record, does not show beyond a reasonable doubt that the accused was guilty of the offense as charged, and because of certain rulings made by the trial judge, which will be hereafter considered. It is not, we think, necessary to set out the evidence upon which the state relies to support the conviction. It may not be amiss, however, to remark that the brief sets out the evidence in such a confused and disconnected manner as to make it a work of great difficulty to determine what has or has not been proved. If any attempt was made to put the evidence in narrative form, we must say that it was not very successful. It will be sufficient,

So, if poison was given to a woman in one state for the purpose either of killing her or of producing an abortion, and she was taken into another state, and her head was there cut off by another person, the latter is criminally responsible if she was then alive, whether he intended to kill her, or merely did it for the purpose of destroying the chances of identification, supposing her to be already dead. *Jackson v. Com.* 100 Ky. 239, 66 Am. St. Rep. 336, 38 S. W. 422, 1091.

And in such case if the drugs were given to the woman merely for the purpose of producing abortion, and her head was cut off under the supposition that she was dead, for the purpose of destroying the chances of identification, the person cutting it off is guilty of murder if she was alive at the time of the cutting, where the drugs given her were dangerous to her life; and he is guilty of voluntary manslaughter if the drugs administered were not dangerous. *Ibid.*

So, in *Yorke v. Com.* 17 Ky. L. Rep. 1243, 34 S. W. 228, one who stabbed another, who had previously been knocked down with an oar by another person, after which the person stabbed died, was convicted of manslaughter; but the question in the case is not as to which injury caused death, or as to which person was the murderer, but whether the accused acted in self-defense.

In *Stockdale's Case*, 2 Lewin, C. C. 220, however, which was a prosecution for homicide, it appeared that the deceased, a child, was found in a field, alive, with a contusion on its head, and that it died a few hours after; and the court was of the opinion, that, if death was accelerated only by the exposure, charging it as the cause of death was not supported; but the case seems to have been disposed of on the question of the sufficiency of the evidence to warrant a conviction.

c. For first or prior act.

1. Generally.

If a wound is feloniously inflicted with a deadly weapon in such a manner as to put life in jeopardy, and death ensues as a consequence of that act, the fact that another injury was afterwards inflicted by another person does not palliate or excuse the first felonious act. *Com. v. Costley*, 118 Mass. 1; *State v. Hambright*, 111 N. C. 707, 16 S. E. 411. 67 L. R. A.

however, in reference to the evidence, to say that enough may be gathered from the brief to show that the jury were authorized to find that the plaintiff in error shot the deceased, without excuse, with a gun. It does not at all show that he shot him with a pistol, nor does it satisfactorily appear that the deceased died from the effects of the wounds inflicted by the accused.

1. The first and second grounds of the amended motion will be considered together. It appears that during the trial, and while the accused was making his statement to the jury, his counsel, addressing the court, said that he would like to direct the mind of the accused to a particular fact, and let him explain it. In response to this request, the court informed counsel that the

But a man cannot be convicted of murder where his act does not cause the death; and, though he inflicts a mortal wound, if the act of another intervenes, and death follows from that act, the person inflicting the first injury is not, in law, a murderer. *State v. Wood*, 53 Vt. 560; *Tidwell v. State*, 70 Ala. 33; *State v. Scates*, 50 N. C. (5 Jones, L.) 420; *WALKER v. STATE*.

And to constitute manslaughter the accused must have killed someone; and if, though the person killed was mortally wounded by the accused, he actually died from a wound inflicted by another, or by himself, the accused can at most only be guilty of a felonious attempt to kill. *People v. Lewis*, 124 Cal. 551, 45 L. R. A. 783, 57 Pac. 470.

Where one man inflicted a mortal wound, and afterwards a second killed the wounded person by an independent act, to say that the first killed him would involve the absurdity of saying that the deceased was killed twice. *State v. Scates*, 50 N. C. (5 Jones, L.) 420.

And a statute providing that a person put on trial for murder may be acquitted of that and found guilty of manslaughter does not apply to a case in which one person inflicted a mortal wound, and, before death ensued, another killed the same person by an independent act, without concert with, or procurement of, the first. *State v. Wood*, 53 Vt. 560.

Thus, a person giving another a pistol wound, though sufficient to cause death, cannot be held for homicide upon the death of the person shot, where, while alive, another injury was inflicted, which, independent of the pistol wound, caused death, so that death resulted from that, and not from the pistol wound. *Com. v. Costley*, 118 Mass. 1.

And one who cut another with a knife, after which the latter was killed by a third person, is not guilty of murder, where there was no preconcert and no malicious intent on his part, and the cutting with the knife did not produce death, or materially contribute thereto. *Jordan v. State*, 79 Ala. 9.

So, the fact that one person knocked another down while the latter was retreating from an assault by a third person, there being no agreement or preconcert between them, does not render the former guilty of homicide, where the knocking down did not produce death, but the person struck was afterwards killed by another. *Frank v. State*, 27 Ala. 37.

And where a man struck his wife upon the

latter could ask questions of the accused under the rule, if he desired. Counsel then replied that he did not desire to do so, but wished to direct the attention of the accused to a certain matter, and let him explain that. The trial judge then directed the prisoner not to answer that question (suggested by counsel), and stated that if he did he would subject himself to cross-examination. Counsel then, addressing the prisoner, remarked, if there was anything else that he desired to state, to do so; if not, to come down. The prisoner then referred to the subject previously suggested by counsel to the court, and explained the matter to which his attention had been thus directed. The solicitor general then insisted that reference to that subject subjected

the prisoner to cross-examination, and the court so ruled. His counsel objected to a cross-examination, which objection was overruled, because the prisoner had answered the question suggested by his counsel. The court then permitted the prisoner to be cross-examined by the solicitor general. The bill of exceptions assigns as error the refusal of the court to allow defendant's counsel to direct the mind of the prisoner to the subject about which he had neglected to make a statement, and also to the ruling of the court which allowed the prisoner to be cross-examined. It was said by Judge Bleckley, in delivering the opinion in *Brown v. State*, 58 Ga. 212: "In making his own statement to the court and jury, the prisoner is not under examination, and his coun-

head with a club, and fractured her skull, and she afterwards took arsenic and died, if her death resulted from arsenical poisoning, and not from the effects of the blow inflicted by her husband, he is not guilty of her murder. *Lewis v. Com.* 19 Ky. L. Rep. 1139, 42 S. W. 1127.

And where several wounds were inflicted upon a person by different persons, and those which were alone mortal were inflicted in necessary and proper self-defense, the person inflicting them should not be convicted of murder. *Miller v. State*, 37 Ind. 432.

So, to render a person guilty of manslaughter where a death was the result of the joint negligence of himself and another, the death must have been the direct result, wholly or in part, of his negligence, and his neglect must have been wholly or in part the proximate and efficient cause of the death; and it is not so when the negligence of some other person intervened between his act, or omission, and the fatal result. *Queen v. Ledger*, 2 Fost. & F. 857.

Thus, a person having charge of a steam engine, who, negligently, and in violation of duty, stopped it and went away, after which another person came and wrongfully set it in motion, whereby a person was killed, is not guilty of manslaughter, since it was not he whose negligent act was the one directly causing the death. *Hilton's Case*, 2 Lewin, C. C. 214.

So, a station master, who negligently and in violation of rules, sent one train after another into a tunnel at a shorter interval of time than that prescribed, whose act led to a confusion of signals upon the part of a person at work at the tunnel, from which a collision resulted and persons were killed, cannot be held guilty of manslaughter, since the confusion of signals, and not his act, was the direct cause of the collision. *Queen v. Ledger*, 2 Fost. & F. 857.

2. When act contributes to death.

Where two wounds were inflicted by different persons at different times, and death afterward resulted, the test as to the guilt of the person inflicting the first wound is whether, when death occurred, the first wound contributed to the event: if it did, although other independent causes also contributed, the causal relation between the unlawful acts of the accused and the death is made out. If the life current went out from both wounds, so that at the very instant of death the first wound was contributing 67 L. R. A.

to the event, the one who inflicted it is criminally responsible. *People v. Lewis*, 124 Cal. 551, 45 L. R. A. 783, 57 Pac. 470; *State v. Ham-bright*, 111 N. C. 707, 16 S. E. 411.

And where a pistol wound was given by one person to another, and afterwards another injury was inflicted by another person, and death occurred, if the effect of the subsequent injury was merely to prevent any recovery that might otherwise have taken place, or to aggravate or hasten the effect of the pistol wound, that wound might still be considered the cause of death, and indictable and punishable as such. *Com. v. Costley*, 118 Mass. 1.

So, where a person shoots another, causing a painful wound, and the person shot stabs himself with a knife and afterwards dies, if he dies from the effect of the knife wound alone, the person who shoots him is responsible if it is made to appear that the knife wound is caused by the wound inflicted by the shot in the natural course of events. *People v. Lewis*, 124 Cal. 551, 45 L. R. A. 783, 57 Pac. 470.

But where one person inflicts a wound upon another, which does not cause death, the person inflicting the wound is not guilty of homicide, though the wound is mortal, where the wounded condition merely affords an opportunity for another unconnected person to kill the person wounded. *Ibid.*

And the mere fact that one person assaulted another and felled him to the floor, putting his body in such a position that he was helpless to protect himself from a third person, who then assaulted him, and rendered it a possibility for his assailant to kick him, does not render the first assailant responsible for the homicide, where death resulted from the kick. *People v. Elder*, 100 Mich. 515, 59 N. W. 237.

And one who struck another upon the head with a rock at the same time that a third person stabbed the person struck is entitled, where death results, on a prosecution for the homicide, to prove the extent of the injury caused by the rock as bearing upon the question whether or not it contributed materially to the death. *Wilson v. State* (Tex. Crim. App.) 24 S. W. 409.

So, in *Kelley v. State*, 53 Ind. 311, it was held that it is not indispensable to a conviction for homicide that the wounds inflicted were necessarily fatal and were the direct cause of death, but that, if they caused the death indirectly through a chain of natural effects and causes unchanged by human action, it is suffi-

sel has no right to ask him questions. Doubtless the court might, at the prisoner's request, permit questions to be put to him, as matter of discretion." See also, to the same effect, *Echols v. State*, 109 Ga. 508, 34 S. E. 1038. The ruling in the *Brown Case*, 58 Ga. 212, was made because of the fact that while Brown was making his statement his counsel proposed to examine him; and the judge not only refused to allow this to be done, but also declined to hear from counsel as to the question which it was desired to ask the prisoner; and we entirely agree in the view expressed by Judge Bleckley, that counsel had no right to ask the accused questions in relation either to matters stated or to any not stated. The privilege which the law gives a prisoner to make a statement is a much-abused one. This right was granted in the interest of truth and justice, but it extends no further than to permit the prisoner himself to make to the court and jury just such a statement as he deems proper in his defense. The statement which the law recognizes is not evidence, and should consist only of just such things in relation to his case as the prisoner himself wishes to say. The statement to be made, and as made,

must be that of the prisoner. In the case of *Robinson v. State*, 82 Ga. 535, 9 S. E. 528, it appeared that on the trial, after the conclusion of the statement made by the accused, the trial judge asked of the prisoner whether he meant to deny the testimony of the witnesses. This court ruled that such interrogation was improper, and, referring to the matter in the opinion which he delivered in that case, Chief Justice Bleckley said: "It certainly was irregular to interrogate Henry Goldsmith, after he had concluded his statement, by asking him whether he meant to deny the testimony of the witnesses; but the court explains that this was done for the purpose of calling attention to an omission in the statement, and with a purpose altogether friendly. The motive was a kind one. Nevertheless the act was not well advised, and we cannot approve it." We have, then, two propositions expressly ruled by this court: First, that his counsel has no right to ask questions of the prisoner while he is making his statement, in relation to the same; second, that the trial judge himself cannot do so. While counsel, as thus shown, has no right to ask the accused questions, nor to make suggestions to him, in relation to the mat-

ter; but the question was as to the sufficiency of the evidence to prove that death resulted from wounds inflicted by the accused, and not from intemperance.

And in *Wooten v. State*, 99 Tenn. 189, 41 S. W. 813, it was held that the accused, who knocked a man down so that his head struck the pavement, the man afterwards dying from a clot of blood on the brain, would be guilty of some of the degrees of felonious homicide, though the deceased might have died from other causes, or would not have died from this one had no other cause operated with it, either mediately or immediately, or hastened his death: the theory of the defense being that, after the blow, deceased, while drunk, was thrown from the patrol wagon so recklessly that his head struck the wheel and the station-house floor, producing the clot of blood.

IV. Proof.

One who wounds or injures a person, who subsequently dies, has the burden of proving, on a prosecution for the killing, a claim that death resulted from other injuries, and not from those inflicted by him.

Thus, where a wound which might have been fatal was inflicted by one person upon another with a murderous intent, and it is claimed that the surgeon attending him was guilty of malpractice and culpable negligence, the burden of proof rests with the person who inflicted the wound to show, in order to relieve himself from responsibility for the killing, that death resulted from such malpractice or culpable neglect. *State v. Briscoe*, 30 La. Ann. 433.

So, in *Edwards v. State*, 39 Fla. 753, 23 So. 537, it was held that when a wound from which death might ensue was inflicted with murderous intent, and was followed by death, the burden

of proof is upon the party inflicting it to make it appear to the satisfaction of the jury that death did not result from such wound, but from some other cause; but the question was not as to wounds inflicted by different persons, but as to the sufficiency of proof of cause of death.

But the usual rule of acquittal in case of reasonable doubt of guilt applies.

Thus, where several wounds were inflicted upon a person by different persons, and it is uncertain which was the mortal wound, or whether all were mortal, a person who inflicted one of them should not be convicted of murder for inflicting it. *Miller v. State*, 37 Ind. 432.

And where two persons strike another, there being nothing to indicate a conspiracy between them, and death results, if the jury have a reasonable doubt as to which struck the blow causing death, it should acquit them both. *State v. Goode*, 139 N. C. 982, 43 S. E. 502; *State v. Finley*, 118 N. C. 1161, 24 S. E. 495.

So, where a man struck his wife with a club, fracturing her skull, and she afterwards took arsenic and died, if the jury, in a prosecution for the homicide, have a reasonable doubt, growing out of the evidence, as to whether she came to her death by the blow or from arsenical poisoning, they should acquit him. *Lewis v. Com.* 19 Ky. L. Rep. 1139, 42 S. W. 1127.

In *Smith v. State*, 50 Ark. 545, 8 S. W. 941, however, it was held that, where a person charged with murder is shown to have inflicted a malicious wound, and the proof tends to show that death ensued from it, and he seeks to evade the consequences by showing that his act was not the cause of death, the evidence should be very plain to warrant the jury in agreeing with him, but, if there is any evidence to sustain his theory, it must be submitted to the jury under proper instructions; but the claim was not

ter of his statement, this court, in the later case (*Echols v. State*, 109 Ga. 508, 34 S. E. 1038), ruled that it was in the discretion of the judge to allow either to be done. In the present case the judge, in the exercise of his discretion, refused to allow the desired suggestion to be made. In doing so he did not abuse his discretion. In overruling the motion for a new trial, his honor who presided in the court below placed his ruling by which he allowed cross-examination on the idea that the prisoner had been instructed by the court that, if he answered the question or suggestion made by counsel, it would subject him to cross-examination, and that, as the prisoner did answer the question or suggestion, he was thus lawfully subjected to a cross-examination. We cannot agree in this view. We know of no rule of law or practice which sanctions it. The statute expressly declares that the prisoner shall not be compelled to answer questions on cross-examination, should he think proper to decline to answer them. Furthermore, so long as the prisoner confines his statement to matters connected with his defense, he has the right to refer to any particular phase of it, and this he may do without let or hindrance. While counsel has no right to make suggestions to him, or to put any

question to him, if he do so, even while out of order, the prisoner may lawfully incorporate in his statement any matter which involves the subject of the suggestion or question, without placing himself at any disadvantage, because his right to make such a statement as he may deem proper is unqualified. It does not appear in this case that the prisoner consented to be cross-examined. His counsel objected to it, and when the court ruled that by answering the suggestion or question of his counsel the prisoner had subjected himself to cross-examination, under which ruling the prisoner was cross-examined, he committed an error which required the grant of a new trial.

2. It is insisted that the trial judge erred, after both the state and the defendant had closed, in allowing the case to be suspended, on the application of the solicitor general, for the purpose of sending for a witness; the defendant at the time objecting to such suspension. To this ground of the motion the presiding judge attaches an explanatory note to, the effect that on satisfactory proof submitted to the court of the existence of the witness, the importance of his testimony, and that the solicitor general had just heard of the same, he suspended the trial from 11:45 A. M. to 3:10

that the person was killed by someone else, but that he died from pneumonia, or congestion of the lungs.

So, in accordance with other similar matters, the questions whether death resulted from the act of the accused, and whether the act of the accused contributed to death, or shortened life, are ones of fact for the jury under proper instructions.

This is the rule of *WALKER v. STATE*.

And where there were two wounds upon the head of a deceased person, one apparently inflicted in one way, and the other in another, an instruction to the jury, in a prosecution for the killing of such person, that either of the wounds was produced in a particular way, is erroneous as an instruction by the court upon the evidence. *Weeks v. State*, 79 Ga. 36, 3 S. E. 323.

And where the evidence in a prosecution for homicide establishes with certainty a wound on the front of the head of the deceased, inflicted by striking with a bottle, and there was also a wound upon the back of the head, claimed by the defense to have resulted from another cause, the accused is not entitled to an instruction for acquittal if death resulted from the wound on the back of the head, and did not result from that on the front of the head, since it is not the province of the court to locate the position of either wound; it is sufficient to charge that, if death did not result from the wound inflicted by the accused, but from other causes, the accused cannot be convicted. *Ibid*.

V. Summary.

Several people, acting independently, are responsible for their own acts only, and, where each does an act calculated to cause the death of a person, neither can be held criminally re-
67 L. R. A.

sponsible for the resulting death, unless his act actually contributes to the event; nor can all be held jointly responsible, unless the act of each contributes thereto. All may be held, however, where at the very point of death the act of each is a contributing cause, so that the death is the joint result of each.

The rule is that a person cannot be twice killed, and that, therefore, the result can only be charged to the person whose act actually causes it. This rule applies to the act nearest in point of time to the death where death resulted therefrom, though the person injured had been previously mortally injured, and though the later act merely served to accelerate death, and though death would not have occurred but for the previous act or acts. The rule is different, however, if such act did not cause or contribute to death; and the person inflicting the first or prior injury is not guilty of murder, but of assault with intent to kill only, where his act did not result in the complete termination of life, however little may have been left to be acted upon by subsequent acts or events.

The subsequent infliction of an injury by another, however, furnishes no excuse to the prior wrongdoer when death actually ensued as a consequence of his act. If it did he is responsible though other independent causes also contributed; though this rule does not apply where his acts merely afforded an opportunity for the subsequent act.

The burden rests with a person charged with an act which might cause death to show that it resulted from some other cause. But the usual rules as to reasonable doubt of guilt apply, the question as to what act or acts caused or contributed to death being one of fact for the jury.
F. H. B.

P. M. in order to secure the presence of the witness. We find no error in this. The manner of conducting a trial is largely in the discretion of the judge presiding, and that discretion was not abused by a suspension of the trial for the limited time named for the purpose of procuring the evidence of an important witness. On the contrary, such a suspension seems to have been in the furtherance of justice.

3. An examination of the evidence fails to disclose that any witness testified as to threats made on the part of the accused against the deceased, and for that reason it was error on the part of the trial judge to charge the jury in relation to threats.

4. Complaint is made that the court erred in charging the jury in relation to the law of conspiracy. The accused, with one Jones, was jointly indicted, and the charge objected to appears to be a full and accurate presentation of the law in relation to the liability of one of two conspirators for the acts of the other. There can be no objection to the matter of the charge; and, on a review of the evidence, we find there was evidence which tended to some extent, at least, to show that the accused and Jones had entered into a conspiracy to kill deceased.

5. It is claimed that the court erred in instructing the jury as follows: "After going through the evidence, if you should have a reasonable doubt on your mind that any conspiracy existed between these parties, Pomp Walker and Eli Jones, to take the life of this deceased, Tom Holton, yet if you should believe from the evidence that wounds were inflicted upon the deceased by Eli Jones, and that the defendant in this case inflicted a mortal wound on Tom Holton,—a wound that would have produced death,—then you would be authorized to return a verdict finding the defendant guilty of murder, provided you believe that all the other elements of murder existed about which I have charged you." When fairly construed, we think this portion of the charge might be understood to have this meaning: That, if both Jones and the accused inflicted wounds on the person of the deceased, and the wounds inflicted by the accused would have resulted in death, then the accused could be lawfully convicted, although, as a matter of fact, the wound inflicted by Jones may have been the immediate cause of the death. So construed, this charge was error. The state charged that Walker was guilty of murder in killing Holton. It was therefore incumbent upon the state, before a conviction for any grade of homicide could have been had, to prove, not only that the deceased was killed, but that

he died from the effects of a wound inflicted by the accused. Mr. Kerr, in his treatise on the Law of Homicide (§ 31), on authority, lays down the following propositions: "Where the defendant inflicts a fatal blow, he cannot escape liability for his wrongful act from the fact that other blows were subsequently inflicted by other persons which hastened the death. But if one inflicts a mortal wound, and, before death ensues, another kills the same person by an independent act, without concert or procurement of the one who caused his first wound, the first person cannot be convicted of murder." etc. Mr. Wharton, in vol. 1 of his Criminal Law, § 153, says: "When, after a wound, a new and independent causation intervenes, producing death, this relieves parties to whom such new causation is not imputable." And again, in the same volume (§ 309a): "The death must be traced to the blow charged to the defendant." It has been ruled that "if a person receives a wound wilfully inflicted by another, which might cause death, and death actually follows, the burden is on him who inflicted it to show that it did not cause the death." Hughes, *Crim. Law & Proc.* § 87. The converse of this proposition must be true; that is, if the person inflicting such wound in fact shows that it did not cause the death,—as, for instance, by showing that death actually occurred in consequence of a wound inflicted by another,—he meets this burden, and cannot be convicted. It is, however, unnecessary to cite authorities to support this proposition. Of course, in the case of a proved conspiracy, one may be found guilty, while another inflicted the wound which caused death. But in an individual case, one cannot be lawfully convicted of murder when it is shown that the deceased really died from another and a distinct wound, inflicted by a different person. We, of course, are not to be understood as saying that the evidence in this case shows that the deceased did not die from the wound inflicted by the accused. That is a question for legitimate determination by a jury. We are intending only to meet the proposition involved in the instruction to the jury under consideration. That instruction contains the proposition that, if the accused inflicted on the person of the deceased a wound that would have produced death, the jury would be authorized to return a verdict of guilty, if the other elements of murder existed. The charge was error. The jury could not have lawfully convicted the accused of murder, if he was acting independently when he inflicted the wound, unless they could find from the evi-

dence that the wound inflicted was the cause of death.

Judgment reversed.

All the Justices concur, except **Lumpkin**, P. J., absent, and **Candler**, J., not presiding.

NEW JERSEY COURT OF ERRORS AND APPEALS.

May C. RUSSELL *et al.*

v.

ERIE RAILROAD COMPANY, *Plff. in Err.*

(70 N. J. L. 808.)

- *1. It is lawful for a carrier to limit, by special contract, his common-law liability, and he may thereby exempt himself from liability for any loss resulting otherwise than by the negligence or misfeasance of himself or his servants.
2. Where the owner of goods held in storage directed the storage company to send them to him by railroad, and an officer of the storage company sent the box containing the goods by a cartman to the railroad station, accompanied by a complete shipping order, the agent of the railroad company had no right to assume that the cartman had the authority to alter or modify the terms of the shipping order.
3. The presentation of the shipping order, signed by the storage company, was notice to the railroad company that the authority of the cartman was in no sense discretionary. It consisted only in delivering the goods and paying the freight, and there was no authority on his part to enter into a contract to exempt the railroad company from liability.
4. In order to constitute a ratification, there must be acceptance of the results of the act with an intent to ratify, and with full knowledge of all the material circumstances.

(November 14, 1904.)

ERROR to the Supreme Court at Circuit in Bergen County to review a judgment in favor of plaintiffs in an action brought to recover the value of property lost while in defendant's possession for transportation. *Affirmed.*

Statement by **Vroom**, J.:

This action was brought by the plaintiffs to recover the value of a box containing goods owned by Mrs. Russell, which had been consigned from Buffalo, New York, to Rutherford, New Jersey, over the Erie Railroad, and lost in transit. In June, 1902, Mrs.

*HEADNOTES by **VROOM**, J.

NOTE.—For other cases in this series as to right of carrier to limit its common-law liability in the absence of negligence, see *Little Rock & Ft. S. R. Co. v. Cravens*, 18 L. R. A. 527, and *note*; *St. Joseph & G. I. R. Co. v. Palmer*, 22 L. R. A. 385; *Meuer v. Chicago, M. & St. P. R. Co.* 25 L. R. A. 81; *Chicago, M. &*

Russell caused the box in question, containing the goods belonging to her, to be stored with the Goldhagen Storage Company in Buffalo. Mrs. Russell and her husband had packed the articles in the box. It was nailed up, and marked "Last Box Packed." On the 19th of September, 1902, Mrs. Russell wrote to Mr. O. E. Goldhagen, of the Goldhagen Storage Company, saying: "Send a box marked 'Last Box Packed' to M. C. Russell, Rutherford, over Erie Railroad. I would like them sent as soon as possible, and if you will kindly prepay charges I will refund check for same, together with storage rent." No other direction appears to have been given by Mrs. Russell. Mr. Goldhagen testified that on receipt of the letter he "made out the freight bill, marked the tag and nailed it on the box, sent for his cartman, instructed him to pay the freight, and bring him a copy of the freight bill back." He made out a freight bill or shipping order upon one of the printed forms of the Erie Railroad Company, and in the proper place left thereon he wrote, "Buffalo, N. Y. September 23, 1902, Mrs. M. C. Russell, Rutherford, New Jersey, 1 Box;" and he signed the shipping receipt "Goldhagen Storage Company." It appeared that Goldhagen wrote nothing else upon the printed form, and delivered the same to one Weisser, together with the box, and gave him the directions above set forth. He gave the cartman no instructions as to the rate of freight he should pay. Weisser, after receiving the box, with the above instructions, from Goldhagen, turned it over to another cartman in the same employ by the name of Hoffmeister. He said that he was told to pay the freight, and that no instructions of any kind were given to him. Hoffmeister took the box to the Erie Railroad, and there delivered it to the tallyman, who asked what the box contained, and on being told by Hoffmeister that it contained household goods marked the letters "H. H." on the shipping order. Hoffmeister then presented

St. P. R. Co. v. Wallace, 30 L. R. A. 161; *Kirby v. Western U. Teleg. Co.* 30 L. R. A. 612; *Allam v. Pennsylvania R. Co.* 39 L. R. A. 535; *Tecumseh Mills v. Louisville & N. R. Co.* 49 L. R. A. 557; and *Mears v. New York, N. H. & H. R. Co.* 56 L. R. A. 884.

the shipping order to one Fleming, the chief biller of the company, for the purpose of paying the freight. Fleming asked him what the box contained. On the carrier's replying "household goods," he added "gds." after the "H. H." on the shipping order, and then said there were two rates of freight—one a rate of 30 cents valuation, released to \$5 a hundred in case of loss or damage; then there was a rate of 58½ cents a hundred valuation, not released. Fleming testified that Hoffmeister said he wanted the cheaper rate, and that he figured it out at 47 cents, marked it on the shipping order and the original bill of lading. Hoffmeister's version was, "I told him to give me the cheaper rate, because, if they wanted to pay the higher rate, they would send it by express." Fleming wrote on the shipping order the words, "Value relsd. to 5.00 per 100," and also wrote it on the bill of lading. He then made out a prepaid order for 47 cents, and sent Hoffmeister to the cashier to pay that amount. On the day following the bill of lading was brought back to Goldhagen. He folded it up, and sent it by mail to Mrs. Russell, without noticing the words, "Value relsd. to 5.00 per 100," written on it with lead pencil. On October 3d, on receipt of the waybill, the agent at Rutherford sent Mrs. Russell notice that her box had arrived. The next morning her husband directed a drayman to call for the box. When he called for it at the freight yard, it was missing. On October 15th Mrs. Russell notified the company of the loss of the box. At the trial counsel agreed that the value of the contents of the box was \$300. The case was tried at the Bergen circuit before Mr. Justice Pitney and a jury, and a verdict was rendered for the plaintiff for \$363.55.

Messrs. Collins & Corbin, for plaintiff in error:

There being no question of the carrier's negligence, it was lawful for the defendant to limit its liability by contract.

6 Cyc. Law & Proc. p. 400; 4 Elliott, Railroads, § 1510; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; *Illinois C. R. Co. v. Morrison*, 19 Ill. 136; *York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 107, 18 L. ed. 170; *Kinney v. Central R. Co.* 32 N. J. L. 407, 90 Am. Dec. 675, 34 N. J. L. 273.

The cartman had authority to make, on behalf of the plaintiff, a contract limiting the common-law liability of the defendant.

4 Elliott, Railroads, § 1507; 6 Cyc. Law & Proc. p. 408; 5 Am. & Eng. Enc. Law, 2d ed. p. 305; *Nelson v. Hudson River R. Co.* 48 N. Y. 498; *Shelton v. Merchants' Despatch Transp. Co.* 59 N. Y. 258; *Zimmer v.* 67 L. R. A.

New York C. & H. R. R. Co. 137 N. Y. 460, 33 N. E. 642; *Meyer v. Harnden's Exp. Co.* 24 How. Pr. 290, 1 Daly, 227; *Soumet v. National Exp. Co.* 66 Barb. 284; *Donovan v. Standard Oil Co.* 155 N. Y. 112, 49 N. E. 678; *Squire v. New York C. R. Co.* 98 Mass. 239, 93 Am. Dec. 162; *Pemberton Co. v. New York C. R. Co.* 104 Mass. 144; *Hill v. Boston, H. T. & W. R. Co.* 144 Mass. 284, 10 N. E. 836; *Robinson Bros. v. Merchants' Despatch Transp. Co.* 45 Iowa, 470; *Van Schaack v. Northern Transp. Co.* 3 Biss. 394, Fed. Cas. No. 16,876; *McCann v. Baltimore & O. R. Co.* 20 Md. 202, 83 Am. Dec. 549; *Aldridge v. Great Western R. Co.* 15 C. B. N. S. 582; *York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 107, 18 L. ed. 170; *Brown v. Louisville & N. R. Co.* 36 Ill. App. 140; *Christenson v. American Exp. Co.* 15 Minn. 270, 2 Am. Rep. 122, Gil. 208; *Craycroft v. Atchison, T. & S. F. R. Co.* 18 Mo. App. 487; *Armstrong v. Chicago, M. & St. P. E. Co.* 53 Minn. 183, 54 N. W. 1059; *Missouri P. R. Co. v. International Marine Ins. Co.* 84 Tex. 149, 19 S. W. 459; *Barnett v. London & N. W. R. Co.* 5 Hurlst. & N. 604; *Smith v. Southern Exp. Co.* 104 Ala. 387, 16 So. 62; *Illinois C. R. Co. v. Morrison*, 19 Ill. 136.

The defendant had no knowledge of the character and value of the goods, except the statement of the plaintiffs' agent, and, the charge for transportation being based on such representation, the plaintiffs are estopped to claim more than the agreed valuation.

6 Cyc. Law & Proc. p. 402; 5 Am. & Eng. Enc. Law, pp. 328, 345-347; *Graves v. Lake Shore & M. S. R. Co.* 137 Mass. 33, 50 Am. Rep. 282; *Humphreys v. Perry*, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711; *Shack v. Illinois C. R. Co.* 94 Tenn. 658, 28 L. R. A. 176, 30 S. W. 742.

There were acceptance and ratification by Goldhagen, plaintiffs' agent, of the offer of the carrier to reduce the freight rate in consideration of limitation of liability, and the trial judge should have so charged. The contract limiting liability was ratified by Mrs. Russell.

Smith v. Southern Exp. Co. 104 Ala. 387, 16 So. 62; *Nelson v. Hudson River R. Co.* 48 N. Y. 498; 1 Parsons, Contr. 5th ed. § 3, p. 51; 9 Cyc. Law & Proc. p. 387.

Messrs. Copeland, Luce, & Kipp, for defendants in error:

The burden is on the carrier to show an express assent by the shipper to a definite contract of exemption, and such assent is not to be implied or inferred from a general notice to the public, nor from a notice attached to, or embodied in, the receipt or bill of lading which is given to the shipper on receiving his goods, merely because he re-

ceives the paper without expressing any dissent.

New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344, 12 L. ed. 465; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 16 Wall. 318, 21 L. ed. 297; *Sayles v. New York, N. H. & H. R. Co.* 81 Fed. 326, 32 C. C. A. 485, 58 U. S. App. 18, 87 Fed. 444; *The Majestic*, 166 U. S. 375, 41 L. ed. 1039, 17 Sup. Ct. Rep. 597; *Judson v. Western R. Corp.* 6 Allen, 486, 83 Am. Dec. 646; *Limburger v. Westcott*, 49 Barb. 283; *Ayres v. Western R. Corp.* 14 Blatchf. 9, Fed. Cas. No. 689; *Buckland v. Adams Exp. Co.* 97 Mass. 124, 93 Am. Dec. 68; *Perry v. Thompson*, 98 Mass. 249; *Michigan C. R. Co. v. Hale*, 6 Mich. 243; *Seller v. The Pacific*, 1 Or. 409, Fed. Cas. No. 12,644; *Merriman v. The May Queen*, Newberry, Adm. 464, Fed. Cas. No. 9,481.

Such contract of exemption must not only be express, but it must be fairly made and freely entered upon by the shipper.

5 Am. & Eng. Enc. Law, 2d ed. pp. 296, 298; *Seller v. The Pacific*, 1 Or. 409, Fed. Cas. No. 12,644; *Madan v. Sherard*, 73 N. Y. 329, 29 Am. Rep. 153; *Perry v. Thompson*, 98 Mass. 249; *Sayles v. New York, N. H. & H. R. Co.* 81 Fed. 326.

It must be shown to have been made at the time the goods were shipped, and not afterwards.

5 Am. & Eng. Enc. Law, 2d ed. p. 301; 6 Cyc. Law & Proc. p. 407; *Germania F. Ins. Co. v. Memphis & C. R. Co.* 73 N. Y. 90, 28 Am. Rep. 113; *Perry v. Thompson*, 98 Mass. 249; *Gulf, C. & S. F. R. Co. v. Wood* (Tex. Civ. App.) 30 S. W. 715; *Seller v. The Pacific*, 1 Or. 409, Fed. Cas. No. 12,644.

Such a contract is to be construed most strongly against the carrier.

5 Am. & Eng. Enc. Law, 2d ed. p. 336; *Ashmore v. Pennsylvania Steam Towing & Transp. Co.* 28 N. J. L. 180; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 16 Wall. 318, 21 L. ed. 297.

A person dealing with one known to him to be a special agent, or whom he might reasonably know to be such, is bound to ascertain the extent of his powers.

Dowden v. Cryder, 55 N. J. L. 329, 26 Atl. 941; *Cooley v. Perrine*, 41 N. J. L. 322, 32 Am. Rep. 210; *Hayes v. Campbell*, 63 Cal. 143; *Seller v. The Pacific*, 1 Or. 409, Fed. Cas. No. 12,644; *Nelson v. Hudson River R. Co.* 48 N. Y. 499; *Buckland v. Adams Exp. Co.* 97 Mass. 124, 93 Am. Dec. 68; *Merriman v. The May Queen*, Newberry, Adm. 464, Fed. Cas. No. 9,481; *Schouler*, Bailments, p. 470; 6 Cyc. Law & Proc. p. 408; 5 Am. & Eng. Enc. Law, 2d ed. p. 305. 67 L. R. A.

Vroom, J., delivered the opinion of the court:

It was conceded at the trial that in the course of transit from Buffalo, New York, to Rutherford, in this state, the property of the plaintiffs below was lost, and that the plaintiffs were entitled to a verdict for some amount by reason of that loss. The claim of the railroad company was that the trial judge should have charged the jury to find a verdict for the plaintiffs for \$6.47, being the amount of the value of the shipment at the rate of \$5 per 100 pounds, plus the amount of freight 47 cents. This request of defendant was declined, and the case was left to the jury on the questions whether Mrs. Russell was charged with the terms of the returned bill of lading and the writing thereon, and whether the carter, Hoffmeister, had apparent authority to agree to a limitation of liability, and whether there was an agreement made to limit liability.

The first count in the declaration attributed negligence to the defendant's employees in the carriage and transportation of these goods, but the trial judge properly held that this was not sustained by the evidence, and charged the jury that they could not find a verdict against the defendant on that ground. That it is lawful for a carrier, by special contract, to limit his common-law liability, is admittedly the general rule in this country, and he may thereby exempt himself from liability for any loss resulting otherwise than by the negligence or misfeasance of himself or his servants. That a common carrier cannot, by contract, secure exemptions from liability for losses occasioned by its negligence was held in *Paul v. Pennsylvania R. Co.* (Supreme Court, Feb. Term, 1904) 57 Atl. 139. Where there is no express contract limiting the liability of the carrier, he is bound, when goods are delivered to him for transportation, to deliver them, unless prevented by the act of God or other cause which would excuse the carrier from the undertaking of insurance. The question, then, arises whether there was any contract made in this case limiting the liability of the defendant, which is binding on the plaintiff, Mrs. Russell. The burden of proof of showing such a limitation of liability is on the defendant company, and, being in derogation of common right, is to be construed most strongly against the carrier. 5 Am. & Eng. Enc. Law, 2d ed. p. 336; *Ashmore v. Pennsylvania Steam Towing & Transp. Co.* 28 N. J. L. 180; *Hooper v. Wells, F. & Co.* 27 Cal. 11, 85 Am. Dec. 211. No presumptions will be indulged in favor of exemptions from common-law liability. While it is competent for a common carrier to provide by contract for such exemp-

tions, it must be done in clear and unambiguous terms. *Edsall v. Camden & A. R. & Transp. Co.* 50 N. Y. 661; *Babcock v. Lake Shore & M. S. R. Co.* 49 N. Y. 491; *Etna Ins. Co. v. Wheeler*, 49 N. Y. 616; 6 Enc. Law & Proc. p. 408. It will be conceded that the only contract limiting the liability of the company was made with one Hoffmeister, a cartman employed by the Goldhagen Storage Company, to carry the box containing the goods to the railroad. The instruction to have the goods shipped was from Mrs. Russell, and the directions in her letter to O. E. Goldhagen were simply to send a box marked "Last Box Packed" to M. C. Russell, Rutherford, New Jersey, over the Erie Railroad. Mr. Goldhagen did not go personally with these goods, but delivered them, with the two shipping orders, which he had filled out in his own hand, to a cartman—first to one Weisser, who turned the box and two papers over to another cartman named Hoffmeister. The evidence is explicit that no instructions were given to the carter save "Take the goods," "Pay the freight." He was given the money to pay the freight, and to bring back the bill. It will not be disputed that the doctrine cited by the plaintiff in error is correct, that "a consignor who sends goods to the depot of a carrier for shipment, by an agent, impliedly authorizes such agent to make a special contract with the carrier as to the carriage of the goods, and the acceptance by such agent of a receipt or bill of lading containing limitations upon the liability of the carrier will bind his principal." 5 Am. & Eng. Enc. Law, 2d ed. p. 305. The law was clearly stated by the trial judge in his charge: "The ordinary rule is that a person intrusted with goods to take to a freight office, in order that they may be shipped by the railroad, is presumed to have general authority to agree with the railroad company as to the terms of shipment; and that would include authority to make a reasonable agreement limiting the liability of the railroad company as an insurer, limiting it with respect to the valuation of the goods, as far as the contract goes. So that, if Goldhagen, or the Goldhagen Storage Company, had gone with the goods, or if any person lawfully authorized by the Goldhagen Company had gone with the goods, without any limitation of his authority appearing, in that event it would be presumed that he had a right to make the contract limiting the railroad company's liability." Notwithstanding the fact that there were no other instructions given to the carter, Hoffmeister, then above mentioned, the railroad company contends that the cartman had authority to make, in behalf of the plaintiff, a contract limiting the common-law liability of

the defendant company. 6 Cyc. Law & Proc. p. 408, as follows, was cited in support of this contention: "One who has authority to ship goods for another has thereby implied authority to make a contract for their shipment, involving a limitation of the carrier's liability. Even though the delivery . . . [of the goods] is by a cartman or teamster, if by the usual course of business between the shipper and the carrier it is customary for the cartman or teamster to accept the shipping contract, valid stipulations therein limiting the carrier's liability will be binding on the shipper." This is a broad statement, and not borne out by the examination of the cases I have made. It will be noted, however, that nothing appeared in the testimony in this case showing the usual course of business between the shipper and the carrier, or that it was customary for the cartman or teamster to accept the shipping contract; but it does appear from the evidence that the cartman here had no express authority to agree to a limitation of liability. An instructive case (*Nelson v. Hudson River R. Co.* 48 N. Y. 498) from the court of appeals of New York was cited by both the plaintiff and defendant in error; by the former because it seemed to support the authority of the cartman to make a contract limiting liability, by the latter because the enforcement of the liability was not put upon the ground that the cartman had authority to make the contract, but of what the court termed "a most complete and unequivocal ratification of the contract by the consignor." In the opinion in that case Earl, J., said (p. 510): "The cartman was not authorized to make this contract. He was merely the servant of the consignors to deliver this box to the railroad, and was clothed with no discretion to act for them. No authority could be implied from his character and business, and his principals were near at hand, where they could be consulted and they could act for themselves. But he assumed to act for them, and to do what they were authorized to do. They were notified of all the facts, and the contract made by him for them was delivered to them. They were informed, if they had any objection to the contract made by their assumed agent, they should notify the defendant the next day. They made no objection and expressed no dissatisfaction with the contract, leaving the defendant's agent to suppose that it was satisfactory to them. It seems to me that these facts constitute a most emphatic and unequivocal ratification of the contract. A subsequent ratification, with knowledge of the facts, of the acts of the assumed agent, is equivalent to an original authority, and, as this was a contract which the consignors could

have deputed the cartman to make for them, it must be treated as if made by them in person, and binding upon the plaintiff." And in *Seller v. The Pacific*, 1 Or. 409, Fed. Cas. No. 12,644, it was held that where a drayman of the shipper, on the delivery to the carrier of a package, takes a receipt from the freight clerk of the ship containing the words "not accountable for contents," this of itself does not constitute such an agreement. It is a mere *ex parte* proposition on the part of the carrier after the receipt of the package, and to exonerate the carrier there must be direct or unequivocal evidence of the assent of the shipper. I am clearly of opinion that no authority was disclosed which would warrant the making of any contract by the cartman which would limit the liability of the railroad company as common carriers. When the Goldhagen Storage Company sent this box by the cartman to the railroad station, it was accompanied by a complete shipping order, and upon what principle can it be contended that the agent of the railroad company had the right to assume that the cartman had authority to alter or modify the terms of the shipping order? It seems to me that the duty of the agent plainly was to accept the goods on the terms stated in the order or refuse them, or he could, as actually was done here, take the risk of subsequently showing the authority of the cartman to change the terms of the contract. The railroad company was notified by the presentation of this shipping order, signed by the storage company, that the authority of the cartman was in no sense discretionary; that it was of the simplest kind, and consisted merely of delivering the goods and inquiring and paying the amount of freight; and there was no authority on his part to enter into any contract so important as the exemption of the railroad company from liability. The charge of the trial judge on this point was not erroneous, although too favorable to the defendant.

If, however, the act of Hoffmeister was subsequently ratified by the Goldhagen Storage Company, or Mrs. Russell, it is binding upon Mrs. Russell, although Hoffmeister was not authorized to make this limitation, and although he was not clothed with apparent authority. As was laid down in *Nelson v. Hudson River R. Co.* 48 N. Y. 498: "A subsequent ratification, with knowledge of the facts, of the acts of the assumed agent, is equivalent to an original authority." The contention of the plaintiff in error was that there was acceptance and ratification by Goldhagen, plaintiff's agent, of the offer of the carrier to reduce the freight rate in consideration of the limitation of liability authorized by Mrs. Russell. 67 L. R. A.

But there was no duty in the Goldhagen Storage Company on the return of the carrier with the bill of lading to see whether the railroad company had accepted the goods on the terms stated in the shipping order. This, I think, was to be assumed in the absence of notice to the contrary. In the case of *Nelson v. Hudson River R. Co.* 48 N. Y. 498, notice was given to the consignors of the contract made for them by the cartman, and they were given until the next day to object to it. The intention of a carrier to limit his liability as insurer must be brought home to the shipper by a clear and unambiguous notice, and, as stated by the Supreme Court of the United States, "the right of the carrier thus to limit his liability in the shipment of goods, has, we think, never been doubted. But admitting the right thus to restrict his obligation, it by no means follows that he can do so by any act of his own. He is in the exercise of a sort of public office, and has public duties to perform from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation which may or may not be assented to." *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 382, 12 L. ed. 465. A ratification is defined to be the confirmation of a previous act done either by the party himself or by another. It is the confirmation of a voidable act. 23 Am. & Eng. Enc. Law, p. 889. And a confirmation necessarily supposes a knowledge of the thing ratified. *Blen v. Bear River & A. Water & Min. Co.* 20 Cal. 613, 81 Am. Dec. 132; *San Diego, A. T. & P. B. R. Co. v. Pacific Beach Co.* 112 Cal. 53, 33 L. R. A. 788, 44 Pac. 333. It follows, then, that, in order to constitute a ratification, there must be an acceptance of the results of the act with an intent to ratify and with full knowledge of all the material circumstances. *Ansonia v. Cooper*, 64 Conn. 544, 30 Atl. 760.

The insistent of the railroad company is that, even if the cartman had no lawful authority to make the agreement limiting the company's liability, yet the receipt of the bill of lading as changed by Goldhagen, without objection, was an acceptance of the company's proposition, and likewise the receipt of the bill of lading by Mrs. Russell, without objection, was an acceptance by her of the contract therein expressed. In other words, both ratified the illegal contract made by the cartman. But, if ratification necessarily supposes a knowledge of the thing ratified, and Mr. Goldhagen testified that he noticed no alteration in the bill of lading when he sent it to Mrs. Russell on its return to him by the cartman, and as no

notice was given to him of the alteration there could have been no ratification on his part. And Mrs. Russell certainly could not have been held to ratify it, in the absence of any notice, and when she received the bill of lading not earlier than three days after the goods were shipped, and too late to recall the box.

This question of ratification the trial judge left to the jury, and the following parts of the charge relate thereto: "Now, did Mr. Goldhagen see that [referring to the alterations by the company's agent in the bill of lading] and notice it? He testifies not. I don't know anything on which you have a right to believe that he did see it, and notice it as an alteration of the contract, and therefore the question is, Was he negligent in not noticing it? Would a reasonably careful man, in his situation, have noticed it; noticed it, I mean, not as a mere scratch or word written upon the paper, but as an intended alteration of the contract that he had proposed to the company? That is the point. If Mr. Goldhagen did not notice it, then comes the question of what Mrs. Russell noticed. It was mailed—the paper was mailed, this bill of lading—by Goldhagen to Mrs. Russell, and reached her presumably a day or two after

the 24th day of September, two or three days after the shipment, as I understand the evidence. Well, the question of what he, as a reasonably prudent person, ought to do, is quite different, because, you see, she was not where she could easily communicate with the railroad, and not as well charged with the circumstances of the shipment as Mr. Goldhagen; but at any rate it is for you to say whether, if she had been reasonably prudent, she would or would not have been charged with this notice." Clearly, so far as the plaintiff in error is concerned, there was no error in this part of the charge. The only criticism to be made, if any, is that it is too favorable to the plaintiff in error.

The questions of the authority of the cartman to modify the terms of the contract, and of the notice to the consignor of such alteration, and of ratification, having been found by the jury in favor of the plaintiffs below, the added terms to the bill of lading, describing the contents of the box as "H. H. gds.," and limiting the liability to \$5 per 100 pounds, become immaterial, and need not be further considered.

I find no error, and *the judgment below should be affirmed.*

NEW MEXICO SUPREME COURT.

James B. ORMAN, *Plff. in Err.*,
v.

James L. VAN ARSDELL *et al.*

(.....N. M.....)

- *1. A right, fully matured under existing law, to defeat a debt by a plea of the statute of limitations, is neither a vested right nor a property right, and may be taken away at will by the legislature.
2. Act March 14, 1903 (Laws 1903, chap. 62, p. 121), construed to be retrospective in operation.

(September 13, 1904.)

ERROR to the District Court for Santa Fé County to review a judgment in favor of plaintiffs in an action brought to enforce a judgment. *Affirmed.*

The facts are stated in the opinion.

Mr. John H. Knaebel for plaintiff in error.

Messrs. Charles A. Spiess and Catron & Gortner for defendants in error.

*Headnotes by PARKER, J.

NOTE.—As to vested right in defense under statute of limitations, see also, in this series, *McEldowney v. Wyatt*, 45 L. R. A. 609, and *note*.

67 L. R. A.

Parker, J., delivered the opinion of the court:

James L. Van Arsdell and Philip J. Barber began September 6, 1901, in the district court for Santa Fé county, an action at law against James B. Orman for the recovery of the amount of a judgment alleged to have been given against him in that court in 1885 at the suit of Adam J. Hager, and afterwards affirmed by judgment of this court, January 20, 1886 (3 N. M. 568, 9 Pac. 363), and assigned, August 6, 1888, to the said Van Arsdell and Barber. The plaintiff afterwards filed an amended complaint. An answer to the amended complaint was interposed November 4, 1901, setting up the statute of limitations. March 14, 1903, the legislature passed the following act (Laws 1903, chap. 62, p. 121):

"That § 2921 of the Compiled Laws of 1897 be and the same is hereby amended to read as follows:

"Sec. 2921. If, at any time after the incurring of an indebtedness or liability, or the accrual of a cause of action against him, or the entry of judgment against him in this territory, a debtor shall have been, or shall be, absent from or out of the territory, or concealed within the territory, the

time during which he may have been, or may be, out of, or absent from, the territory, or may have concealed, or may conceal, himself within the territory, shall not be included in computing any of the periods of limitation above provided.'

"Sec. 2. All acts and parts of acts in conflict herewith are hereby repealed, and this act shall take effect and be in force from and after its passage."

Thereafter, July 25, 1903, a demurrer was interposed to the answer to the amended complaint, and was sustained by the court. Plaintiff in error declining to plead further, judgment was upon proofs entered against him, of which he complains here.

Section 2921 of the Compiled Laws of 1897 is a part of the Laws of 1880 (Laws 1880, chap. 5, § 9, p. 45), and is as follows: "If after a cause of action accrues, a defendant removes from the territory, the time during which he shall be a nonresident of the territory shall not be included in computing any of the periods of limitation above provided." It appears from the pleadings that plaintiff in error has never been a resident of New Mexico, and that consequently, under the rule in *Lindauer Mercantile Co. v. Boyd* (N. M.) 70 Pac. 568, he never could have removed from the territory, and that § 2921, *supra*, had no application to him.

1. The first proposition presented is whether a repeal or amendment of the statute of limitations is within the constitutional power of a territorial legislature in so far as it deprives a debtor of a defense fully matured under the pre-existing law. However interesting an argument on this subject might be, it could serve no useful purpose, in view of the controlling authority of *Campbell v. Holt*, 115 U. S. 624, 29 L. ed. 485, 6 Sup. Ct. Rep. 209, where it is held that a right to defeat an action for debt by a plea of the statute of limitations is not a property right nor a vested right, and may be taken away at will by the legislature. We therefore declare, following the above authority, the affirmative of the proposition. It may be well to notice in this connection, however, the distinction between the right to defeat an action for a debt and a vested right to real or personal property fully matured under a statute of limitations. In the latter case the right, of course, is within the constitutional prohibition, and cannot be disturbed. *Campbell v. Holt*, 115 U. S. 624, 29 L. ed. 485, 6 Sup. Ct. Rep. 209. It is argued that *Campbell v. Holt* is not authority in this jurisdiction, because inapplicable. In that case the court was passing upon a constitutional provision of the state of Texas, and construed the same only in so far as it might encroach upon the guar-

anties of the Federal Constitution; while in this case it is argued we have additional limitation upon legislative power contained in what is termed our "Bill of Rights," wherein it is provided: "No bill of attainder, *ex post facto* law, retroactive law, or any law impairing the obligation of contracts shall be made;" and "to guard against transgressions of the high power herein delegated, we declare that everything in this Bill of Rights is excepted out of the general power of government, and shall forever remain inviolate; and all laws contrary thereto, or the provisions thereof, shall be void." Sections 3771, 3779, Comp. Laws 1897. This was an act of the legislature of July 12, 1851 (Laws 1851, 1852, §§ 14, 20, p. 154), and ever since has remained unchanged upon the statute books of the territory. It is not seriously contended, however,—as, of course, it could not be,—that this act is of more dignity or binding force than any other act of the legislature, except in so far as its scope and declaration of important and far-reaching principles of government entitled it to such distinction, or that the legislature enacting this law could thereby limit the powers of any of its successors. It is suggested, however, that this Bill of Rights, having been submitted to Congress, and, either affirmatively or negatively, approved, it perhaps ought to be given the status of organic importance. The unsoundness of the proposition must be apparent. This Bill of Rights is an ordinary act of the legislature, of no more sanctity than any other, enacted with no more formality than any other, and submitted to Congress in the same way as every other act of the legislature. If the submission to and approval of this act by Congress makes it a part of our organic law, then a like approval of every other act of the legislature makes it organic law. If so, when the legislature has once acted on a given subject, the law so enacted becomes organic and fixed, and is no longer open to change by the legislature. This, of course, is not true.

2. The next question is whether the act was intended to be, and is in fact, retrospective in its operation. This must be determined from the act itself. It may be assumed that statutes of limitation will be construed prospectively, unless existing causes are clearly within its terms. It is fair to assume in this territory, especially in view of our Bill of Rights, that courts will not construe an act retroactively unless compelled so to do by the language used. The court will not unnecessarily assume an abandonment of a legislative policy declared in 1851, and ever since recognized. It is likewise a rule of statutory construction that no sentence, clause, or word shall be

deemed to be void, superfluous, or insignificant if such a construction be possible. It is with these considerations in mind that we shall examine the terms of this act of 1903. Assuming, for the moment, that the legislature intended this act to be prospective only in its operation, we may find without difficulty the terms in the act to effectuate that purpose as follows: "If at any time after . . . the entry of judgment against him in this territory, a debtor . . . shall be absent from or out of the territory, the time during which he . . . may be out of or absent from the territory shall not be included. . . ." Here we have a complete provision covering all cases where the entry of judgment and the absence from the territory occur subsequently to the passage of the act. The terms used are specific, and plainly indicate what was intended by the legislature. But in the act we find two additional clauses, namely, "shall have been" and "may have been," and the question is, What effect is to be given to them? If the act is to be prospective only in its operation, these words are entirely superfluous. We cannot assume that they were so used, and their full effect and meaning must be given them, if the same can be ascertained. They clearly refer to some other absence from the territory than such as might occur in the future. Of course, the only other absence from the territory to which the words could refer is such as had occurred in the past. Let us assume then, that the legislature intended to include past causes of action and past absences within the operation of the act, and see if that intent will be within the meaning of the terms used. Thus: "If at any time after . . . entry of judgment [heretofore entered] against him in this territory, a debtor shall have been absent from or out of the territory, . . . the time during which he may have been out of or absent from the territory shall not be included. . . ." These words seem to be well adapted to express the intention assumed, and, indeed, seem susceptible of no other application. The words "may have been" are in the present perfect tense and potential mode of the verb. The tense denotes a condition completed in present time, the mode denotes

possibility, contingency. The use of "may" in connection with "have been" precludes the application of the terms to anything future. They are the equivalent of "has been," the only difference being that in one case the expression is in the certain or indicative form, and in the other in the contingent or potential form. They both refer to a condition completed in present time. It is claimed that the words "shall have been" can be properly applied only to absences to be completed at or before a future time. This, of course, is ordinarily true, the tense of the verb being the future perfect; but in the connection used, it being assumed that we have agreed that past absences are included in the words of the act, they express merely a past future—past or complete at or before the time the legislature speaks, future in relation to the time of the entry of judgment. In this way we give to each word in the section its proper and full meaning, and only in thus giving the act this construction can we do so. We must conclude, therefore, that the act is retrospective in its operation.

It is further suggested that § 2921 is a part of the act of 1880, in which act no mention is made of domestic judgments, of which this is one; and it is urged that the words "limitation above provided" in the act of 1903 limit the scope of the latter act to such limitations as were provided in the act of 1880, which had no application to judgments such as this. But in 1891 the legislature substituted for § 2 of the act of 1880 a section which included domestic judgments, and which is compiled as § 2914, Comp. Laws 1897. So, if § 2921 is to be construed as § 9 of the act of 1880, likewise is § 2914 to be construed as § 2 of the same act. This makes the words "limitation above provided" apply to domestic judgments.

We see no error in the record, and *the judgment of the lower court will be affirmed*, and it is so ordered.

Mills, Ch. J., and **Pope** and **Baker**, JJ., concur. **McFie**, J. having tried the case below, and **Mann**, J., not having heard the argument, did not participate in this decision.

NORTH CAROLINA SUPREME COURT.

W. D. BOWEN, *Appt.*,

v.

George HACKNEY *et al.*

(136 N. C. 187.)

1. No estate vests in the children until

the widow's death, under a will giving real estate to testator's wife for life, and providing that at the expiration of the life estate "that which is given to her for life shall be equally divided between all my children, share and share alike, the representatives of such as may have died to stand in

NOTE.—As to when remainders are vested, see also, in this series, *Myers v. Adler*, 1 L. R. 67 L. R. A.

A. 432, and *note*; *Culbreth v. Smith*, 1 L. R. A. 538, and *note*; *Bunting v. Speaks*, 3 L. R. A.

the place of their ancestors," and therefore a child dying before the widow has no interest which will pass by its will.

2. The word "representatives," in a devise of a remainder to be equally divided, at the expiration of the life estate, among testator's children, "the representatives of such as may die to stand in the place of their ancestors," is not broad enough to include a devise of the interest of a child.

(October 11, 1904.)

A PPEAL by petitioner from a judgment of the Superior Court for Wilson County in favor of defendants in an action brought to secure partition of certain real estate. *Affirmed.*

Statement by **Walker, J.:**

This is a special proceeding for the partition of land, which was brought before the clerk, and by him transferred, under the statute, to the superior court, for the trial of issues joined between the parties, a jury trial having been waived. The court held that the plaintiff is not a tenant in common with the defendants, and a judgment was entered accordingly, to which the plaintiff excepted and appealed.

Messrs. Small & McLean and S. C. Bragaw for appellant.

Messrs. John F. Bruton, F. A. Woodard, S. A. Woodard, and Connor & Connor, for appellees:

The intention is that only such of the children who may survive Mrs. Hackney, and the children of those who die prior to her death, are to take any portion of the property given to Mrs. Hackney for life.

Perry v. Rhodes, 6 N. C. (2 Murph.) 140; *Giles v. Franks*, 17 N. C. (2 Dev. Eq.) 521; *Anderson v. Felton*, 36 N. C. (1 Ired. Eq.) 55.

There are many circumstances which will be deemed to overcome the leaning of the courts to regard a devise as vested.

Whitesides v. Cooper, 115 N. C. 570, 20 S. E. 295; *Williams v. Hassell*, 74 N. C. 434; *Watson v. Smith*, 110 N. C. 6, 28 Am. St. Rep. 665, 14 S. E. 640; *Re Miller*, 90 N. C. 625.

Walker, J., delivered the opinion of the court:

It appears from the case that Willis N. Hackney, who died in 1887, left a will, in which he devised a lot containing about $\frac{1}{2}$ acre in the town of Wilson, and certain per-

sonal property, to his wife for life. He then devised and bequeathed to his children land and personal property. These devises and bequests were made in the first six items of the will, and the seventh item is as follows: "I now declare that, with the advancements already made and specially given in this will, in my judgment, equality is made to all my children, so that at the expiration of the life estate of my wife, that which is given to her for life shall be equally divided between all my children, share and share alike, the representatives of such as may have died to stand in the place of their ancestors." Plaintiff married Orpah, a daughter of the testator, who died in July, 1899, without issue, leaving a will in which she devised and bequeathed all her property to the plaintiff. The widow of Willis N. Hackney died in December, 1901. Plaintiff claims an interest in the $\frac{1}{2}$ acre lot as tenant in common with the defendants by virtue of the seventh item of the will of Willis N. Hackney and the will of his wife. The judge ruled that he was not so entitled, and this ruling we are called upon to review.

The decision of the case turns upon the proper construction of the seventh item of the will. If the remainder after the life estate of Mrs. Hackney was vested absolutely by the seventh clause in Orpah (plaintiff's wife) at the death of the testator, and the direction as to the division of the property at her death, or, to use the words of the will, "at the expiration of her life estate," referred, not to the time of the vesting of the estate in interest, or of the vesting of a right to a future estate of freehold, but merely to the time of enjoyment or the vesting of the estate in possession, it will follow that the plaintiff's contention is right, and that he acquired that vested interest of his wife under her will: but, if the provision of the seventh item does refer to the time of the vesting of the estate in interest, or, in other words, to the accrual of the right of property as distinguished from the right of enjoyment, his wife acquired an estate contingent upon her surviving the life tenant; and, as she died before the latter, her interest never vested, plaintiff took nothing under her will, and his suit must fail. We are of the opinion that the latter view is the correct one.

In the construction of a will, the main purpose is to ascertain and effectuate the intention of the testator, so that his prop-

690; *Kansas City Land Co. v. Hill*, 5 L. R. A. 45; *Hills v. Barnard*, 9 L. R. A. 211, and *note*; *Ebey v. Adams*, 10 L. R. A. 162; *Schuyler v. Hanna*, 11 L. R. A. 321; *Gindrat v. Western R. Co.* 19 L. R. A. 839; *Saxton v. Webber*, 20 L. R. A. 509; *Starnes v. Hill*, 22 L. R. A. 598; 67 L. R. A.

Thorington v. Thorington, 36 L. R. A. 385; *Bigley v. Watson*, 38 L. R. A. 679; *Sumpter v. Carter*, 60 L. R. A. 274; *Allison v. Allison*, 63 L. R. A. 920; and the following case of *Wool v. Fleetwood*.

erty may be received and enjoyed by those who were the objects of his bounty, and his intent will always be carried out when to do so will not contravene some well-settled rule of law,—for example, a rule by which a certain, fixed, and definite meaning is given to the language employed by him. The case before us does not present any serious difficulty in the way of ascertaining what the testator meant, when we read the will as a whole, and interpret it accordingly, or even when we isolate the seventh item and construe it by itself. The testator had in former parts of his will devised the lot in question and certain personal property to his wife for life, and devised and bequeathed other property to his children in a manner which, in his opinion, gave each of them an equal share of his estate. Having thus produced equality in this distribution among them, as he declared, he then directs, in the seventh item of his will, that, at the expiration of the life estate of his wife, that which was given to her for life should be equally divided among all his children, share and share alike: the representatives of such as may have died to stand in the place of their ancestors. There are no words of devise in this item, except by inference or implication from the direction that the property, at the death of his wife, should be equally divided; and, as to the period of division, and consequently of devise, the will uses terms of strict condition, namely, “at the expiration of the life estate.” The general rule undoubtedly is that, if there is, in terms, a devise, and the time of enjoyment, merely, is postponed, the interest is a vested one, but if the time be annexed to the substance of the gift or devise, as a condition precedent, it is contingent and transmissible. 3 Wooddeson, 512. This rule was applied in the case of *Anderson v. Felton*, 36 N. C. (1 Ired. Eq.) 55, to a gift which was to take effect at the time the testator’s daughter “arrived to the age of fifteen years,” but there was no preceding life estate, as there is in this case; and in *Rives v. Frizzle*, 43 N. C. (8 Ired. Eq.) 237, this was said to take the case out of the rule as stated in *Anderson v. Felton*. But there are words in the seventh item of the will which distinguish this case from either of those last mentioned, and bring our case within either one or the other of the principles stated in *Starnes v. Hill*, 112 N. C. at page 10, 22 L. R. A. 598, 16 S. E. 1011, and *Whitesides v. Cooper*, 115 N. C. at page 574, 20 S. E. 295, in the passage quoted from Gray, Rule against Perpetuities, 108, which is as follows: “The true test in limitations of this character is that, if the conditional element is incorporated into the description of the gift to the remainderman (as it is 67 L. R. A.

in the case under consideration) then the remainder is contingent, but if, after the words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus, on a devise to A for life, remainder to his children, but, if any child die in the lifetime of A, his share to go to those who survive, the share of each child is said to be vested, subject to be divested by its death. But on a devise (as in the present case) to A, for life, remainder to such of his children as survive him, the remainder is contingent.” *Clark v. Cox*, 115 N. C. 93, 20 S. E. 176; 2 Underhill, Wills, § 867, and also pages 1309 and 1310. It can make no difference in this case whether the remainder to each child was contingent or vested, but subject to be divested by its death before that of the life tenant. In either view, the plaintiff must fail, and it is immaterial, therefore, which alternative of the proposition we adopt as applicable to this case. If the remainder to the children of the testator at the death of their mother is not contingent, it can only be vested, subject to be divested as to any child who predeceased the mother, for it surely was intended that the representatives of any deceased child should take, not by descent, but by purchase; that is, nothing from the parent, but all directly from the deviser. This appears plainly, we think, from the language of the item. 2 Underhill, Wills, § 867. In the first place, the division is not to be made until the death of the life tenant, and that is the time fixed by the terms of the will when it shall be definitely and finally determined who shall take. *Fleetwood v. Fleetwood*, 17 N. C. (2 Dev. Eq.) 223; *Simms v. Garrot*, 21 N. C. (1 Dev. & B. Eq.) 397; *Irvin v. Clark*, 98 N. C. 437, 4 S. E. 30. The testator evidently had in mind the possibility that one or more of his children might die during the life of his wife, and provided for that contingency by giving the share which a deceased child would have taken if it had outlived the mother to his or her representatives. It is manifest that the testator intended that the gift in the seventh item should take effect finally and absolutely according to the state of his family as it existed at the death of his wife, and the item should be construed as if it read: “So that at the expiration of the life estate of my wife, that which is given to her for life shall be equally divided between all my children then living, and the representatives of such as may have died, the latter to stand in the place of their ancestors.” By this construction of the will, a condition precedent would be annexed to the gift which would prevent its vesting in any child unless he or she should survive the life tenant. The case, in this

aspect, would fall within the principle stated in *Watson v. Watson*, 56 N. C. (3 Jones, Eq.) 400; *Williams v. Hassell*, 74 N. C. 434; *Young v. Young*, 97 N. C. 132, 2 S. E. 78; *Re Miller*, 90 N. C. 625; *Starnes v. Hill*, 112 N. C. 1, 22 L. R. A. 598, 16 S. E. 1011; *Clark v. Cox*, 115 N. C. 93, 20 S. E. 176; and *Whitesides v. Cooper*, 115 N. C. 570, 20 S. E. 295.

The children took contingent remainders, the contingency being that they should survive their mother; and, failing in this, as to any one or more of them, the remainder vested in his or their representatives by purchase, as said by Shepherd, Ch. J., in *Whitesides v. Cooper*, 115 N. C. 570, 20 S. E. 295. This would be the limitation of concurrent fees to take effect alternatively, or as substitutes one for the other, which Fearne, *Contingent Remainders*, 3d Am. ed. 373, explains as follows: "However, we are to remember that although a fee cannot, in conveyances at common law, be mounted on a fee, yet two or more several contingent fees may be limited merely as substitutes or alternatives one for the other, and not to interfere, but so that one only take effect, and every subsequent limitation be a disposition substituted in the room of the former, if the former should fail of effect." *Luddington v. Kime*, 1 Ld. Raym. 203. Cruise (vol. 1, title 16, chap. 1, § 50) describes the ulterior devise to the "representatives" as a contingent fee, not contrary to, but concurrent with, the former limitations to the parent, according to the notion in *Plunket v. Holmes*, T. Raym. 28, and the limitation as one upon a contingency, with a double aspect; the language of Fearne, *Contingent Remainders*, p. 373, being: "This sort of alternative limitation was termed a 'contingency with a double aspect.'" Shepherd, Ch. J., explains this principle with his usual clearness in *Watson v. Smith*, 110 N. C. 6, 28 Am. St. Rep. 665, 14 S. E. 640, and *Whitesides v. Cooper*, 115 N. C. 570, 20 S. E. 295. If a child survived the mother, the remainder was to vest; but, if a child died before the mother, the remainder then vested in the representatives of that child. "But at this day," says Fearne (p. 373), "such limitations may be good in a will or by way of use, upon a contingency that may happen within a reasonable period, though this not by way of direct remainder, but by way of executory devise, or springing or shifting executory use." The nature of the limitation is immaterial in this case.

That there is a condition precedent annexed to the gift to the children we find decided in *Hunt v. Hall*, 37 Me. 363, a case substantially like ours. The limitation there was "after the decease of my dear wife, my

will is that my executor hereafter named cause an equal division to be made among all my children and the heirs of such as may then be deceased." With reference to this devise the court said: "The persons who are to take are not those who are living at the death of the testator. The division is not then to take place. This is to be done at a subsequent and uncertain period. If the estate were to be construed as vesting at the death of the testator, an heir might convey by deed his share of the estate; and if he should decease before the termination of the life estate, leaving heirs, his conveyance would defeat the estate of such heirs. This would be against the express provisions of the will, which provide that the estate should be divided 'among his children and the heirs of such as may then be deceased.' By the terms of the will, the estate is not to vest till after the death of the widow, and then the division is to ensue. Till then there is a contingency as to the persons who may take the estate." The only distinction between the two cases, though they are not any wise different, is the substitution of the words "legal representatives" for the word "heirs," and it must be conceded that, with reference to the lot in controversy, the words "legal representatives" clearly refer to the heirs or the persons who would have represented their ancestor had she outlived the life tenant and the remainder had vested in interest and then by her death the descent had been cast. The words were used to designate the persons who would thus have taken in the other event, but, in the event as it actually occurred, shall take, not by descent, but by purchase; the intention being to create a new stock of inheritance. If we assume though, that the remainder vested in each child upon a condition subsequent, namely, that he or she should survive their mother, which would divest the interest as to any child if it died before its mother, then Mrs. Bowen's will passed nothing to her husband (the plaintiff), as, the very instant it took effect under the statute, she lost her interest in the property, her mother being alive at that time. *Wilson v. Bryan*, 90 Ky. 482, 14 S. W. 533.

The fact that Orpah Hackney Bowen died without issue cannot change the construction of the will, which must be determined from its language as of the time when it took effect, and not from subsequent events, for the evident meaning of the testator was that his property should go to his "children equally, share and share alike," the representatives of anyone who had died before the mother to stand in the place of such dead ancestor, and, if there were no such representatives, then the leading and para-

mount intention of the testator should prevail, and the division should still be made equally among his children; that is, the survivors, who would also be the heirs or representatives of the deceased daughter.

It was argued that the word "representatives" includes, not only heirs, but a devisee, or one who takes from another by purchase. We do not think that such a comprehensive meaning can be given to the word "representatives," under the terms of this will. It means the persons who are appointed, not by the deviser in her will, but by the law, to represent her, and upon whom the law would have cast the inheritance; it having been used in this sense as *designatio personarum*. Besides, they must be the representatives of their "ancestor," which is defined as follows: "One who has preceded another in a direct line of descent; a lineal ascendant. A former possessor; the person last seised. . . . A deceased person from whom another has inherited land." Black, Law Dict. p. 69; 2 Bl. Com. 201. 4 Kent, Com. 404, says: "Ancestral estates are such as are transmitted by descent, and not by purchase." The plaintiff, as devisee of his wife, does not come within any of these definitions.

We have examined the cases cited by the appellant's counsel in their brief and argument, and find that the language of the several wills which was construed in them as giving vested remainders was entirely different from that of the will in this case. We must observe well-settled rules of construction in interpreting a will, but such rules must be applied with strict reference to the peculiar wording of the will, so as not to defeat the expressed intention of the testator. We are speaking of rules of construction, and not rules of property.

The court correctly adjudged that the plaintiff is not a tenant in common with defendants, and *there was no error*, therefore, in dismissing the action.

Connor, J., did not sit on the hearing of this case.

Elizabeth WOOL, Exrx., etc., of Jacob Wool,
Deceased, *et al.*,

v.

J. J. FLEETWOOD, Appt.

(136 N. C. 460.)

1. A clause in a will forbidding the sale of testator's real estate during the

NOTE.—As to when remainders are vested, see the preceding case of *Bowen v. Hackney*, and footnote thereto.
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lifetime of the life tenant is void, as against public policy.

2. A direction that testator's real estate remain in the name of his estate for a period of five years after the death of his wife, who is given a life estate in the property, and that at the expiration of that period his children appoint commissioners who shall partition the property between them, does not prevent the immediate vesting of the remainder in them, so that with the co-operation of the life tenant they can convey a good title to the property immediately after the death of the testator.
3. The meaning of the words "lawful heirs" cannot be restricted as including only children.
4. A provision in a will that, five years after the death of a life tenant, testator's children shall procure the property to be divided between them, and that they shall own and occupy during their natural lives, and directing that at their death the property shall go to their lawful heirs, vests in them a fee simple, under the rule in *Shelley's Case*, so that an attempt to make a further limitation of the estate in case of their death without lawful heirs is void.
5. A limitation over to the heirs of testator in case of failure of lawful heirs of the persons to whom and their lawful heirs an estate is given, is defeated, and does not make the first estate a conditional or defeasible fee if the heirs of testator and of such persons must of necessity be the same persons.
6. Specific performance of a contract to sell property devised by will will not be decreed against the protest of the parties, where the result would be to defeat the intention of the testator as manifested in the will.

(November 15, 1904.)

APPEAL by defendant from a judgment of the Superior Court for Perquimans County in favor of plaintiffs in an action brought to enforce specific performance of a contract to purchase real estate. *Affirmed*.

Statement by Walker, J.:

This is a controversy, submitted without action, in which the plaintiffs seek specific performance of the contract with the defendant by which they undertook and agreed to sell, and the defendant to buy, 125 acres of land, known as the "Saunders tract." The land originally belonged to Jacob Wool, who devised it to the plaintiffs in the manner set forth in his will, the material items of which are as follows:

"(3) I give, devise, and bequeath my estate and property, real and personal, unto my wife, Elizabeth Arnold Wool, the same to be held by her during her natural life

For rule in *Shelley's Case*, see also, in this series, *Fowler v. Black*, 11 L. R. A. 670, and note; *Vanolinder v. Carpenter*, 2 L. R. A. 455,

and the income from said property shall go to her for her support.

"(4) I do hereby constitute and appoint my said wife, Elizabeth Arnold Wool, my sole executrix of this my last will and testament without bond to settle my estate.

"(5) I order and direct that none of my real estate be sold by my wife or by my heirs, or disposed of in any way during her natural life.

"(6) I order and direct that my estate remain in the name of Jacob Wool's estate five years after the death of my wife, Elizabeth A. Wool, and at her death the surviving heirs shall select an administrator who shall qualify according to law and shall manage the estate and make a settlement with the heirs, once a year, of all money he has on hand to their credit; upon a failure to do so the heirs may select another administrator if they deem it necessary.

"(7) I order and direct that at the expiration of five years after the death of my wife, Elizabeth A. Wool, my son, Leonard Jackson Wool, and Elizabeth shall select three commissioners and make an equal division of my estate between themselves, Leonard Jackson and Elizabeth Wool, who shall own and occupy said property during their natural lives and, at the death of Leonard Jackson and Elizabeth Wool, the property shall go to their lawful heirs, and, should they have no surviving heirs, the property shall go to my lawful heirs.

"(8) I order and direct that the administrator shall receive as compensation for his services one and one-fourth per cent for receiving and one and one-fourth per cent for disbursing whatever money may come in hand belonging to my estate."

The devisees all survived the testator, are plaintiffs in this controversy, and are of full age, unmarried, and without any children. The executrix, Elizabeth A. Wool, qualified as such, and has fully settled the estate of her testator. Prior to the 15th day of June the defendant duly contracted with the plaintiffs to purchase of them the tract of land herein first described, in fee simple, at the sum of \$1,200, and the plaintiffs contracted to convey to him a good and indefeasible title in fee to the same; and before the commencement of this action the plaintiffs, Elizabeth A. Wool, Leonard J. Wool, and Elizabeth Wool, executed and duly tendered to the defendant, J. J. Fleetwood, a deed in fee simple, with full warranties, conveying to him, in terms, the tract of land aforesaid, and demanded of him the pur-

chase money which he had agreed to pay for the same. The defendant, Fleetwood, refused to accept the deed or to pay the purchase money, upon the ground only that, by the terms of the will of Jacob Wool, the plaintiffs could not convey a good and indefeasible title to the land. It was agreed between the parties that if, under and by virtue of the will, the plaintiffs had the legal right to convey the land to the defendant, and did, by the deed tendered, convey a good and indefeasible estate in fee to him, then judgment should be entered requiring him to comply with his said contract, by accepting the said deed, and by paying over the money which he had contracted to pay, but, if the court should be of the opinion that the plaintiffs are unable to convey, by virtue of the will and deed, a good and indefeasible fee-simple title to the land in controversy, then the defendant should go without day. Upon consideration of the facts agreed, the court held that the plaintiffs had the legal right to convey and make a good and indefeasible title to the land described in the contract, and thereupon adjudged that, upon the plaintiffs tendering to the defendant a deed in due form, with a covenant of warranty, for the land, and with proper probate, they recover of the defendant the amount of the purchase price (\$1,200) and the costs. The defendant excepted to this judgment, and appealed.

Mr. Charles Whedbee, for appellant.

The word "lawful" in this section, before the word "heirs," changes the technical meaning of "heirs" to "children," and describes the persons who are to take after Leonard J. and Elizabeth's death.

The rule in *Shelley's Case* does not apply.

Howell v. Knight, 100 N. C. 254, 6 S. E. 721; *Bird v. Gilliam*, 121 N. C. 326, 28 S. E. 489; *Rollins v. Keel*, 115 N. C. 68, 20 S. E. 209; *Mills v. Thorne*, 95 N. C. 362.

The prohibition against selling during Mrs. Wool's life prevents the execution of a valid conveyance by the plaintiffs till that event.

2 Washb. Real Prop. pp. 67-69; *Munroe v. Hall*, 97 N. C. 206, 1 S. E. 651.

Messrs. Pruden & Pruden, for appellees:

A freehold estate is given Leonard Jackson and Elizabeth, and by the same conveyance an estate is limited to their heirs in fee simple, which meets exactly the conditions required to put in operation the rule in

and *note*; *Re Browning*, 3 L. R. A. 209; *Starnes v. Hill*, 22 L. R. A. 598; *McIlhinny v. McIlhinny*, 24 L. R. A. 489; and *Grainger v. Grainger*, 30 L. R. A. 186.

As to meaning of word "heirs" in will, see 67 L. R. A.

notes to Vanolinder v. Carpenter, 2 L. R. A. 457; *Boston Safe Deposit & T. Co. v. Coffin*, 8 L. R. A. 747; and *Proctor v. Clark*, 12 L. R. A. 721; also *Kendall v. Gleason*, 9 L. R. A. 509, and *Conger v. Lowe*, 9 L. R. A. 165.

Shelley's Case, and to create in the first takers a fee-simple estate.

Den ex dem. Folk' v. Whitley, 30 N. C. (8 Ired. L.) 133; *King v. Utley*, 85 N. C. 59; *Smith v. Brisson*, 90 N. C. 285; *Nichols v. Gladden*, 117 N. C. 498, 23 S. E. 459; *Leathers v. Gray*, 101 N. C. 166, 9 Am. St. Rep. 30, 7 S. E. 657; 2 Washb. Real Prop. pp. 274, 275.

The words "lawful heirs" do not change the technical meaning and prevent the operation of the rule in *Shelley's Case*.

Ham v. Ham, 21 N. C. (1 Dev. & B. Eq.) 598; *Donnell v. Mateer*, 40 N. C. (5 Ired. Eq.) 7; *Worrell v. Vinson*, 50 N. C. (5 Jones, L.) 91; *Sanderlin v. Deford*, 47 N. C. (2 Jones, L.) 74.

The legal estate is conveyed during the period of five years to no one by the will, and therefore necessarily descends to Leonard Jackson and Elizabeth, who are the only heirs at law of Jacob Wool, and is conveyed by their deed, or certainly they will be estopped to claim against their deed, and no one else can.

Den ex dem. Ferobee v. Procter, 19 N. C. (2 Dev. & B. L.) 439; *Beam v. Jennings*, 89 N. C. 451; *Munds v. Cassidey*, 98 N. C. 562, 4 S. E. 353, 355; *Gay v. Grant*, 101 N. C. 219, 8 S. E. 99, 106.

If the title goes to the administrator, to be appointed after the death of Mrs. Wool, it will be held by him for the use of Leonard and Elizabeth as a simple trust, and the legal title will be executed in them as soon as the said administrator is appointed, under the statute of uses.

Perkins v. Brinkley, 133 N. C. 154, 45 S. E. 541; *McKenzie v. Sumner*, 114 N. C. 425, 19 S. E. 375.

The restraint of alienation in general, to anyone and for all time, is invalid as being repugnant to the estate granted.

2 Washb. Real Prop. pp. 67-69; *Twitty v. Camp*, 62 N. C. (Phill. Eq.) 61; *Hardy v. Galloway*, 111 N. C. 519, 32 Am. St. Rep. 828, 15 S. E. 890; *Pritchard v. Bailey*, 113 N. C. 521, 18 S. E. 668; *Latimer v. Waddell*, 119 N. C. 370, 26 S. E. 122.

Walker, J., delivered the opinion of the court:

We do not see why the plaintiffs are not able, by the deed which they have tendered, to convey a good and indefeasible title to the defendant. The latter contends, as we understand, that the deed will not pass to him such a title, for three reasons: (1) Because by the fifth item of the will the widow and the heirs are forbidden to sell or dispose of any of the real estate during the life of the former; (2) because by the terms of the sixth item no estate vested in the plaintiffs Leonard and Elizabeth Wool, 67 L. R. A.

either by descent or purchase, until the expiration of five years after the devisors' death; and (3) because by the seventh item the said Leonard and Elizabeth did not acquire the fee, but only a life estate, the word "lawful," which qualifies the word "heirs," having the effect, in law, of preventing the latter word from operating as one of limitation, and of restricting the meaning of the words "lawful heirs" to that of "children," who will take, not by descent from their parents, but by purchase directly from the devisors, and therefore that the rule in *Shelley's Case* and the act of 1784 (Code, § 1325) converting fees tail into fees simple do not apply. It is true that the testator places a positive restraint upon the alienation of the real property in the fifth item of his will, and the plaintiffs, by reason of that restriction, cannot convey a good title to the defendant if that provision of the will is valid. We entertain no doubt upon the question thus presented, as it is well settled that such a restraint upon the donee's right to dispose of the property is void, as being contrary to a wise principle of the law, which is based upon a sound public policy. As a general rule, it may be conceded that every person may do with his own as he pleases, but this rule is not of universal application, but is subject to some exceptions made necessary by the interest of the public that the titles to land should be as little fettered, and the power of alienation as little subject to restraint, as possible and consistent with a reasonable enjoyment of the right of property and all of its incidents: it being, generally speaking, against public policy to allow restraints to be put upon transfers which that public policy does not forbid. Gray, *Restraints on Alienation*, 2d ed. § 3. Hence it has ever been the inclination of the courts, in their decisions, to remove old restraints, and not only to discountenance but to disallow new ones, and to put all obstacles out of the way of a fair and reasonable exercise of this power of alienation, which is one of the most important and valuable incidents of the right of property. While limited restraints of a certain kind have been recognized as valid, when the fee is conveyed, it must be conceded at this time to be well settled that a restraint upon the right of alienation, even for a limited period of time, is, as to such an estate, invalid; it being inconsistent with the nature of the grant, or of the estate which is created by the latter. Gray, *Restraints on Alienation*, 2d ed. 41. The elementary law writers (2 Bl. Com. 157) lay down the rule generally that a condition of nonalienation annexed to a conveyance *inter vivos* or to a devise of a fee is void, because it is inconsistent with the full and

free enjoyment which the ownership of such an estate implies. *Twitty v. Camp*, 62 N. C. (Phill. Eq.) 61. "The doctrine," says Ruffin, Ch. J., speaking for the court, "rests upon these considerations: That a gift of the legal property in a thing includes the *jus disponendi*, and that a restriction on that right, as a condition, is repugnant to the grant, and therefore void." *Mebane v. Mebane*, 39 N. C. (4 Ired. Eq.) 131, 44 Am. Dec. 102.

The statute *quia emptores* (18 Edw. I. chap. 1 [1290]) abolished subinfeudation, and, by virtue of its provisions, all persons except the King's tenants *in capite* were left at liberty to alien all or any part of their lands at their own pleasure and discretion (2 Bl. Com. 289), and finally restrictions in cases of freehold tenure were entirely removed by 12 Car. II. chap. 34; and ever since those statutes were passed the right of free and unlimited alienation has been regarded as an inseparable incident to an estate in fee. 1 Washb. Real Prop. 5th ed. p. 83; *Hardy v. Galloway*, 111 N. C. 519, 32 Am. St. Rep. 828, 15 S. E. 890. It cannot be questioned that a condition of non-alienation annexed to the grant of an estate in fee is void, though confined in its operation to a limited period of time. Gray, *Restraints on Alienation*, § 54. "The capricious regulations which individuals would fain impose on the enjoyment and disposal of property must yield to the fixed rules which have been prescribed by the supreme power as essential to the useful existence of property." *Dick v. Pitchford*, 21 N. C. (1 Dev. & B. Eq.) 484; *Pritchard v. Bailey*, 113 N. C. 521, 18 S. E. 668; *Latimer v. Waddell*, 119 N. C. 370, 26 S. E. 122; *School Committee v. Kesler*, 67 N. C. at page 447; *Coke*, § 362. We think it is equally well settled—at least in this state—that such a condition annexed to the grant or devise of an estate for life is also void, both as to legal and equitable estates. In *Dick v. Pitchford*, 21 N. C. (1 Dev. & B. Eq.) 484, Gaston, J., for the court, says: "The deed does not provide that in the event of the . . . [life tenant] attempting to sell or dispose of the same, or otherwise to anticipate the receipt thereof, that they shall then go over and be paid to some other person. It secures to him, at all events, the enjoyment of the property for life, but prohibits him from transferring it or anticipating its profits. Now, the general right of the giver of property to prescribe the modifications of his gift is subject to the condition that these modifications be not contrary to law, nor repugnant to the nature of the conveyance, nor incompatible with the legal incidents belonging to the disposition he has made. The power of alienation is a legal incident of

ownership. It is familiar doctrine that if a feoffment, grant, release, confirmation, or devise be made upon condition not to alien the estate, or if a term for years or chattel personal be granted upon condition not to assign, such conditions are altogether nugatory. The doctrine obtains not less in courts of equity, acting upon these interests which are the proper subject-matter of their jurisdiction, than in courts of law, adjudicating upon legal interests. A departure from it would introduce endless confusion and innumerable mischiefs." Gray, *Restraints on Alienation*, § 134; 24 Am. & Eng. Enc. Law, p. 870. A distinction is sometimes to be found in the cases between a condition against alienation or anticipation coupled with a provision that the life tenant and his assigns shall lose the estate if the condition is broken, and that it shall go over (which makes it a limitation), and one by which he is compelled to keep the property, so that neither his grantees nor any third person can get hold of or enjoy it; the latter condition being declared as void, and the former as valid. We need not pass upon this distinction, as there is no limitation over in this case.

The next objection to the title is equally untenable. It will be observed on reading the sixth item of the will that, while the testator provides that his surviving heirs shall appoint an administrator, he does not devise any estate to the appointee, but directs that the "estate" shall remain "in the name of Jacob Wool's estate." There can be no doubt that there is nothing in this item to interrupt the immediate descent of the land to the heirs, and they consequently became seised by descent of an estate in remainder, which was vested in interest, though not in possession,—a vested remainder after the life estate of their mother. *Den ex dem. Ferebee v. Procter*, 19 N. C. (2 Dev. & B. L.) 439; *Beam v. Jennings*, 89 N. C. 451; *Munds v. Cassidey*, 98 N. C. 558, 4 S. E. 353, 355; *Gay v. Grant*, 101 N. C. 219, 8 S. E. 99, 106. As the case shows that the executrix had fully administered, and there was no necessity for the appointment of an administrator with the will annexed, and as an administrator has nothing to do with the land, except for the purpose of selling it and paying debts under a power given by the will or by the statute, we do not see how this provision can be executed; and if we construe the item to mean that they shall select an administrator, or a trustee who is called an administrator, and that he shall take either the freehold or a chattel interest (*Trodd v. Downs*, 2 Atk. 304; *Goodtitle ex dem. Hayward v. Whitby*, 1 Burr. 228) for the purpose of performing the trust (*Sanders, Uses &*

Trusts, 2d Am. ed. pp. 253-257), which trust is special, and therefore not executed by the statute of uses (Sanders, pp. 2-4), we yet do not see why, if the defendant accept the deed of the plaintiffs, the latter will not be estopped by their deed, or rebutted by their warranty, to ever hereafter assert any right or title under that item of the will, or to avail themselves thereof in any way; and this will equally follow as a result if the provision is regarded as one for the appointment of an administrator, and as such is valid. Especially will this be the case if the deed contains covenants of seisin, for quiet enjoyment, and against encumbrances (*Halleyburton v. Slagle*, 132 N. C. 947, 44 S. E. 655; *Doe ex dem. Taylor v. Roe*, 11 N. C. 14 Hawks) 116, 15 Am. Dec. 512; Bigelow, Estoppel, 5th ed. pp. 440-446), and if in the premises and habendum the land, as well as its rents, issues, and profits, is conveyed. A copy of the deed should have been inserted in the transcript, as we are asked to decide whether it will convey a good and indefeasible title, and we should see it before finally determining what its effect will be; but, as there is no copy, we must assume from what is said in the case that it is in proper form to transfer the land and everything connected therewith in which the plaintiffs have any interest under the will; the question submitted to us involving merely the ability of the plaintiffs to pass a good title by their deed to what they acquired by the will.

The third objection to the title of the plaintiffs cannot be sustained. By the sixth item of the will a life estate was given to the widow, and the remainder in fee descended to the heirs, Leonard and Elizabeth, who by the terms of the seventh item are to make partition of the land at the expiration of five years from the death of the life tenant. The provision in the seventh item that Leonard and Elizabeth shall own and occupy the property during their natural lives, and at their death it shall go to their lawful heirs, and, should they have no lawful surviving heirs, it shall go to the testator's lawful heirs, does not change the quantity of their interests, or convert their fee into an estate for their lives, with remainder to their children. There can be no such thing as an unlawful heir. The term "lawful heirs" means the heirs designated by the law to take from their ancestor, and it cannot be construed as meaning the children of the first taker. It follows that by that item of the will an estate of freehold was given to the ancestors, Leonard and Elizabeth, and afterwards by the same instrument there is a limitation by way of remainder to their heirs generally, as a class, to take in succession as heirs to them. The case therefore falls directly within the rule in 67 L. R. A.

Shelley's Case, the word "heirs" being one of limitation, and the estate is vested absolutely in the ancestors. *Ham v. Ham*, 21 N. C. (1 Dev. & B. Eq.) 598; *Donnell v. Mateer*, 40 N. C. (5 Ired. Eq.) 7; *Worrell v. Vinson*, 50 N. C. (5 Jones, L.) 91; *Sanderlin v. DeFord*, 47 N. C. (2 Jones, L.) 74. This rule is of very ancient origin, and has always been considered as a rule of law or of property, and not merely as a rule of construction adopted for the purpose of ascertaining the actual intention of the testator. When the words employed bring the case within the rule, the intention of the testator is not to be considered, even though he should declare that the ancestor shall only have a life estate. The rule is imperative, and must be enforced inflexibly in all cases to which by the terms of the particular instrument it is applicable. 25 Am. & Eng. Enc. Law, p. 640. If there is anything in the instrument to indicate clearly an intention not to use the words in their technical sense, but as *descriptio personarum*,—as, for instance, that by the words "heirs of the body" the testator meant children,—such an interpretation will be given to his language as will effectuate his intention. "As the law will not entrap men by words incautiously used, if in the limitation of a remainder by any instrument of conveyance the phrase 'heirs' or 'heirs of the body' be expressed, but it is unequivocally seen that the limitation is not made to them in that character, but simply as a number or class of individuals thus attempted to be described, then the whole force of the phrase is restricted to this designation or description,—it shall have the same operation as the words would have of which it is the representative; there is not, in fact, a limitation to 'heirs,' and, of course, there is no room for the application of the rule." *Allen v. Pass*, 20 N. C. 207 (4 Dev. & B. L. 77).

This court has said that the rule in *Shelley's Case* applies only when the same persons will take the same estate, whether they take by descent or purchase, in which case they are made to take by descent, as it is more favorable to the donee, to the feudal incidents of seignories, to the rights of creditors, and for other reasons, that the first taker should have an estate of inheritance; but, when the persons taking by purchase would be different or have other estates than they would take by descent from the first taker, the rule does not apply, and the first taker is confined to an estate for life, and the heirs, heirs of the body, or issue in wills, will take as purchasers. *Ward v. Jones*, 40 N. C. (5 Ired. Eq.) 400; *Mills v. Thorne*, 95 N. C. 362; *Howell v. Knight*, 100 N. C. 254, 6 S. E. 721. In *Allen v. Pass*, 20 N. C. (4 Dev. & B. L.) at page 211, the same idea

is thus expressed: "Before the application of the rule in *Shelley's Case*, it is always proper first to ascertain whether, on the true interpretation of the words of the gift, there is a limitation of the inheritance in remainder to the heirs or to the heirs of the body of one to whom a precedent freehold is given,—such a limitation does exist when the gift is to them in the quality of heirs,—embracing the same number and succession of objects, and conferring the same extent of interest as would be embraced and conferred where the inheritance has been limited to the ancestor."

The word "lawful" is not sufficient *per se* to show an intention not to use the word "heirs" in its ordinary legal sense, as a word of inheritance or of limitation; and we must therefore hold that Leonard and Elizabeth, under the seventh, if not under the sixth, item of the will, took an estate in fee. *Ex parte Cooper*, 136 N. C. 130, 48 S. E. 581, and *Britt v. Rowland Lumber Co.* 136 N. C. 171, 48 S. E. 586, both at this term.

The defendant's counsel, in his brief, contends that the rule in *Shelley's Case* does not apply, and relies upon *Rollins v. Keel*, 115 N. C. 68, 20 S. E. 209; *Howell v. Knight*, 100 N. C. 254, 6 S. E. 721; *Mills v. Thorne*, 95 N. C. 362; and *Bird v. Gilliam*, 121 N. C. 320, 28 S. E. 489. But in each of those cases the language of the will was different from that used in this will, and there were special circumstances which prevented the application of the rule. The case of *Patrick v. Morehead*, 85 N. C. 62, 39 Am. Rep. 684, which is cited with approval by the court in *Rollins v. Keel*, is a direct authority for the construction we have placed upon this item of the will with respect to the operation of the rule in *Shelley's Case*. The subject is discussed by Ashe, J., at page 67, 85 N. C., 39 Am. Rep. 684.

It is not suggested in the briefs of counsel that the limitation over to the "lawful heirs" of the testator, upon the death of Leonard and Elizabeth without leaving heirs, renders their estate a fee contingent or defeasible. We have, however, considered the question, and have reached the conclusion that it does not. The heirs of Leonard and Elizabeth will not necessarily be the heirs of the testator, as they may have heirs on the maternal side; but the converse is not true, as the heirs of the testator must of necessity be the heirs of his children. It therefore follows that if, at the death of Leonard and Elizabeth, there be any persons living who are the heirs of the testator, they will also be their heirs; and this will, of course, destroy the ulterior limitation, for it is not to take effect, by the terms of the devise, if Leonard and Elizabeth die leaving heirs.

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If the parties were reversed, and we were called upon to decide whether the defendants in this case are entitled to specific performance, the relief would be denied, as the granting it is a matter of sound judicial discretion, controlled, it is true, by established principles of equity, but exercised only upon a consideration of all the circumstances of each particular case (*Pom. Contr. Spec. Perf.* § 35); and as a conveyance by the present plaintiffs, Leonard and Elizabeth, would tend to defeat the intention of the testator as manifested in item 6 of the will, this consideration alone would be sufficient to induce the court to withhold its aid. And a like result would follow if the plaintiffs in this case were seeking to compel the defendants, against their will, to comply with the contract, for the same consideration would arise. The question, though, is not presented in either of these ways. The defendant is willing to take the title upon our declaration that it will at least be good in them by reason of the estoppel or rebutter arising out of the plaintiffs' deed or warranty, and we so decide. This affirms the judgment below.

Affirmed.

W. H. TRIPP, Exr., etc., of Mary Nobles,
Deceased,

v.

S. J. NOBLES, Impleaded, etc., Appt.

(136 N. C. 99.)

1. A widow who offers for probate, and undertakes to carry out as administratrix with the will annexed, the will of her husband, which devises to her her own land for life, with remainder to their children, and an additional sum of money, is estopped to assert her absolute title to the real estate; and it is immaterial that the money is only a small portion of the value of the estate, and no more than she would be entitled to claim under the law for support.
2. Creditors of a widow, who become such after the death of her husband, cannot complain of her election to claim under the will of her husband, which devises to her her own real estate with remainder to her children, and an additional sum of money.

(*Walker and Douglas, JJ., dissent in part.*)

(September 27, 1904.)

NOTE.—As to estoppel of legatee receiving, though under protest, amount due under will, to contest validity thereof, see, in this series, *Stone v. Cook*, 64 L. R. A. 287.

As to doctrine of election generally as applied to wills, see note to *Callahan v. Robinson*, 3 L. R. A. 497; *McQuerry v. Gilliland*, 7 L. R. A. 454; *Re Vance*, 12 L. R. A. 227; and *Schley v. Collis*, 13 L. R. A. 567.

APPEAL by defendant from a judgment of the Superior Court for Pitt County in plaintiff's favor in a petition for leave to sell real estate for the payment of the debts of Mary Nobles, deceased. *Reversed.*

Statement by **Connor, J.:**

This is a petition filed by the plaintiff, executor of Mary Nobles, deceased, for license to sell her real estate to make assets for the payment of her debts. The defendants are her heirs at law. The petition contains the usual averments prescribed by the statute in such cases. The defendant S. J. Nobles filed an answer to the petition, denying the material averments therein. The clerk, upon the coming in of the answer, transferred the cause to the civil issue docket for trial upon the issues raised by the pleadings. The only issues and finding thereupon pertinent to the exceptions are: "Did Mary Nobles die in possession of, and holding title in fee to, the lands described in the petition?" This issue was, by consent, answered "Yes." "Is the plaintiff estopped to allege title in Mary Nobles at the time of her death of the lands described in the complaint?" The jury, under instruction of the court, answered the second "No." From a judgment for the plaintiff the defendant S. J. Nobles appealed.

Messrs. Skinner & Whedbee for appellant.

Messrs. Jarvis & Blow for appellee.

Connor, J., delivered the opinion of the court:

The land described in the petition was the property of Simon J. Nobles, the husband of plaintiff's testatrix, and father of the defendants. He conveyed it to Macon G. Moye, who immediately conveyed to said Mary J. Nobles. Ten years thereafter the husband, Simon J. Nobles, executed his will, bequeathing to his wife, the said Mary, all of his personal property of the value of \$100, and devising to her the land conveyed as aforesaid for her life, remainder to his son, the defendant S. J. Nobles, subject to a charge of \$126 in favor of his daughter Florence L. Moye, and \$172 in favor of another daughter, C. F. Crawford, both of whom are defendants herein. Said Simon J. died March, 1891, and his widow, the said Mary, offered the will for probate, and qualified as administratrix *cum testamento annexo*. In her application for probate of said will and letters of administration she set forth the value of the estate as \$600, of which "\$500 is real estate and \$100 is personal property." She further set forth that "Simon J. Nobles, Florence L. Moye, and Mary Nobles, the widow, are entitled

as heirs and distributees." The said Simon J. and wife, Mary, resided on said land during the life of the former, and after his death she remained in possession until her death, November 19, 1902. She retained the personal property bequeathed to her in the will of her said husband. The said Mary Nobles left a last will and testament, appointing the plaintiff executor, which was duly admitted to probate. She made no disposition of said land in her will. The defendant S. J. Nobles insists that by proving the will of her husband and qualifying as his administratrix *cum testamento annexo*, and taking and retaining the personal property, the said Mary elected to take thereunder, and that she and her representatives are thereby estopped from making any claim to the land inconsistent with the provision of the will.

Gaston, J., in *Melchor v. Burger*, 21 N. C. (1 Dev. & B. Eq.) 634, says: "Ever since the case of *Noyes v. Mordaunt*, which was decided in 1706 (2 Vern. 581), it has been holden for an established principle of equity that where a testator, by his will, confers a bounty on one person, and makes a disposition in favor of another prejudicial to the former, the person thus prejudiced shall not insist upon his old right, and at the same time enjoy the bounty conferred by the will. The intention of the testator is apparent that both dispositions shall take effect, and the conscience of the donee is affected by the condition thus implied that he shall not defraud the design of the donor by accepting the benefit and disclaiming the burden, giving effect to the disposition in his favor and defeating that to his prejudice." The doctrine is so strongly fixed in our jurisprudence, and so uniformly adhered to and enforced by the court, that it is unnecessary to cite authority for its support. The facts set out in this record bring the case clearly within the operation of the principle, unless, as contended by the plaintiff, there be some distinguishing feature to take it out of the general rule. The land devised to the wife for life, remainder to his son, subject to the charge in favor of the daughters, was the property of the wife. This was well known to the husband. The personal property bequeathed to her in the will was the property of the husband. Upon the death of the husband the wife well knew the status and value of the property and the provisions of the will. She was *sui juris*, and fully competent to elect by dissenting from the will, if she so desired, thereby holding her land and taking the personal property as her year's support by appropriate proceedings for that purpose. She deliberately, and by a most solemn and unmistakable act, chose to take and hold

under the will. The principle of law which fixed her status in respect to the property is thus stated: "The doctrine of election, as applied to the law of wills, simply means that he who takes under a will must conform to all of its provisions. He cannot accept a benefit given by the testamentary instrument and evade its burdens. He must either conform to the will or wholly reject and repudiate it. No person is under any legal obligation to accept the bounty of the testator; but, if he accepts what the testator confers upon him by his will, he must adhere to that will throughout all its dispositions." 2 Underhill, Wills, § 726. This court, in *Weeks v. Weeks*, 77 N. C. 421, says: "It is a familiar principle of equity that a devisee or legatee cannot claim both under a will and against it. If the will gives his property to another, he may keep his property, but he cannot at the same time take anything given to him by the will; for it was given to him on the implied condition that he would submit to the disposition of his property made by the testator." But it is suggested that, as the personal property given the wife was worth only \$100, and the land \$500, she took no benefit under the will; that she was entitled to have the personality allotted to her as and for her year's support, and therefore received no more than by the law she was entitled to have from her husband's estate. We at first thought this fact relieved her of the duty to elect, but upon a careful examination of the works on equity jurisprudence and many cases we find no suggestion of any such exception to the general rule. The value of the personality and her right to claim in some other way presented a strong reason to her for exercising her right to dissent from the will, and thereby elect to take against it; but with a full knowledge of the facts she elected to prove the will, and take out letters of administration, assuming thereby the duty of executing its provisions. If she had been misled or acted under misconception of the condition of the estate and her rights, she might have had relief, and been permitted to exercise her right of election to dissent from the will; but there is no suggestion of that kind here. It has been held in New York that when one elected to take a benefit under the will with burdens attached, he was bound, although it turned out that the burden was greater than the benefit. *Brown v. Knapp*, 79 N. Y. 136. "One who accepts of a devise or bequest does so on condition of conforming to the will. No one is allowed to disappoint a will under which he takes a benefit, and everyone claiming under a will is bound to give full effect to the legal dispositions thereof so far as he can, . . . and where

one is thus put to his election under a will it matters not that what he takes turns out to be greater or less in value than that which he surrenders." *Caulfield v. Sullivan*, 85 N. Y. 153. Certainly this must be so where the person knows at the time she elects to take under the will the value of the property. In *Syme v. Badger*, 92 N. C. 706, Judge Badger, for the purpose of providing for the payment of a debt due his wife, devised and bequeathed to her real and personal property in payment of the debt. He left other property and other creditors. Mrs. Badger qualified as executrix, and took possession of the property. It turned out that the property given her was of insufficient value to pay her debts. This court held that by proving the will and qualifying as executrix she elected to take under the will, and was thereby precluded from resorting to other assets of her testator to pay her debts. Smith, Ch. J., quoting with approval the language of this court in *Mendenhall v. Mendenhall*, 53 N. C. (8 Jones, L.) 287, said: "The act of qualifying as executrix and undertaking upon oath to carry into effect the provisions of the will is irrevocable." The authorities are cited in the opinion in that case. The principle has been approved by this court in *Allen v. Allen*, 121 N. C. 328, 28 S. E. 513, and *Treadway v. Payne*, 127 N. C. 436, 37 S. E. 460. We can see no distinction between the qualification of the wife as executrix and administratrix with the will annexed. In either case the will is offered for probate, and the party claims under it, and assumes the duty of executing its provisions.

It is argued that the election by Mrs. Nobles cannot affect the rights of her creditors; that to permit her thereby to divest herself of her lands would be a fraud upon them. If the debts were in existence at the time of the death of her husband, we should concur with the plaintiff in this view. The record does not disclose when the debts were contracted. For the purpose of disposing of this appeal we cannot assume that the outstanding debts were contracted during coverture. If they were so contracted, they could not, as simple contract debts or bonds, be a charge upon her land. Of course, if the debts were chargeable upon her land, she could not, by her election to take other property of less value under her husband's will, permit the land to pass to other parties discharged of such debts. This question may be inquired into upon another trial. Her heirs at law and her personal representative, except in so far as the rights of existing creditors may be affected, are bound by her election. "An election once made by a party bound to elect, and under

no misapprehension as to his rights, and with knowledge of the value of the properties to be affected by such election, is irrevocable, and binds the party making it and all persons claiming under him, and also all donees under the instrument whose rights are directly affected by the election." *Eaton*, Eq. p. 199; *Cory v. Cory*, 37 N. J. Eq. 198.

A careful examination of the record we think explains the conduct of the parties. The land belonged to Simon J. Nobles. He conveyed it to his son-in-law, who immediately conveyed to the wife. It was the purpose by these conveyances to put the title in the wife, doubtless to meet some undisclosed conditions or family arrangement. The husband thereupon makes his will, giving this land to the wife for life, remainder to the son, subject to a charge of about one half its value in favor of his two daughters. The wife leaves a will, in which she makes no mention of this land. The reasonable inference is that she understood and acquiesced in her husband's disposition of the property. The issue in regard to her ownership is found by consent in the affirmative. It was evidently the purpose of counsel to present the contested question upon the third issue. His honor instructed the jury to answer the issue "No." Strictly speaking his honor was correct. The right of the remainder-man, S. J. Nobles, does not accrue by way of estoppel. A court of equity would, if applied to at the death of the husband and the election of the wife to take under the will, have decreed a conveyance of the legal title in the land to the remainder-man, subject to the life estate of the wife; or accomplished the same end by impressing a trust upon the legal title in accordance with the disposition made in the will. Mr. *Eaton* says: If the donee "elect to take under the instrument, he must carry out all its provisions, and transfer his own property disposed of thereunder to the person named as the recipient thereof." *Eaton*, Eq. § 66. The will of Simon J. Nobles did not transfer the legal title, hence it remained in the wife, burdened with the rights of the son and his sisters. We notice this phase of the record because of the apparent inconsistency in the verdict. The legal title to the land is in the heirs of Mrs. Nobles, but, as she would have been precluded from asserting it against the devise in the will save for her life estate, so her executor may not sell the naked legal title as against the beneficial owner, the defendant Simon J. Nobles. The cause must be remanded for a new trial in accordance with this opinion. it is so ordered.

New trial.

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Walker, J., dissenting:

The facts of this case are well stated in the opinion of the majority of the court as written by Mr. Justice Connor, and it is not necessary, therefore, to repeat them here. I do not differ with my brethren of the majority in their understanding of the facts, but their views and mine are not at all in accord as to the law applicable to those facts. They think, and have so decided, that a case of election is presented, which deprives the widow of her land, while I do not; my opinion being that the law did not compel her to part with her valuable property in exchange for the paltry sum of \$100 which was given her in the form of a legacy, but which really belonged to her at the time of the pretended gift. The doctrine of election came to us from the civil law, and is equitable in its nature. It is based upon no principle, as I conceive, which, in its application, will work so great an injustice as to take that which in law belongs to a widow and give it to another upon an inadequate consideration, to say the least of it. "An election, in equity, is a choice which a party is compelled to make between the acceptance of a benefit under a written instrument and the retention of some property already his own, which is attempted to be disposed of in favor of a third party by virtue of the same paper. The doctrine rests upon the principle that a person claiming under any document shall not interfere by title paramount to prevent another part of the same document from having effect according to its construction. He cannot accept and reject the same writing." *Bispham*, Eq. 6th ed. p. 413, § 295. The doctrine, it is said, requires that there should be alternative benefits between which the donee is to make his choice once for all, and it has been settled by the more recent authorities that it is based upon the principle of compensation, and not at all upon the idea of forfeiture, as was formerly, but erroneously, held, by not distinguishing between express and implied elections and cases in which the beneficiary elects to take under and those in which he elects to take against the will. The text writers and the courts are now practically agreed that the underlying principle of this equity is one of compensation to the disappointed donee, instead of an entire forfeiture by the other donee who gets the benefit under the will. *Fetter*, Eq. pp. 51, 54. The latter must only make compensation out of his share under the will to the person who is disappointed by his election. Indeed, *Adams* in his work on Equity, 2d Am. ed. by L. & C. p. 237 (97), says: "This [testator's] intention is at once effected if compensation be the result, but will be manifestly defeated by for-

feiture unless the court can imply a gift to the disappointed donee, for which the testator has given no authority." Eaton, Eq. 182; Snell, Eq. pp. 204, 205; 1 Pom. Eq. Jur. § 462; Bigelow, Estoppel, 5th ed. pp. 674, 675; Bispham, Eq. 6th ed. §§ 296, 395; Herman, Estoppel, § 1031. The doctrine is not applicable if there is no fund from which compensation can be made. This follows as a matter of course. Snell, Eq. 1st Am. ed. 205, 206; Bigelow, Estoppel, p. 676; Fetter, Eq. p. 54. But it is also necessary, in order to put anyone to an election, that the testator should give by his will property actually and absolutely owned by himself to the person required to elect, or, as it is put, some free disposable property, which can become compensation for what the donor seeks to take away. Bigelow, Estoppel, 676; Fetter, Eq. 52, 54; Eaton, Eq. 185. This doctrine of equity has grown out of the fundamental maxim that he who seeks equity must do equity, and it does not arise when the conscience of the alleged refractory donee is not so affected as to require him to surrender something of his own for that which his donor has conferred upon him. 1 Pom. Eq. Jur. § 461; Snell, Eq. p. 202. Applying the principle as thus understood to the facts of our case, let us see if there was any obligation imposed upon Mrs. Nobles to elect between inconsistent benefits, and whether, by what she did, her title to the land devised in the will has been lost or in the least impaired. In the very beginning it must be conceded that such is not the case, as, in any event, she is required to give up only the pecuniary legacy of \$100 for the purpose of making compensation, and to that extent merely does she lose anything. The authorities are all at one in stating that she may keep that which is her own, provided she makes compensation to the losing donee, if the alternative gift to her is sufficient for that purpose, and, if not sufficient, then *pro tanto*, and, if it is more than enough for the purpose, she retains the surplus. This is the well-settled rule, as the above citations will substantiate, and it holds good in her favor until by some decree of the court she has, or, if she is dead, her heirs have, been compelled to convey to the other donee. The devisee S. J. Nobles could recover at the utmost only the sum of \$100 and interest, if the land is worth more than that sum.

It is not necessary, though, to rely upon the principle of compensation in order to defeat the claim of the defendant S. J. Nobles. Every widow of an intestate, or of a testator from whose will she has dissented, is entitled, besides her distributive share in her deceased husband's personal estate, to an allowance for the support of herself and 67 L. R. A.

family for one year after his death; the value of that "year's allowance" being not less than \$300. Code, §§ 2116, 2118. Where the value of any gift of personal property to her in her husband's will does not exceed the amount allowed her by law, she need not dissent in order to claim her year's support, because it is presumed to be given by the testator as and for her allowance. *Flippin v. Flippin*, 117 N. C. 376, 23 S. E. 321. There could be no reason for requiring her to dissent if she will get no more by doing so, and in such a case she takes the amount given in the will as her year's allowance by virtue of the law, and not of the will. She is considered as in the possession and enjoyment of it under her paramount title. Statutes in all material respects like ours have been thus construed in other states by courts whose decisions are entitled to the highest respect. *Baker v. Baker*, 57 Wis. 382, 15 N. W. 425; *Godman v. Converse*, 38 Neb. 657, 57 N. W. 394; *Moore v. Moore*, 48 Mich. 271, 12 N. W. 180; *Williams v. Williams*, 5 Gray, 24. Why should the widow be compelled to dissent in such a case as this one? Why be required to do so vain and unprofitable a thing? If she had formally dissented, she would have received no more than if she had taken what was given by the will, as the \$100 was all of her husband's personal estate, and therefore with or without a dissent she would get the same thing, and much less than the minimum sum to which she was entitled under the law. The benefit which she received, in order to bind her by an election to abide by the devise of her own property, must have been a substantial one, and surely must have been something of which her husband had the absolute right of disposal, without any right of veto in her. This is not like the case of a distributee, who can take nothing unless the ancestor dies intestate, but must be content, when there is a will, to take what is given by it, and who cannot repudiate it in order to take under the law, being dependent altogether on the bounty of the decedent. Pearson, Ch. J., notes the distinction in *Harrington v. McLean*, 62 N. C. (Phill. Eq.) at page 260, in citing and commenting on *Mendenhall v. Mendenhall*, 53 N. C. (8 Jones, L.) 287. I have been able to find but two cases in which the point presented in this case has been considered. In *Stone v. Vandermark*, 146 Ill. 312, 34 N. E. 150, a widow had taken possession of certain land and personal property devised to her by her husband, and it was contended that she thereby elected to take under the will; but the court, finding that the personal property was less in value than she was entitled to receive under the statute as her

year's allowance, and that the land was the homestead, to the possession of which, during her life, she was also entitled under the law, held that there had been no election. The case of *Compher v. Compher*, 25 Pa. 31, is much like ours in its facts. There the husband bequeathed to his wife personal property to the value of \$300, being the amount of the year's support allowed by the statute, as in this case. She accepted the provision made for her, and the court held that this did not bind her to an election to take under the will, as she claimed under the law; but the court further said that, if she had claimed as distributee, it would have been otherwise, making the same distinction that was made by Pearson, Ch. J., in *Harrington v. McLean*, 62 N. C. (Phill. Eq.) 260. In *Smith v. Butler*, 85 Tex., at page 130, 19 S. W. 1085, the court, in discussing this question, said: "The wife would receive, if she took under the will, something she would not otherwise be entitled to, so far as the record shows, either by reason of her community right or as the surviving head of the family; and by the will the children of the testator would be deprived of some property to which they would have been entitled but for the will. The principle of election is that he who accepts a benefit under a will must adopt the whole contents of the instrument, so far as it concerns him, conforming to its provisions, and renouncing every right inconsistent with it . . . Some free disposable property must be given to the electing donee which can become compensation for what the testator sought to take away." The rule requires, therefore, that there must be a benefit which the party claimed to have elected would not have enjoyed if the will had not been executed. What did this widow get under the will that she would not have received under the law by dissenting (if a dissent was necessary), or if her husband had died intestate? The taking of her property under such circumstances, when she gets nothing that can justly be called compensation, would amount to confiscation, and would violate the cardinal principle of the doctrine of election.

The cases cited in the opinion do not sustain the conclusion of the court, because in all of them there was a substantial benefit received by the electing donee. There was something like compensation given for that which was taken and devised or bequeathed to another. In *Syme v. Badger* the donee was given, not only a specific fund for the payment of the debt due her, but also a large pecuniary or "bond" legacy, and also the residue of the testator's estate. Every one of those cases proceed upon the assumption that the donee, who was held to have

made an election, had received something from the testator which would not have been his or hers but for the bounty thus conferred.

The idea that the mere qualification of a person as executor or administrator with the will annexed estops him to claim against the instrument—that is, to accept and reject it at the same time—was founded upon the ancient provision of the common law by which the personal representative, after paying debts and legacies, was entitled to the surplus of the estate, and also had the right of retainer against other creditors whose debts were of equal dignity, and had other rights and privileges not necessary to be enumerated. All of these have been taken away, and the rule founded upon this reason of the common law has ceased to exist. This is in accordance with the maxim of the law. "Reason is the soul of the law, and, when the reason of any particular law ceases, so does the law itself." Broom, Legal Maxims, 8th ed. p. 159. The proposition that an executor is thus estopped by his proving the will and qualifying under it is distinctly repudiated by this court in *Allen v. Allen*, 121 N. C. 328, 28 S. E. 513, as the following language of the court in the opinion of Montgomery, J., will clearly show. Discussing the question as to whether proving the will and qualifying as executor estop or amount to an election, the court says: "This is an important question, and is raised in its naked simplicity for the first time in this state. Under the common law the answer to the question was ready enough, if not entirely satisfactory. By the act of qualification the executor became vested with the whole personal estate, and after the payment of debts and legacies was entitled to the surplus, unless it appeared on the face of the will that the testator did not intend for the executor to have it. Therefore, and under that system, it is manifest that the act of qualifying as executor and taking the oath of office to execute the provisions of the will was irrevocable on his part, and the executor had to proceed to execute the will in all its parts and in its entirety. But the reason of the common law is of no force now, for executors, after the debts and legacies are paid, are trustees of the residuum for the next of kin." This repudiates the ancient doctrine. What is said by Chief Justice Smith in *Yorkly v. Stinson*, 97 N. C., at page 240, 1 S. E. 454, in referring to *Mendenhall v. Mendenhall* and *Syme v. Badger*, must be taken and considered in connection with the peculiar facts of those cases, in which it appeared that the donees received a clear benefit. The point we are discussing was not involved in *Yorkly v. Stinson*.

and the language used in that case by the chief justice at page 239, 97 S. E., page 453, 1 S. E., shows plainly that he thought it necessary some benefit should be received in order to put the donee to an election. The very essence of the doctrine is that there should be inconsistent benefit. This is implied by the very word "election," and the party to choose may keep his own, which is given away by a will, unless an alternative benefit is presented, which one, if accepted by him, renders it inequitable and unconscionable that he should retain the other. As the doctrine is a creature of equity, it should not be allowed to work an injustice, and should not be applied to any case upon purely technical principles, and where the person whom it is proposed to bind by the election has received no real or substantial advantage by gift which would affect his conscience and preclude his right to disappoint the will of the donor. That is the case to be found in this record.

It all comes to this: That the widow did not forfeit her land so as to divest her title and take away the right of her executor to sell it, but, if she was put to an election at all,—which I think has been shown not to be the case,—she can still claim her own (and her executor succeeds to her right) by making compensation to the extent of the legacy received by her. The subject, in this aspect of it, is so exhaustively discussed, and the principle for which I contend is so conclusively vindicated, in 2 Underhill on Wills, § 729, as the only true and equitable one, and the one, too, which has been generally, if not universally, accepted, that I must add what is said by that text writer to the other authorities cited. If it is suggested that this view of the case was not presented in the court below nor in this court, I can only answer that the lower court held the plaintiff was not estopped, and, as the charge to the jury to that effect was correct, it can make no difference what reason for the ruling was in the mind of counsel or the court. We must presume, in the absence of a reason being assigned, that the decision was based upon the right one.

I conclude that neither the widow nor her executor was estopped to deny the title, nor was she put to an election; and, if she was, the case should have been decided upon the principle of compensation, and not upon that of forfeiture or estoppel. In no view of the case can the court, upon the ground of estoppel or election, deprive the widow or her executor, who represents her, of that which was rightfully hers, and give it to another, who will lose nothing to which he is justly entitled if the money and the land are both adjudged to have been hers at her 67 L. R. A.

death. In my judgment, it would be not only against sound law so to do, but against established principles of equity. The defendant would be merely receiving something for nothing. Believing as I do, and for the reasons stated, that the court committed no error in the trial of the case, and that it should be so declared, I must dissent from the opinion of the court.

Douglas, J.: I concur in the dissenting opinion.

S. M. DANIEL, *Appl.*,

ATLANTIC COAST LINE RAILROAD
COMPANY.

(136 N. C. 517.)

The appointment of one as cashier at a railway station, with power to collect money, give receipts, sell tickets, take care of the money received, and forward it to the treasurer of the company, does not empower him to arrest persons whom he suspects of having stolen money which has come into his possession, so as to render the railroad company liable in case he causes the arrest of an innocent person.

(November 22, 1904.)

A PPEAL by plaintiff from a judgment of the Superior Court for Pitt County in defendant's favor in an action brought to recover damages for alleged wrongful arrest and imprisonment. *Affirmed.*

Statement by Walker, J.:

This is an action for malicious prosecution and false arrest and imprisonment. The plaintiff was accused and prosecuted by the agent of the defendant at Greenville of stealing money from its office at that place, of which the agent had charge. The testimony necessary to be stated was, in substance, as follows: The plaintiff is a young man, thirty years of age, a native of Pitt county, and now a resident of Goldsboro. On the day of his arrest, but prior thereto, he went to the depot of the defendant company in Greenville to take the train for Goldsboro

NOTE.—As to liability of master for false arrest, imprisonment, or malicious prosecution by servant, see also, in this series, Mulligan v. New York & R. B. R. Co. 14 L. R. A. 791, and note; Gillingham v. Ohio River R. Co. 14 L. R. A. 798; Palmer v. Manhattan R. Co. 16 L. R. A. 136; Staples v. Schmid, 19 L. R. A. 824; A'Hern v. Iowa State Agri. Soc. 24 L. R. A. 655; Central R. Co. v. Brewer, 27 L. R. A. 63; Atchison, T. & S. F. R. Co. v. Henry, 29 L. R. A. 465; Elchengreen v. Louisville & N. R. Co. 31 L. R. A. 702; Little Rock Traction & Electric Co. v. Walker, 40 L. R. A. 473; Palmer v. Maine C. R. Co. 44 L. R. A. 673; and Markley v. Snow, 64 L. R. A. 685.

via Kinston, and, finding the passenger depot closed, he went to the freight depot, inquired about his train, and was invited into the office by Atkinson, the agent of defendant. Plaintiff went behind the rail and sat by the stove. Three or four people came in, and then went out. Atkinson was counting money and putting it in a package. He got another man to count it, and he put it in an envelope, and then put it in a drawer, locked the drawer, and went to supper. Plaintiff went out behind him in about three minutes, leaving several white people and one colored man in the office. Defendant's train was late, and when it came the plaintiff boarded it and went to Kinston, where he missed connection with the Atlantic & North Carolina train, and was forced to spend the night at Kinston. During the night a call came from the depot at Greenville for the depot at Kinston by phone—agent at Greenville calling agent at Kinston—connection was made, and immediately after this the agent of defendant at Kinston went to the hotel, called for a policeman, and told him he had orders to arrest Daniel; and then, with the policeman, the agent went to his room at the hotel, and demanded admission; and on being admitted to the room the agent of defendant company directed his search, and also his arrest until the agent at Greenville could be communicated with; the agent at Kinston stating that the arrest was for larceny of money from the company in Greenville. No warrant was sworn out for the arrest, and all was done by agents of defendant company, and the policeman at their instance. The agent at Greenville came down town, saw the chief of police at Greenville, and asked him to go to the phone office with him. They went to the phone office, and the agent—Atkinson—called for the policeman in Kinston, and at his request the Greenville policeman did the talking. Atkinson was notified that, no warrant being at that time sworn out for plaintiff's arrest, the policeman declined to order his arrest; but afterwards the chief of police of Greenville, at Atkinson's request, called up the policeman at Kinston over the phone, and requested him to arrest plaintiff, which he did; being assisted by the defendant's agent at Kinston, as above stated. The arrest was made in plaintiff's room in the hotel late at night, after he had retired, and he was subjected to the most thorough search and also his room; Meacham, the defendant's agent at Kinston, and several policemen being present and taking part in the search. Plaintiff was taken through the hotel office, and down the public street to the guardhouse, where he was detained a half or three-quarters of an hour. No evidence of plaintiff's guilt

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being discovered, he was released, after a policeman had communicated with the agent at Greenville, and had been told to let him go. On Sunday morning, following the arrest and search, the agent at Greenville applied to the mayor of Greenville, who was local counsel for defendant company, for a warrant for the plaintiff, charging him with the larceny of defendant company's money from the possession of the agent. The warrant was issued, and plaintiff arrested under it on his return to Greenville next day. This was done after he had once been arrested and searched by direction of agent at Greenville, and, at his direction released. On application the case was removed for trial to another justice. At the trial, delay was caused by the failure of the agent to appear. He was afterwards seen coming out of the office of the local attorney of defendant company, and soon appeared at the trial. After hearing all the evidence, the justice dismissed the warrant, finding no probable cause. Atkinson, at whose instance and request plaintiff was arrested at Kinston, and afterwards in Greenville, was cashier in the defendant's office in the latter place. His duties were to collect money for freight, give receipts therefor, sell tickets to passengers, take care of the money received by him, and forward the same to the treasurer of the defendant company at Wilmington. Plaintiff testified that he did not take the money or voucher. Money to the amount of \$132.45 and a railroad voucher for \$37.50 were stolen from a cash drawer in the railroad office the night the plaintiff was there. At the close of the testimony for the plaintiff, the defendant moved to dismiss the action under the statute. The motion was granted, and judgment rendered accordingly. Plaintiff excepted and appealed.

Messrs. Fleming & Moore, for appellant:

The principal is liable to third persons in civil suits for acts of his agent in the course of employment, though the principal did not authorize, justify, or participate in, or indeed know of, such misconduct, or even though he forbade or disapproved of it.

Story, *Agency*, § 452.

In anything he did, if the agent did not act for any purpose of his own, but to discharge what he believed to be his duty to his principal, it matters not that he exceeded the powers conferred upon him by his principal, and that he did an act the principal was not authorized to do, so long as he acted in the line of his duty, or attempted to perform a duty pertaining to his employment, or which he believed pertained to that service,—the company is liable.

Lynch v. Metropolitan Elev. R. Co. 90

N. Y. 86, 43 Am. Rep. 141; *Stone v. Hills*, 45 Conn. 47, 29 Am. Rep. 635.

When it is contended that the master is not liable for wilful wrong of the servant, the language must be understood as referring to an act of positive and designed injury, not done with a view to the master's service.

Rounds v. Delaware, L. & W. R. Co. 64 N. Y. 136, 21 Am. Rep. 597; *Cooley, Torts*, 2d ed. p. 626.

The question as to whether or not the servant acted within the scope of his employment is for the jury.

1 Thomp. Neg. § 615, p. 564.

And the burden of proof that he did not so act is on the defendant.

1 Thomp. Neg. § 613, p. 563; 1 Shearm. & Redf. Neg. § 147.

A railroad company is responsible for injury caused by the wrongful act of its employee, while acting in the general scope of his employment, whether such act is wilful, wanton, and malicious, or merely negligent.

Cook v. Southern R. Co. 128 N. C. 333, 38 S. E. 925; *Hussey v. Norfolk Southern R. Co.* 98 N. C. 41, 2 Am. St. Rep. 312, 3 S. E. 923; *Pierce, Railroads*, 279; *First Nat. Bank v. Graham*, 100 U. S. 699, 25 L. ed. 750; *Gruber v. Washington & J. R. Co.* 92 N. C. 1; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 16 L. ed. 73; *Lovick v. Atlantic Coast Line R. Co.* 129 N. C. 433, 40 S. E. 191; *Kelly v. Durham Traction Co.* 132 N. C. 372, 43 S. E. 923.

Messrs. Skinner & Whedbee and Pou & Fuller, for appellee:

The cashier's duty is plain and simple to collect and remit, and it is not within the course or scope of his employment to put the criminal law into operation, and there is not even a suggestion that defendant either authorized or ratified Atkinson's action.

State v. Morris & E. R. Co. 23 N. J. L. 369; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 608, 30 L. ed. 1148, 7 Sup. Ct. Rep. 1286; *Moore & Cohen*, 128 N. C. 345, 38 S. E. 919; *Cooley, Torts*, § 131; *Fox v. Jackson*, 8 Barb. 355; *Fire Asso. v. Fleming*, 78 Ga. 733, 3 S. E. 420; *Brown v. Kendall*, 8 Allen, 209; *Ferguson v. Terry*, 1 B. Mon. 96.

The arrest of the plaintiff at bar was not within the scope of a cashier's duty in collecting and remitting.

Carter v. Howe Mach. Co. 51 Md. 298, 34 Am. Rep. 311; *Tolchester Beach Improv. Co. v. Steinmeier*, 72 Md. 316, 8 L. R. A. 846, 20 Atl. 188.

An agent must be expressly authorized to put the criminal law into operation.

Central R. Co. v. Brewer, 78 Md. 406, 27 67 L. R. A.

L. R. A. 63, 28 Atl. 615; *Kirk v. Garrett*, 84 Md. 385, 35 Atl. 1089; *Baltimore & Y. Turnp. Road v. Green*, 86 Md. 161, 37 Atl. 642.

Walker, J., delivered the opinion of the court:

The foregoing statement of the testimony is sufficient to present the point upon which the case turns, namely, the authority of the agent of the defendant to cause the arrest to be made. We are not concerned so much with the manner in which the arrest of the plaintiff was made, as we are with the question whether the defendant, who was the principal of Atkinson and Meacham, is to be charged with liability, for their tortious acts. That their conduct towards the plaintiff was inexcusable, if not criminal, and justly provokes the resentment of every good and law-abiding citizen against them, may be freely admitted. The circumstances under which they pursued this man, without the warrant of the law, even to his bedchamber, and at the silent hour of midnight, arousing him from his peaceful slumbers, invading the sanctity and privacy of his room, which the law surrounded with its protection as much so as if it had been his home or his castle; subjecting him to such indignities as no self-respecting man could submit to, even under compulsion, without feeling that he had been humiliated, if not degraded by them; marching him through the office of the hotel, and down a public street, where any and all might see the infamy and disgrace which they had fastened upon him,—all these things, and more, they did, which made their offense against him, if the evidence be true, a very serious one; and to him they, and all who participated in causing his arrest, are responsible before the law, and they must reckon with him if he sees fit to call them to account. But we must not allow any feeling of indignation at the grievous wrongs inflicted upon the plaintiff (which cannot be too severely condemned, if, as we must assume, he is an innocent man) to withdraw our attention from those principles of that same law by which the defendant's rights are guarded. The excesses of Atkinson and Meacham do not establish the defendant's liability. That can be shown only by proof that the defendant authorized the acts to be done, or that after they were done it ratified them. An agent's authority to bind his principal cannot be shown by the agent's acts or declarations. *Francis v. Edwards*, 77 N. C. 271; *Gilbert v. James*, 86 N. C. 244; *Taylor v. Hunt*, 118 N. C. 168, 24 S. E. 359; *Willis v. Atlantic & D. R. Co.* 120 N. C. 512, 26 S. E. 784. The authority must first be shown, before the acts done or decla-

rations made in pursuance of the authority can bind the principal, or impose any liability whatever upon him. It is not pretended in this case that there was any express authority, or that there was any ratification of the acts of the alleged agents. The plaintiff's sole contention is that what Atkinson did at Greenville, and Meacham at Kinston, was within the line of their duty and the scope of their employment, and therefore they had implied authority from the defendant to do what they did, upon the theory, we suppose, that every authority carries with it, or includes in it, as an incident, all the powers which are necessary, proper, or usual as means to effectuate the purposes for which it was conferred, and that consequently when an agency is created for a specified purpose, or in order to transact particular business, the agent's authority, by implication, embraces the appropriate means and power to accomplish the desired end. He has not only the authority which is expressly given, but such as is necessarily implied from the nature of the employment. Story, Agency, 9th ed. § 97. This is the general rule, and the doctrine of *respondet superior* is a familiar one. But in our opinion, it has no application to the facts of this case. If we should hold that it is so broad in its scope as to include a case like this one, it would lead to most dangerous consequences. For us to say that an agent can by his acts subject his principal to liability in damages to anyone injured by his said acts, done when he was not about his master's business, and had no express or implied authority to do them, but was merely seeking to avenge a supposed wrong already committed or to vindicate public justice, would be carrying the doctrine of *respondet superior* far beyond its acknowledged limits. A servant intrusted with his master's goods may do what is necessary to preserve and protect them, because his authority to do so is clearly implied by the nature of the service; but when the property has been taken from his custody or stolen, and the crime has already been committed, it cannot be said that a criminal prosecution is necessary for its preservation or protection. This may lead to the punishment of the thief or the trespasser, but it certainly will not restore the property, or tend in any degree to preserve or protect it. It is an act clearly without the scope of the agency, and cannot possibly be brought within the limits of the implied authority of the agent. It would seem that so plain a proposition should need neither argument nor authority to support it, but we are abundantly supplied with both in the cases upon the subject. It is not intend-

ed to assert that a principal cannot be held responsible for the wilful or malicious acts of the agent, when done within the scope of his authority, but that he is not liable for such acts, unless previously expressly authorized or subsequently ratified, when they are done outside of the course of the agent's employment and beyond the scope of his authority, as when the agent steps aside from the duties assigned to him by the principal to gratify some personal animosity, or to give vent to some private feeling of his own (*M'Manus v. Crickett*, 1 East, 106), or, as is forcibly stated by Lord Kenyon in the case cited, quoting in part from Lord Holt: "'No master is chargeable with the acts of his servant but when he acts in the execution of the authority given him.' Now, when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and . . . his master will not be answerable for such act."

A very able and learned discussion of the question in this case will be found in *Allen v. London & S. W. R. Co.* L. R. 6 Q. B. 65, by Blackburn, J., one of the most eminent of the English judges of his time. The case was apparently well argued on both sides. The judges delivered separate opinions. We quote so much of the leading opinion by Justice Blackburn as will show the full result of the decision: "There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something with reference to the property which he has not done. The act of punishing the offender is not anything done with reference to the property. It is done merely for the purpose of vindicating justice. And in this respect there is no difference between a railway company, which is a corporation, and a private individual. If the law were that the defendants are responsible for the act of their booking clerk in giving the plaintiff into custody on an unfounded charge, every shopkeeper in London would be answerable for any act done by a shopman left in his shop who chose to accuse a person of having attempted to plunder the shop, every merchant would be responsible for a similar act of his clerk, and every gentleman for the act of his butler or coachman." The case of *Allen v. London & S. W. R. Co.* was cited

with approval and reviewed at some length in *Carter v. Howe Mach. Co.* 51 Md. 290, 34 Am. Rep. 311 (opinion by Alvey, Ch. J.), and the doctrine thus summed up: "From these authorities it is quite clear that in a case like the present, where the corporation is sought to be held liable for the wrongful and malicious act of its agent or servant in putting the criminal law in operation against a party upon a charge of having fraudulently embezzled the money and goods of the company, in order to sustain the right to recover it should be made to appear that the agent was expressly authorized to act as he did by the corporation. The doing of such an act could not, in the nature of things, be in the exercise of the ordinary duties of the agent or servant intrusted with the custody of the company's money or goods; and, before the corporation can be made liable for such an act, it must be shown, either that there was express precedent authority for doing the act, or that the act has been ratified and adopted by the corporation." That case was cited and followed in several other decisions in the same court to the like effect. *Tolchester Beach Improv. Co. v. Steinmeier*, 72 Md. 316, 8 L. R. A. 846, 20 Atl. 188; *Central R. Co. v. Brewer*, 78 Md. 406, 27 L. R. A. 63, 28 Atl. 615; *Kirk v. Garrett*, 84 Md. 385, 35 Atl. 1089; *Baltimore & Y. Turnp. Road v. Green*, 86 Md. 161, 37 Atl. 642. The following cases presented the same question precisely as we now have under consideration, and were decided in the same way as those already cited: *Stevens v. Midland Counties R. Co.* 10 Exch. 351; *Pressley v. Mobile & G. R. Co.* 4 Woods, 569, 15 Fed. 199; *Mali v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448; *Springfield Engine & Threshing Co. v. Green*, 25 Ill. App. 106; *Croasdale v. Von Boyneburgyk*, 206 Pa. 15, 55 Atl. 770; *Hershey v. O'Neill*, 36 Fed. 188. In *Dally v. Young*, 3 Ill. App. 39, the plaintiffs in error were sued for malicious prosecution by Young, in that Dally, a subagent of Lathrop, who was agent for the Remington Machine Company, had, at the instigation of Lathrop and the company, prosecuted him criminally for the embezzlement of the funds of the company, of which charge he was acquitted. There was no evidence that the prosecution had, previous to its institution, been expressly authorized or afterwards adopted or ratified by Lathrop or the company. The court thus referred to the principle governing the case: "It is true, Lathrop was the general agent of the company at Chicago, and that Dally was a subagent at Bloomington, and subject to his jurisdiction in all matters pertaining to the business of the company, but this circumstance of itself would not make him liable 67 L. R. A.

for a criminal prosecution commenced by Dally without his knowledge or consent. Where an agent institutes a malicious prosecution of his own head, and without the instigation or direction of his principal, the latter will not be liable for the same, unless he adopts and continues the same with knowledge of all the circumstances." And in *Edwards v. London & N. W. R. Co.* L. R. 5 C. P. 446, the court took the same view of the law upon facts substantially similar: "A servant of a railway company has no implied authority, as such, to give a person into custody on a charge of felony. It is the duty of anyone who sees a person committing a felony to give him into custody, and it cannot be assumed that Holmes was acting in this matter as the company's servant, and not in accordance with that general duty. If the defendants are held liable here, it will follow that every servant has authority to act in this way for his master, and to render him liable, should he arrest a man wrongfully. It is said that Holmes was in charge of the property which he believed was being stolen, and that from that fact it may be inferred that he had authority to act as he did; but the same would apply to a shopman in charge of a shop, or a servant in charge of a house, and yet it has never been suggested that, if such a servant gave a person in charge for felony, the master would be liable." See also Pollock, Torts, 6th ed. pp. 89, 90.

The principle we have stated as applicable to the facts in this record, and, as established by the authorities cited, has met with the approval of this court in cases closely resembling the one in hand, and in other cases where it was adopted by analogy. Quoting from *Wood on Master & Servant*, 546, the court, in *Willis v. Atlantic & D. R. Co.* 120 N. C. 512, 26 S. E. 785, says: "In the absence of express orders to do an act, in order to render the master liable the act must not only be one that pertains to the business, but must also be fairly within the scope of the authority conferred by the employment. . . . For illustration, a clerk to sell goods suspects that goods have been stolen, and causes an arrest to be made. The master is not liable for the imprisonment or for the assault, because the arrest was an act which the clerk had no authority to do for the master, either express or implied." In a case where the agent of the defendant company had slandered the plaintiff, the court stated the principle as follows: "In a vast majority of the cases the principle is recognized that in some way the company must authorize or approve the tortious act of its agent, and it would be unreasonable to hold the company liable on

a bare presumption, in the absence of allegation or any proof of authority or ratification." *Redditt v. Singer Mfg. Co.* 124 N. C. 100, 32 S. E. 392. Where the defendants had placed a claim against the plaintiff in the hands of their attorney for collection, and the attorney caused the plaintiff to be arrested, the court held that the defendants were not liable to the plaintiff in an action for malicious prosecution and false arrest, as the act of their attorney was not within the general course and scope of his employment, and therefore he had no implied authority to do the act, and as the defendants had not expressly authorized the act to be done, or in any way ratified it. *Moore v. Cohen*, 128 N. C. 345, 38 S. E. 919. That case would seem to be decisive of this one, and it is fully sustained by the decision in *Burnap v. Albert*, Taney, 244, Fed. Cas. No. 2,170, in which Chief Justice Taney delivered the opinion. The cases cited in the brief of plaintiff's counsel may, we think, be distinguished from our case. The court was influenced in the decision of them by their peculiar facts, which do not exist in the case at bar. It is not necessary for us to review or comment upon them, except to say that the court thought there was in each of them some evidence tending to show authority from the company for the commission of the wrongful act.

It may then be gathered from the books as a general rule, which is clearly applicable to the facts of this case, that if the servant, instead of doing that which he is employed to do, does something else, which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for what he does. It is not sufficient that the act showed that he did it with the intent to benefit or to serve the master. It must be something done in attempting to do what the master has employed the servant to do. *Mitchell v. Crasweller*, 13 C. B. 246; *Limpus v. London General Omnibus Co.* 32 L. J. Exch. N. S. 34. Nor does the question of liability depend on the quality of the act, but rather upon the other question,—whether it has been performed in the line of duty, and within the scope of the authority conferred by the master. The facts of this case do not bring it within the principle. There is no ground for saying that what was done by the agent was in the ordinary course of the business of the company, nor that it was for its benefit, except in so far as it is for the benefit of all the citizens of the state that a criminal should be prosecuted, convicted, and punished. If the agent acted from a sense of the duty which rests on every one to give in charge a person who he

thinks has committed a felony, his conduct, while commendable, would in no way be connected with the defendant so as to fasten liability upon it. *Edwards v. London & N. W. R. Co.* L. R. 5 C. P. 448. In *Croasdale v. Von Boyneburgk*, 206 Pa. 15, 55 Atl. 770, the court says: "The purpose of a criminal prosecution is to punish the offender for violating the laws of the commonwealth, and not to enforce the payment of money, nor, as in civil proceedings, to restore to the owner the property of which he has been defrauded. The criminal process of the court should not be invoked for any such purpose. While the appellant, like any other person, could have instituted the prosecution against Stotsenberg, it was clearly not his duty as managing owner to do so." The court, in *Pressley v. Mobile & G. R. Co.* 4 Woods, 569, 15 Fed. 199, states the principle with equal emphasis: "The question is, Can such action on his part be held to be within the scope of his agency, and in the course of his employment? There may be, and the books recognize, some difficulty in determining what acts of an agent or employee are properly within the range and course of his employment; but to say that to put the criminal law in operation against a party on a charge of larceny of the property of the corporation is within the scope of his agency and in the course of his employment is a proposition which, in the light of the decided cases, cannot be maintained."

There can be no doubt that the plaintiff has been very ill-used and grievously wronged, as he was most improperly arrested, but unfortunately he has sued an innocent party, instead of suing those who were the real authors and perpetrators of the wrong done to him. We have assumed, of course, that they did the wrong to him, as we are required by an imperative rule, upon a motion to nonsuit or a demurrer: to evidence, to take as true, not only every fact which there is evidence tending to establish, but also to consider all such fair and reasonable inferences of fact as the jury, if trying the case, might properly have drawn from the evidence. It may be that those parties, if they had been sued, would have been able to show quite a different state of facts from the one with which we have now to deal, and therefore what we have said must be taken as based entirely upon the hypothesis that the facts are correctly given in the testimony introduced by the plaintiff.

Since this opinion was written, we have examined a case recently decided by the supreme court of Pennsylvania, in which we find that court reached the same conclusion we have in this case upon facts substantially similar, and supported its decision by cogent

reasoning and by the citation of many and weighty authorities. *Markley v. Snow*, 207 Pa. 447, 64 L. R. A. 685, 56 Atl. 999.

Finding no error in the ruling of the court upon these facts, *the judgment of nonsuit must stand.*

T. E. VANN, Admr., etc., of Darius Edwards, Deceased,
v.

D. K. EDWARDS, Appt.

(135 N. C. 661.)

1. A parol gift of a note is not within the meaning of a constitutional provision requiring a man's written consent to make valid his wife's "conveyance" of her property, since the word "conveyance" has reference to the transfer of such property as must be transferred by written instruments.
2. The right to free alienation by a married woman of her property, except as expressly restricted, is conferred by

a constitutional provision vesting in her a sole and separate estate in her property with power to devise and bequeath it, and, "with the written consent of her husband," convey it as if she were unmarried; so that the restriction must be limited to technical conveyances such as are required to be in writing.

3. A decision on appeal that the possession of a note by the maker raises a presumption of payment does not preclude the raising upon a subsequent appeal of the question as to the legal effect of the indorsement and transfer of the note by the payee.

4. The rights of the maker of a note, to whom it had been indorsed and delivered by the payee as a gift, are not affected by the fact that it is found among the effects of another person after the latter's death, and his administrator takes possession of and attempts to enforce it as part of the estate.

(Montgomery, J., dissents.)

(June 1, 1904.)

NOTE.—Is a parol gift a conveyance?

The general rule is that a parol gift is not a "conveyance." This term has a technical meaning, and from its origin has been construed and understood to apply to transfers in writing of real property. Only two cases have been found which seem to be exceptions to the general rule, and in one of them the effect of this construction does not seem to have been discussed.

So, in *VANN v. EDWARDS* the word "convey" was held to be restricted in its operation to such property as was by law required to be transferred by a written instrument or conveyance. This was under N. C. Const. art. 10, § 8, providing that the real and personal property of any female in this state, acquired before marriage, and all property, real and personal, to which she may after marriage become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, liabilities, and engagements of her husband, and may be devised and bequeathed, and, with the written consent of her husband, conveyed, by her as if she were unmarried. In this case the wife, without the assent of her husband, made a gift of a note payable to her.

So, "fraudulent conveyance" was held not to apply to a transfer of personalty by a son to his father in contemplation of bankruptcy, under the bankrupt act of Congress, April 4, 1800, providing that from, etc., if any merchant shall, with intent unlawfully to delay or defraud his creditors, secretly convey his goods out of his house, or conceal them, to prevent their being taken on execution, or make, or cause to be made, any fraudulent conveyance of his lands or chattels, every such person shall be deemed and adjudged a bankrupt. *Livermore v. Bagley*, 3 Mass. 487. This was an action of trover by an assignee in bankruptcy against an execution creditor, who had taken the property from the father. In this case the son made a bill of parcels, without seal, of rigging and boats, and the articles were transferred to his father. No money was paid or credit given. The father had previously told the son that, if he would

make a bill of them, "he would take care of them." It was held that the transfer was not a conveyance of chattels in the technical sense, or according to the legal construction of the clause cited from the statute. The court said: "Whatever may be the loose and popular sense, or possible applications, of the term 'conveyance,' the legislature are not understood to speak in an indeterminate manner,—especially if that construction would violate any general principle of jurisprudence. For, in making a statute, the legislature are understood to refer themselves to existing customs and rules: or, in other words, when using technical terms, to employ them in a precise and technical sense. The same term 'conveyance' is used in speaking of the transfer of lands and of chattels; and different meanings must be given to the same word to apply it to the transaction in question.

... It may be said rather to be taken as a settled maxim, in the construction of the English bankrupt laws, than to have been directly decided, that colorable sales and transfers of the notes, goods, and personal property of a bankrupt, although void as against the creditors of the bankrupt, do not amount to an act of bankruptcy, unless executed by a fraudulent deed or conveyance."

Applying the same rule, it was held that the statute of frauds in regard to a conveyance did not extend to conveyances of personalty, but of real property only. *Sewall v. Glidden*, 1 Ala. 52. In this case a deed of slaves was made, which was void because not acknowledged or proved as required by the Alabama statutes. It was held, however, that the chattels passed by a parol gift, and that such gift was not void, under 27 Eliz. chap. 4, providing that all conveyances, etc., of lands, made with intent to defraud or deceive such persons, etc., as shall purchase such lands for money or other good consideration, shall be utterly void.

On the other hand, in *Lippman v. State*, 104 Ala. 61, 16 So. 130, a shipment of mortgaged chattels to the consignee, "to do as he pleased with it," was held to be a violation of Ala. Crim. Code, § 3836, providing that any person who sells or conveys personal property upon which

A PPEAL by defendant from a judgment of the Superior Court for Hertford County in favor of plaintiff in an action brought to enforce payment of the amount alleged to be due on a promissory note. *Reversed.*

The facts are stated in the opinion.

Mr. L. L. Smith for appellant.

Messrs. Winborne & Lawrence, for appellee:

The indorsement by the wife without the knowledge and written consent of her husband passed no title to defendant.

Walton v. Bristol, 125 N. C. 419, 34 S. E. 544.

The bond, at the death of the wife, became the property of the husband, plaintiff's intestate, and he was the proper party to sue for it.

Wooten v. Wooten, 123 N. C. 219, 31 S. E. 491.

Courts only overrule adjudicated cases, where errors clearly appear.

Hudson v. Jordan, 110 N. C. 250, 14 S. E. 741; *Mullen v. Norfolk & N. C. Canal Co.* 115 N. C. 15, 20 S. E. 167; *Bradsher v. Cheek*, 112 N. C. 838, 17 S. E. 533; *Thomas v. Fulford*, 117 N. C. 693, 23 S. E. 635.

he has given a written mortgage, lien, or deed of trust, and which is then unsatisfied, is guilty of a misdemeanor.

In the above case the court, referring to the case of *Johnson v. State*, 69 Ala. 593, said: "Adhering to this exposition of the statute, there was a conveyance or transfer of the type-writers, offending its letter and spirit. A consignment of goods, intrusting them to a common carrier for delivery to a person named in the bill of lading or receipt given by the carrier, the bill of lading or receipt not expressing otherwise, prima facie vests the title to the goods in him to whom they are deliverable."

The case in which this construction was previously made was *Johnson v. State*, 69 Ala. 593, which was a prosecution for selling personal property covered by a mortgage, where the defendant had swapped a mule colt for a horse. The court, in defining the word "convey" as set out in Ala. Code, § 4354, said: "The word 'convey,' when applied to a disposition of property, has the signification of transfer; and means the passing of title and dominion from one person to another. It is in this, its largest sense, it is employed in this statute, intended to prohibit the mortgagor, or maker of a lien, or grantor in a deed of trust, from disposing of the property, so that the security of the mortgage or lien, or deed of trust, would be endangered or embarrassed. The danger or embarrassment would result, not only from a sale, but from an exchange, a gift, or any other transfer, by which a title, not in subordination to the mortgage, lien, or deed of trust, was created, or by which the possession was changed."

Some reason may be found for construing "convey" as applicable to personal property, for the reason that otherwise this act would be without any force, as it was only intended to apply to chattel mortgages, but it might be construed to mean a conveyance in writing under seal. At all events, the intention of the legis-

Mr. George Cowper also for appellee.

Walker, J., delivered the opinion of the court:

This action was brought to recover the amount of two notes, one for the sum of \$450, and the other for the sum of \$500. We are concerned only with the latter note, as the other is not in controversy. The note for \$500 was executed by the defendant to his mother, Sarah F. Edwards, on the 8th day of June, 1888, and was payable eight years after its date, with 6 per cent interest. The defendant, having admitted the execution of the note, avers that it was transferred, indorsed, and given to him by his mother, and he also avers that, if the transfer from his mother was void, he acquired title to the note by gift from his father. At the time the note was executed, and also at the time it was alleged to have been transferred to the defendant by his mother, Darius Edwards, the husband of Sarah F. Edwards, was living, and did not assent to the transfer, and the same was made, if at all, without his knowledge, and with the belief, on the part of Mrs. Edwards and the

lature in this case was that the word "convey" was alone applicable to personalty.

And in *Luebbe's Estate*, 179 Pa. 447, 36 Atl. 322, the word "conveyance" was held to apply to personal as well as real estate. In this case a gift of a note under seal was made by the testatrix to a charitable corporation within thirty days of her death. This was held void, under Pa. act April 26, 1855, providing that no estate, real or personal, shall hereafter be bequeathed, devised, or conveyed within thirty days of the testator's death. The court said: "It is unnecessary to inquire to what extent—if at all—the ruling of the court below may be in conflict with *McGlade's Appeal*, 99 Pa. 338. That case has been practically overruled by subsequent decisions construing the act of 1855." It may be said that this was not a parol gift, being a note under seal, but, as it overruled *McGlade's Appeal*, 99 Pa. 338, it is here inserted.

In *McGlade's Appeal*, 99 Pa. 338, a testatrix gave a letter of attorney to transfer a loan with the certificates to a third party, with instructions to sell the loan and pay the amount of her charitable legacies from the proceeds, and gave the balance to B. to use as he saw fit. It was held that the donee did not hold by virtue of a bequest, devise, or conveyance, but by virtue of a gift fully executed in the donor's lifetime, and was not within the act of 1855, *supra*.

Blackstone (Com. vol. 2, p. 309), speaking of deeds, says: "I shall only examine the particulars of those which, from long practice and experience of their efficacy, are generally used in the alienation of real estate, for it would be tedious, nay infinite, to descant upon all the several instruments made use of in personal concerns, but which fall under our general definition of a deed; that is, a writing sealed and delivered. The former, being principally such as serve to convey the property of lands and

defendant, that he would not assent to the transfer. There was evidence in the case tending to prove that after Mrs. Edwards's death the note passed into the possession of her husband, who survived her, and remained in his possession until his death. There was evidence, on the contrary, which tended to prove that, while the note was in the possession of Darius Edwards after the death of his wife, it was delivered by him to the defendant, who kept it until the death of his father, and had possession of it until this suit was brought, when it was handed by the defendant's wife to one of the defendant's attorneys. When the case was here before, it was held that the defendant's possession of the note after the death of his father, in whose possession it had been subsequent to the death of his wife, who was the original owner and holder of the note, would, if established, raise a presumption that such possession was lawful, and that he is the owner of the note; and a new trial was granted to the defendant because of an erroneous ruling in the court below upon this point. At the second trial an issue was submitted to the jury as to the ownership

of the note, the plaintiff asserting title to it as the administrator of Darius Edwards. The jury found against the defendant, and judgment having been rendered upon the verdict for the plaintiff, the defendant excepted and appealed. The only exceptions which we need notice were taken to the charge of the court, and to an instruction of the court given to the jury at the plaintiff's request, which is as follows: "If you find from the evidence that the defendant acquired possession of the \$500 note by delivery from his mother, without the knowledge or consent of his father, Darius Edwards, then no title to the note would pass to the defendant thereby; and, if that were his only claim to the note, you should answer the first issue 'Yes.'" The court also charged the jury among other instructions, to which no exception was taken, as follows: "If the note was executed by the defendant to his mother, and by her indorsed and transferred to the defendant without her husband's knowledge or consent, and that was his only claim, that would avail the defendant nothing, and the note would have passed to the husband as his property upon

tenements from man to man, are commonly denominated conveyances; which are either conveyances at common law, or such as receive their force and efficacy by virtue of the statute of uses."

It may be of some interest to notice the construction placed upon the word "conveyance" by the various legal lexicographers which are here inserted.

Conveyance "is a deed which passes land from one to another." Cunningham, Law Dict. 1783; Potts, Law Dict. 1813.

"Is a deed or instrument that passes land, etc., from one to another." Students' Law Dict. 1740.

"A deed which passes or conveys land from one man to another." Tomlin, Law Dict. 1810; Jacobs, Law Dict. 1811; Winfield, Adjudged Words & Phrases, 1882.

"The transfer of the title of land from one to another." Cochran, Law Dict. 1897.

"The transfer of the title of land from one person or class of persons to another." Black, Law Dict. 1891; Shumaker & L. Cyc. Law Dict. 1901.

"An instrument conveying from one person to another person an interest in land." Stroud. Judicial Dict. 1903.

"These, which anciently were called 'assurances,' are instruments under seal, whereby lands are conveyed or assured from the vendor to the vendee, so as to vest in the latter such an estate as the vendor has in himself to convey or assure, and as the words of limitation in the deed limit or mark out." Brown, Law Dict. 1875.

"Is a writing sealed and delivered, whereby the property of lands and tenements is conveyed from one person to another." Burns, Law Dict. 1792; Whishaw, Law Dict. 1829.

"An instrument of alienation by which an interest or estate in lands and tenements is conveyed from one person to another." Holthouse, Law Dict. 1847.

veyed from one person to another." Holthouse, Law Dict. 1847.

"An instrument in writing under seal, by which some estate or interest in lands is transferred from one person to another." Kinney, Law Dict. 1893.

"A transfer of the title to lands or vessels; the instrument by which such an act is evidenced." Ironside, Law Dict. 1899.

"The transaction of passing the title to property, usually real property." Abbott, Law Dict. 1879.

"The transfer of the ownership of property, especially landed property, from one person to another." Mozley & W. Law Dict. 1876.

"A document effecting a transfer of property, usually real estate, other than a will, a lease for a short term, or an executory contract of sale." Stimson, Law Glossary, 1881.

"Is a mode by which property is conveyed or voluntarily transferred from one person to another by means of a written instrument and other formalities. Sweet, Law Dict. 1882; Rapalje & L. Law Dict. 1888.

"An instrument which transfers property from one person to another." Rawson & R. Law Lex. 1893; Wharton, Law Lex. 1902.

"An instrument transferring the title of property from one person to another." Peloubet, Law Dict. 1888.

"An instrument in writing by which property, or the title to property is transferred from one person to another." Burrill, Law Dict. 1859.

"The act of transferring an estate by instrument in writing." English, Law Dict. 1899.

"When the legislature uses technical language in its statutes, it is supposed to attach to it its technical meaning, unless the contrary manifestly appears." Burton v. Reeve, 16 Mees. & W. 307, per Parke, B.

the death of his wife, subject to the payment of her debts." Defendant excepted. These two exceptions are, in substance, the same, and may be considered together, and they involve the question whether a married woman can make a valid transfer to another of a note belonging to her, without the written consent of her husband.

The Constitution (art. 10, § 6) provides as follows: "The real and personal property of any female in this state, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried." It is provided by the Code (§ 1826) that "no woman during her coverture shall be capable of making any contract to affect her real or personal estate, except for her necessary personal expenses, or for the support of the family, or such as may be necessary in order to pay her debts existing before marriage, without the written consent of her husband, unless she be a free trader, as hereinafter allowed." Our answer to the question we have stated must be in the affirmative. The decision of the case turns upon the construction of § 6 of article 10 of the Constitution, for if, by that section, a married woman is vested with the power of disposing of her personal property, such as the note upon which the suit was brought, this power cannot be divested or taken from her by any act of the legislature, and § 1826 of the Code can have no operation in such a case, assuming it to be fully sufficient in its scope to embrace her executed contracts of sale or gifts. It is provided by the Constitution, which is the higher, and indeed, the supreme, law, to which all conflicting legislation must yield, that the property of every female, whether acquired before or after her marriage, shall be and remain her sole and separate estate, and shall not be liable for any of the debts, obligations, or engagements of her husband. If this were all of the section, we would have to conclude that, as a married woman is thus vested with full and complete ownership of things, real and personal, acquired by her before or after her marriage, having both the legal and equitable title, she must necessarily have also acquired every right which inheres in, or is incidental to, such ownership, and the most important and most valuable among them is the right of alienation, or what is commonly known in the law as the *jus dispo-*

endi. While this may not accord with the view taken of that section in one or two of the cases, it will be found upon examination that they did not involve a decision of the question of a married woman's right to dispose of her personal property, but of her power to contract so as to bind her property generally, and it was held that, notwithstanding the provision of § 6, art. 10, of the Constitution, the disability of coverture remains as it was at common law, and prevents her from making a valid executory contract.

It will be observed that it is ordained by the Constitution that all that a married woman has or acquires in things real and personal shall be her sole and separate estate and property. The word "property" is of very broad signification. It is defined as: "Rightful dominion over external objects; ownership; the unrestricted and exclusive right to a thing; the right to dispose of the substance of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it. . . . Property is the highest right a man can have to anything, being used for that right which one has to lands or tenements, goods or chattels, which no way depends on another man's courtesy. . . . A right imparting to the owner a power of indefinite user, capable of being transmitted to universal successors by way of descent, and imparting to the owner the power of disposition. . . . The right of property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. It consists in the free use, enjoyment, and disposal of all a person's acquisitions, without any control or diminution, save only by the laws of the land." Black, Law Dict. pp. 953, 954. The word "estate," which is also used in the Constitution, denotes the interest which anyone has in lands, or in any other subject of property. An estate in lands, tenements, and hereditaments, says Blackstone, signifies such interest as the tenant has therein. 2 Bl. Com. 103. It also signifies the condition or circumstance in which the owner stands with regard to his property. Both words are also used to describe the thing, real or personal, in which one has an estate or the subject-matter of ownership, or over which the right of property is exercised; and in this sense, perhaps, they were intended to be used in the Constitution. But the very word "property" implies the exclusive right of possessing, enjoying, and disposing of a thing, and, when used subjunctively, it means that with respect to which this right exists, or that

which is one's own. So it must be admitted that, if there were no words in § 6 of article 10 of the Constitution to limit the scope of that part of the section which we have just quoted, a married woman would have the same dominion over her separate estate and property as if she were a *feme sole*. But there are such words of limitation, and how and to what extent they restrict the right of alienation is the difficult and delicate question presented for solution. After exempting her property from any debt, liability, or obligation of her husband, it is provided that she may devise and bequeath the same. This power is absolute. She may will her property with the same freedom as if she were unmarried or *sui juris*. And by the last provision of the act she may, with the written assent of her husband, "convey" her property as if she were a *feme sole*. A correct analysis of this section brings us to this conclusion: that a married woman may dispose of her property in any way she may see fit to do so, except that, when she conveys it, the written assent of her husband is essential to the validity of her conveyance. But what is meant by the word "convey?" The act by which she passes to another the title to her property must in law be a conveyance. Discussing a kindred subject in *Kelly v. Fleming*, 113 N. C. at page 138, 18 S. E. at page 81, this court, by Mr. Justice MacRae, says: "The word 'convey,' in its broadest significance, might embrace any transmission of possession; but we are restrained to its legal meaning, which, ordinarily speaking, is the transfer of property from one person to another by the means of a written instrument and other formalities. Rapalje & L. Law Dict.: *Convey*; *Conveyance*. According to Webster, a conveyance is 'an instrument in writing by which property or the title to property is conveyed or transmitted from one person to another.' The meaning of this word being well understood at common law, it must be understood in the same sense when used in a statute. *Smithdeal v. Wilkerson*, 100 N. C. 52, 6 S. E. 71." A conveyance is "an instrument in writing under seal (anciently termed an 'assurance'), by which some estate or interest in lands is transferred from one person to another; such as a deed, mortgage, etc." Black, Law Dict. p. 273, citing 2 Bl. Com. In *Pickett v. Buckner*, 45 Miss. 245, the court, in construing the dower act of that state, says: "In employing the term in the dower act . . . 'conveyance,' 'conveyed,' we suppose that the legislature meant the sense in which the word is ordinarily used in our jurisprudence. It is a technical or quasi-technical word, of precise and definite import. As defined by Bou-

vier (1 Law Dict. 346), 'Conveyance is the transfer of the title to land by one person to another.' The instrument itself is called a conveyance.'" In *Nickell v. Tomlinson*, 27 W. Va. 720, the word "convey" is thus defined: "But the language now used is probably just as open to criticism as the language used a hundred years ago. The language now used is: 'Shall operate to convey from the wife her right of dower in the real estate embraced in the deed.' Now 'convey' means transfer the title of land from one person or class of persons to another. See 1 Bouvier, Law Dict. p. 399. Clearly, an inchoate dower interest is no title to land. It is no estate, present or future, vested or contingent, and the term 'convey' can be properly used only when the transfer of some 'estate in land' is spoken of." Again, the court says: "Conveyance is a transfer of an estate in land from one person to another." In *Thompson v. Hart*, 58 App. Div. at page 449, 69 N. Y. Supp. 229, the court, in construing the word "convey" with reference to its sufficiency as a legal term to pass personal property, said: "Manifestly the word 'convey' is inappropriate to the transfer of personal estate."

In *Klein v. McNamara*, 54 Miss. 105, the word "conveyance" is said to be a general word, and "comprehends the several modes of passing title to real estate. It is defined to be 'the transfer of the title of land from one person, or class of persons, to another.'" *Lambert v. Smith*, 9 Or. 193; *Edelman v. Yeakel*, 27 Pa. 27. Defining the word in *Jenckes v. Probate Court*, 2 R. I. 255, the court says: "The term 'convey' is a technical term, long known or used in deeds conveying real estate." We believe all the lexicographers generally adopt, as the definition of the word "convey," the transfer of the title to realty, and of the word "conveyance" the instrument by which this is done. Anderson, Law Dict. p. 254; 1 Bouvier, Law Dict. (1897) p. 434; 1 Rapalje & L. Law Dict. 289; Abbott, Law Dict. 284. Blackstone emphasizes the distinction between instruments used in the alienation of "real estate" and those by which personal property and effects are transferred. "The former," he says, "being principally such as serve to convey the property of lands and tenements from man to man, are commonly denominated conveyances; which are either conveyances at common law, or such as receive their force and efficacy by virtue of the statute of uses." 2 Bl. Com. 309. And, speaking again of conveyances, he says: "The legal evidences of this translation of property are called common assurances of the Kingdom, whereby every man's estate is assured to him, and all controversies,

doubts, and difficulties are either prevented or removed." 2 Bl. Com. 294, 295. Referring to this definition of Blackstone, the court, in *McCabe v. Hunter*, 7 Mo. 357, says: "It has been argued that there is nothing in our statute concerning conveyances which requires an instrument conveying lands to be sealed. The statute uses the word 'conveyance' to designate all instruments conveying lands from one to another. Blackstone says deeds which serve to convey the property of lands and tenements from man to man are commonly denominated conveyances. 2 Bl. Com. 309. We have seen that in England the word 'conveyance' carries with it the idea of a sealed instrument. This word is used by our legislature in the sense in which it is understood in England." But if the framers of the Constitution used the word "convey" in its widest sense, as meaning transfer of property or the title to property from one person to another by means of a written instrument and other formalities, and its substantive "conveyance" as signifying the instrument itself by which the transfer is effected (*Prouty v. Clark*, 73 Iowa, 55, 34 N. W. 614), we do not think it can affect the result in this case. The word "convey" must still be restricted in its operation to such property as is by law required to be transferred by a written instrument. The words "convey and devise" are technical terms relating to the disposition of interests in real property. It would not be technically or legally correct to speak of conveying personal property by a verbal sale of it, or even by a writing, any more than it would be to speak of devising it by last will and testament; not that a draftsman may not use a technical word to express his meaning without intending that it shall be construed in its strictly technical sense, but, in the absence of anything to clearly indicate that the word was not intended to have its commonly accepted meaning in the law, but was used in some other and different sense, we must adopt the legal definition of the word, because, in the first place, it must be presumed to have been used in that sense, and, in the second, because it would be unsafe to reject that well-understood meaning for another, unless the latter had been most clearly manifested; and this principle should especially apply to constitutions and statutes, which are generally written by those learned in the law, and are intended to declare what the law shall be. It must be assumed in such a case that the state of the law and the meaning of its technical terms at the time of the enactment was known, for we are required, in construing written laws, especially those changing the common law, to consider the

old law, and, in comparing it with the new so as to gather the intent, words of well-known legal signification must have the meaning thus attached to them by the law; and especially must they be understood in the sense which they have acquired by actual judicial interpretation, unless, by such construction, we defeat the intention which clearly and distinctly appears from some other part of the enactment or from its context. It may be added that the framer of § 6, art. 10, of the Constitution, must have been familiar with the meaning of technical or legal terms, for he made the proper distinction between the disposition of realty and the disposition of personalty by will, when he used the words "devise" and "bequeath." It may fairly be assumed that he knew also that a writing was not essential to the transfer of personalty, and that when he used the word "convey" he intended it should have its technical meaning.

There is another reason why the restriction upon the wife's right of alienation should be confined to that kind of property which can be transferred only by a written instrument. Section 6 of article 10 of the Constitution provides that a married woman's separate estate and property may be conveyed by her, with the written assent of her husband, as if she were unmarried. Property in things personal, generally speaking, may pass from one person to another by mere delivery or by word of mouth. An unwritten sale or gift is quite sufficient for that purpose. This being so, can it be supposed to have been intended by that section to require that, in every case where the wife makes a sale or gift of her personal property by delivery or by word of mouth, however small or however inconsiderable in value the article of property may be, the husband must give his written assent thereto? Or, to put the case more strongly, is it intended by that section that, if the wife wishes to sell or give to another her personal estate or any part of it, however small that part, she cannot do so by delivery or by word of mouth,—a usual and immemorial method of transferring such property,—but she must, in every instance, reduce the transfer to writing, in order that her husband may assent in writing to it, and that without this kind of written assent a valid transfer cannot be made? Either one or the other of the two alternatives must be adopted, unless the restriction upon her right to convey her separate estate and property is held to apply only to her realty, or to property the title to which can pass only by a written instrument. It further appears from an examination of § 6, art. 10, of the Constitution, that it was not intended

to vest in the wife merely the naked title, or power to hold in her own name this "sole and separate estate and property," without any of the usual incidents of ownership, and without the right of direct control or dominion over it; but it was manifestly the purpose that, as it was vested in her own right, it should become her sole and separate property as if she were a single female, subject only to the limitations of that section. It is an enabling provision of the law, and should be construed in the spirit which prompted its enactment, and, as it authorized the wife to take and hold property to her sole and separate use, without the interposition of a trustee, and has thus made her capable of holding it by herself and for herself, independently of her husband, she should be adjudged to have the capacity of disposing of it, except in so far as she may be expressly or impliedly restrained. That this was the spirit and purpose of the lawmakers is evidenced by the fact that she is given the absolute right to dispose of her estate by will, which is certainly something more than the naked right to own and possess it, and then she may also convey it. It is therefore perfectly clear that it was intended she should have the right of disposition, in one form absolutely, and in another under certain restrictions. As she is vested with her property, including the incidental right of disposing of it *inter vivos*, subject only to one condition, it must follow that in all other respects her right of alienation is left free and unfettered. The expression of the one limitation upon this right is the exclusion of all others. When the law says that in one case she shall be under the restraint of her husband, it means, necessarily, that in all other cases she shall be free. We may well ask, Why should a wife be permitted to devise and bequeath her property, real and personal, and be allowed to convey only her real estate? If the use of the word "convey" restricts the right of alienation to the real estate, as we have shown that it does, then as to the personal property she is left without the right of disposition, unless it was the intention to confer upon her a general power to dispose of her property, with the proviso that real estate should not be conveyed without the assent of her husband. There is no valid or sufficient reason for making any distinction between the right to dispose of real estate, and the right to dispose of personal property, which would deprive her of the latter right. We think the true meaning of § 6, art. 10, is that a married woman may dispose of her property without the assent of her husband, except in those cases where a written instrument or

conveyance is required for that purpose. This construction of the Constitution seems to be strongly favored by the court in *Withers v. Sparrow*, 66 N. C. 138. Referring to *Knox v. Jordan*, 58 N. C. (5 Jones, Eq.) 175, Boyden, J., for the court, says: "But the court in that case seemed unwilling to sanction the doctrine that, as to the separate estate of the wife, she was to be regarded as a *feme sole* in all respects, as held in England and also in the state of New York. But however proper this unwillingness of the court to recognize that doctrine might have been at the time of that decision, there can be no reason, since the adoption of our present Constitution, why the English and New York doctrine should not now be followed in our state." We understand the court to mean that a married woman has under the Constitution the right to dispose of her separate estate in any manner, save in so far as she may be restricted to any particular method of alienation pointed out in that instrument, and not that she may contract generally, so as to subject her separate estate at law to the payment of her debts, as would be the case if she were *sui juris*. We are not at all disposed to change or impair the doctrine so frequently announced by this court with reference to the capacity of a married woman to contract. That question is not now directly before us. Nor do we think it necessary to disturb the principles established in *Frazier v. Brownlow*, 38 N. C. (3 Ired. Eq.) 237, 42 Am. Dec. 165; *Harris v. Harris*, 42 N. C. (7 Ired. Eq.) 111, 53 Am. Dec. 393; *Knox v. Jordan*, 58 N. C. (5 Jones, Eq.) 175; and more recently in *Pippen v. Wesson*, 74 N. C. 438; *Dougherty v. Sprinkle*, 88 N. C. 300; *Flaum v. Wallace*, 103 N. C. 296, 9 S. E. 567; and *Farthing v. Shields*, 106 N. C. 289, 10 S. E. 998; and still more recently in *Harvey v. Johnson*, 133 N. C. 352, 45 S. E. 644.

Our decision of the question involved in this case does not conflict with what this court has so often said, and which is thus clearly stated by Ruffin, J.: "At law a *feme covert* is incapable of making a contract of any sort, and any attempt of hers to do so is not simply voidable, but absolutely void. If, however, she be possessed of separate property, a court of equity will so far recognize her agreement as to make it a charge thereon. But even in that case, and in that court, her contract has no force whatever as a personal obligation or undertaking on her part. . . . Nor was there any change wrought in this particular by the alterations made in our court system under the Constitution of 1868, or by the adoption of the statute known as the mar-

ried woman's act. It was in reference to these very alterations, and the effect of the statute, that the court declared in *Pippen v. Wesson*, 74 N. C. 437, and *Huntley v. Whitner*, 77 N. C. 392, that no deviation from the common law had been produced thereby as respects either the power of a *feme covert* to contract, the nature of her contract, or the remedy to enforce it; that as a contract merely her promise is still as void as it ever was, with no power in any court to proceed to judgment against her *in personam*." *Dougherty v. Sprinkle*, 88 N. C. 304; *Flaum v. Wallace*, 103 N. C. 296. 9 S. E. 567. The Constitution does not remove the incapacity which prevents a married woman from contracting debts or pecuniary obligations. So far as her power to thus contract is concerned, the disability of coverture remains as it was at common law, except where changes have been made by statute. In this connection the language of the court in *Pippen v. Wesson*, 74 N. C. at page 445, is appropriate: "We conceive that while it would be beyond the power of the legislature to destroy or alter the essential qualities of the separate estate given by the Constitution, as by giving the personal property to the husband, making the property liable for his debts, or by destroying the wife's power of disposition, yet it is within its power to regulate the manner in which the separate estate shall be held, to prescribe what contracts and what dispositions of their estates, other than those specifically authorized by the Constitution, married women may make, and by what forms and ceremonies all their contracts shall be made and authenticated, and their free consent thereto ascertained. The legislature may abolish all the incapacities of married women, and give them full power to contract as *femes sole*. The question is, Has it done so?"

In what respect the method of charging in equity a married woman's separate estate with liability for her agreements may be affected, if at all, by this decision, is not now presented for our consideration. We simply hold that, without the assent of her husband, she may dispose of any of her property, unless the law requires the disposition of it to be evidenced by a conveyance or a writing.

It is argued that the case of *Walton v. Bristol*, 125 N. C. 419, 34 S. E. 544, is at variance with the conclusion we have reached, but we do not think so. The conflict, if there is any, is more apparent than real. The note in that case, which belonged to the wife, was indorsed by her alone, and deposited by her with the Piedmont Bank as collateral security for her husband's

indebtedness to that bank. His indebtedness having increased to the amount of \$3,000, an arrangement was made by which the husband borrowed to the amount of his indebtedness from the Wilmington Bank, and gave his note to that bank for the loan, and, with the proceeds realized on his note to the Wilmington Bank, he paid the debt due the Piedmont Bank, which bank had indorsed his note to the Wilmington Bank, for his accommodation, upon an agreement with him that the note for \$1,250 should be deposited with it as collateral security or indemnity for its indorsement, and the husband so notified the Wilmington Bank, by letter, both before and after that bank loaned him the \$3,000. The wife did not assent to, and, so far as appears in the case, had no knowledge of, this new arrangement. Upon these facts it is clear, we think, that, as the wife could only be liable as surety for her husband by reason of the indorsement and deposit of her note at the bank (*Purvis v. Carstaphan*, 73 N. C. 575; *Southern Loan & T. Co. v. Benbow*, 135 N. C. 303, 47 S. E. 435; *Fleming v. Barden*, 126 N. C. 450, 53 L. R. A. 316, 78 Am. St. Rep. 671, 36 S. E. 17. 127 N. C. 214, 53 L. R. A. 326, 37 S. E. 219), the change in the arrangement fully discharged her, whether it be regarded as an extension of the time of payment to her husband as a novation of the debt, or as a payment of the debt and an extinction of her liability, the last being the correct view as we think. If the wife did not assent to the agreement by which her note was to be retained by the Piedmont Bank as indemnity against any loss resulting from its indorsement of her husband's note to the Wilmington Bank, and could not, in any view of the matter, be bound thereby, why inquire whether her indorsement of the note was valid and binding upon her? The indorsement had been virtually canceled and nullified by the payment of the note due the Piedmont Bank, whether it was originally valid or not, and the court so treated it, for it says "the wife never assented to the new arrangement," and was therefore not bound. The question as to the validity of her indorsement was not in the case, but, if it was, we would not be inclined to follow the decision, in so far as it conflicts with the conclusion which we have reached in this case. The question was not presented in *Rawls v. White*, 127 N. C. 20, 37 S. E. 68, which is also cited for the plaintiff.

But the plaintiff's counsel, in his well-prepared brief, insists that the point was decided in this case when it was here on a former appeal (128 N. C. 425, 39 S. E. 66), and also on the rehearing of that appeal

(130 N. C. 70, 40 S. E. 853), and that it is *res judicata*, and has become the law of the case, whether the decision was right or wrong. We may admit the general proposition that the decision of a court of final resort upon a given state of facts becomes the law of the case upon a second trial and another appeal in regard to those facts, if they are substantially the same as those upon which the former decision was made, and yet, with that principle conceded, we do not think the question we are now considering has been finally adjudicated, as between the parties to this suit, so as to foreclose any further discussion of it and make any expression in either of the former opinions upon that question, whether correct or not, the law of the case. An examination of the record in the first appeal will show that the only question presented, and upon which the decision therein could have been made, was whether the defendant's possession of the note raised a presumption that he was the lawful holder of it, or, to speak more accurately, raised a presumption that the note had been paid. In passing upon this question, it could make no difference whether the note had been legally indorsed to defendant by his mother or not, for, if it had not been, he would still be entitled to the benefit of the presumption raised by the law from the fact of his possession of the note. When this court decided with him in regard to the presumption, it was not necessary to consider the other question as to the legal effect of the indorsement of his mother, even if it had been presented in a way to call for an adjudication of this court upon it. We have therefore concluded that the question as to the validity of the indorsement of the note by the defendant's mother to him is now open for our consideration.

The question as to the right of a married woman to dispose of her personal property without the written assent of her husband is directly and squarely presented in this case by the defendant's request for instructions and the charge of the court to which exception was taken; and it is the first time, as we think, that it has been so presented. Having held that the transfer of the note by his mother to the defendant was valid, it follows that the court erred in refusing to give the instruction requested by the defendant, and in giving the instruction to which he excepted, because, if the indorsement and delivery of the note to the defendant constituted a valid gift of it to him, the fact that the jury have found that he did not have possession of the note at the time of his father's death should not defeat his

title to it acquired by the gift, as the defendant may be able to show that, even if his father had possession of the note at the time of his death, and there is therefore a presumption in favor of plaintiff, he is himself the real owner of it by virtue of the gift from his mother. This is a question for the jury to decide upon all the facts of the case and under proper instructions from the court, and, by holding that defendant acquired no title to the note by his mother's indorsement, the court deprived him of the use of that important fact in developing his defense. The error thus committed entitles the defendant to another trial.

New trial.

Montgomery, J., dissenting:

I still am of the opinion that the law on the subject of the right of a married woman to dispose of her separate estate, whether it consists of real or personal property, was properly decided in the case of *Walton v. Bristol*, 125 N. C. 419, 34 S. E. 544. The opinion in this case overrules that case. In *Walton v. Bristol*, *supra*, the court said: "The Constitution, as we have seen, so far as the wife's power to convey her separate estate is concerned, makes no difference between real property and personal property. If she undertakes to convey either species of property, the written assent of her husband must be had." Article 10, § 6, of the Constitution, is in these words: "The real and personal property of any female in this state, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate, and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried." It will be seen from reading that section of the Constitution that the words "real and personal property" are always associated, and that the copulative conjunction "and," leading the last clause, connects both real and personal property with the mode of conveying them. If inconveniences arise practically in the disposition of small articles of personal property by the wife, the written assent of the husband being required, the difficulties are created by the section of the Constitution above quoted, and this court cannot dispense with them. I can add nothing to what I said for the court in *Walton v. Bristol*, 125 N. C. 419, 34 S. E. 544.

Petition for rehearing denied.

W. J. MOORE

v.

CHARLOTTE ELECTRIC RAILWAY,
LIGHT, & POWER COMPANY, Appt.

(136 N. C. 554.)

1. A statute making the injury or killing of cattle or other live stock by a railroad company prima facie evidence of negligence does not apply in case of the killing of a dog.
2. The engineer in charge of a moving locomotive is not bound either to keep as vigilant lookout for dogs on the track, or to exercise as great care in the management of his engine to prevent their injury, as in the case of cattle or live stock.
3. One in charge of a locomotive or motor car, seeing a dog near the track, is entitled to act upon the presumption that it will get out of the way in time to avoid danger, in the absence of anything to indicate that it is helpless or totally indifferent to its surroundings.
4. A street railroad company is not liable in damages for the killing of a dog by one of its cars in motion, unless the killing is done either wilfully, wantonly, or recklessly.
5. That the fender on the car which killed a dog was defective cannot be shown by evidence that witness had measured a fender on one of defendant's cars and found it to be too far from the ground, and that there were different kinds of fenders in use on different cars, without anything to show the condition of the fender on the car which did the injury.

(November 22, 1904.)

APPEAL by defendant from a judgment of the Superior Court for Mecklenburg County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of his dog. *Reversed.*

The facts are stated in the opinion.

Messrs. Burwell & Cansler, for appellant:

The evidence as to the fenders was inadmissible.

Grant v. Raleigh & G. R. Co. 108 N. C. 470, 13 S. E. 209; *Raper v. Wilmington & W. R. Co.* 126 N. C. 563, 36 S. E. 115.

It is not the duty of the driver of a railway car or other vehicle to take any notice of the fact that a dog is upon, or crossing, the track in front of the on-moving vehicle, unless there is evidence, from its position, or conduct, which gives the driver notice that the dog is either absolutely oblivious of the approach of the danger, or is so situated as to be unable to extricate itself from it.

NOTE.—As to actions for injuries to dogs by railroads and street cars, see also cases in note to *Graham v. Smith*, 40 L. R. A. 503, and the later case in this series of *Citizens' Rapid Transit Co. v. Dew*, 40 L. R. A. 518, 67 L. R. A.

Jones v. Bond, 40 Fed. 281; *St. Louis S. W. R. Co. v. Stanfield*, 63 Ark. 643, 37 L. R. A. 659, 40 S. W. 126; *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 40 L. R. A. 518, 66 Am. St. Rep. 754, 45 S. W. 790; *Detimers v. Brooklyn Heights R. Co.* 22 App. Div. 488, 48 N. Y. Supp. 23; *Jemison v. Southwestern R. Co.* 75 Ga. 444, 58 Am. Rep. 476; *Wilson v. Wilmington & M. R. Co.* 10 Rich. L. 52; *Texas & P. R. Co. v. Scott* (Tex. Civ. App.) 17 S. W. 1116; *Strong v. Georgia R. & Electric Co.* 118 Ga. 515, 45 S. E. 366; *St. Louis, A. & T. R. Co. v. Hauks*, 78 Tex. 300, 11 L. R. A. 384, 14 S. W. 691.

Defendant should not be held liable in damages for killing a dog, unless under such circumstances as to justify the conclusion that the killing was done either wilfully wantonly, or recklessly.

Dodson v. Mock, 20 N. C. 282 (4 Dev. & B. L. 146).

Mr. Thomas G. McMichael for appellee.

Montgomery, J., delivered the opinion of the court:

This action was commenced in a court of a justice of the peace for the recovery of \$50 for the killing of the plaintiff's dog by the alleged negligent operation by the defendant of one of its street cars. There were no written pleadings in the case, but upon a reading of the evidence it would appear that the plaintiff on a trial in the superior court relied upon four alleged acts of negligence: First, excessive speed of the car; second, permitting high weeds to grow upon the sides of and near the track; third, the failure to stop the car in time to avoid the collision; and, fourth, failure to equip the car with a proper fender.

We have no case in our Reports where the injury to or the killing of a dog by a railroad or street car company is made the subject of a civil action for the recovery of damages by its owner. Our statute (§ 2326 of the Code) makes it prima facie evidence of negligence on the part of a railroad company, in an action for damages against the company, whenever it appears that any cattle or other live stock shall be killed by the engines or cars running upon the railroad. The statute does not give the right, in case of injury or killing of cattle or other live stock, to the owner thereof to bring an action for his loss of property. That right the owner had before. The statute made the killing prima facie evidence of negligence. The dog is not included, of course, in the category of cattle or live stock, but is a species or subject of property recognized as such by the law, and for an injury to which an action at law may be sustained. *State*

v. *Latham*, 35 N. C. (13 Ired. L.) 33. There would be no presumption of negligence, however, by the mere fact of killing or injury being shown. In numerous cases this court has laid down the law concerning the duties of engineers in charge of moving railroad locomotives in regard to cattle and live stock on and in near proximity to the railroad track and in front of the moving cars. In *Wilson v. Norfolk & S. R. Co.* 90 N. C. 69, the court said: "If the mule ran off the road quietly, and manifested by its acts no great alarm, but a disposition to get away from the road, or if at first it stood still, off the road, until the near approach of the train, then it suddenly ran back on the road a short distance ahead of the engine and was killed, the engineer being unable to stop the train, in such case there would not be negligence, and the defendant would not be liable. But, in another view, if the mule was greatly frightened at the whistle and the train,—was panic stricken; ran about wildly and recklessly in the immediate neighborhood of the road,—and would as likely, in its fright, run on as from it, and the engineer failed to slacken the speed of the train, and the mule suddenly dashed back on the road and was killed by the engine, this would be negligence, and the defendant would be liable for damages. It may be conceded that where cattle are quietly grazing, resting, or moving near the road,—not on it,—and manifesting no disposition to go on it, the speed of the train need not be checked; but the rule is different where the cow or mule is near the road, and runs on, then off, along, near to, and back upon it. In such a case reasonable diligence and care require that the engineer shall slacken the speed, keep the engine steadily and firmly under his control, and, if need be, stop it until the danger shall be out of the way." That case is cited and approved by this court in *Snowden v. Norfolk Southern R. Co.* 95 N. C. 93, and *Ward v. Wilmington & W. R. Co.* 109 N. C. 358, 13 S. E. 926. And in *Doster v. Charlotte Street R. Co.* 117 N. C. 651, 34 L. R. A. 481, 23 S. E. 449, the court said: "Where a horse is being driven or is running uncontrolled along a highway parallel to a railway of any kind, though it give unmistakable evidence by its movements that it is alarmed at an approaching train or car, the engineer or motorman in charge is not negligent in failing to diminish the speed unless the animal is actually on the track in his front, or he has reasonable ground to believe that in its excited state it is about to go or may go upon it, so as to cause a collision." We think that the dog is not entitled to the same consideration at the hands of an en-

gineer in charge of a moving locomotive that cattle or live stock are, and that the engineer is not, therefore, compelled to keep either a vigilant lookout for dogs, or as great care in the management of his engine or train, so as to prevent their injury, as he is for cattle or live stock. However, the dog in the case before us suddenly appeared on or near the track, and manifested no fear or excitement. It is not hazarding too much to say that it is a matter of common knowledge that in the classification of animal life (not including man) the dog occupies a position in point of intelligence, fidelity, and affection superior, probably, to all of the others. He is known to have been for ages, not only an animal of prey, but wonderfully acquainted with the habits and ways of both man and beast and birds, keenly sensitive as to sight, hearing, and smell, and remarkably agile in all of his movements. He can, by training and association with man, become adept in many useful employments, and can be taught to do almost anything except to speak. They are known ordinarily to be able to take care of themselves amidst the dangers incident to their surroundings. Where a horse, or a cow, or a hog, or any of the lower animals would be killed or injured by dangerous agencies, the dog would extricate himself with safety. In a line with the foregoing observations is one in the opinion in the case of *Jones v. Bond*, 40 Fed. 281, where the court, in denying the right of recovery for the negligent killing of a dog, said: "I presume the reason that other cases of like kind have not been before the courts is that the dog is very sagacious and watchful against hazards, and possesses greater ability to avert injury than almost any other animal; in other words, takes better care of himself against impending dangers than any other. He can mount an embankment or escape from dangerous places where a horse or cow would be altogether helpless; hence the same care to avoid injuries to an intelligent dog on a railroad is not required on the part of those operating the trains that is required in regard to other animals. The presumption is that such dog has the instinct and ability to get out of the way of danger, and will do so, unless its freedom of action is interfered with by other circumstances at the time and place." We think, therefore, that the dog, on account of his superior intelligence and possession of the other traits which we have mentioned, in respect to the diligence and care which locomotive engineers owe to their owners and to them, must be placed on the same footing with that of a man walking upon or near a railroad track apparently in possession of

all his faculties, and that the engineer would be warranted in acting upon the belief that the dog would be aware of the approaching danger, and would get out of the way in time to avoid the injury. As the engineer would be negligent if he ran over and injured or killed a man on the track who was apparently helpless, so he would be if he killed or injured a dog near or upon the track in a position which showed that he was helpless, or totally oblivious of his surroundings.

In *Citizens' Rapid Transit Co. v. Dev*, 100 Tenn. 317, 40 L. R. A. 518, 66 Am. St. Rep. 754, 45 S. W. 790, the court allowed a recovery because it appeared that the dog which was killed was standing upon the track of the street railway, engaged in pointing some birds, which fact the motorman saw for a considerable distance before the car ran over the dog. Besides, we know of common knowledge that within this jurisdiction, at least, there is scarcely a household without a dog or dogs, that they are found in every street and public place, no limitation being put upon their free movements, and by the hundreds they daily pass in our cities and towns over the street railway track where and as often as they please. If, therefore, it should be required that motormen in charge of these cars should exercise the same degree of care to avoid running over a dog that the law requires of them to avoid injury to other animals, the public convenience of rapid transit in populous communities would be seriously impaired, and all business interests made to suffer. As the defendant's counsel say in their brief: "The dog would be absolute master of the situation, and would force the electric cars out of business." The true rule, we are satisfied, should be that street railway companies, when their cars are properly equipped, should not be held liable in damages for the killing of a dog by one of the street cars in motion, unless it was done under such circumstances as to justify the conclusion that the killing was done either wilfully, wantonly, or recklessly.

The undisputed evidence in this case renders it unnecessary to discuss, according to the view of the law which we have announced, either of the alleged acts of negligence except the last one, to wit, the failure to properly equip the cars with fenders. The plaintiff, in his examination in chief, had testified as to the killing of his dog and its value. He was afterwards recalled. and

then testified, over the defendant's objection, that he had measured one of the fenders on one of the cars, and found that it was 25 inches from the track on one side, and 23 inches from the track on the other side; and, further, that he saw several fenders that were about the same height from the track, and that there were three or four different kinds of fenders on the cars, and that the defendant used on the big cars a very different fender from that used on the little cars, and that it was a little car that ran over his dog. That evidence ought not to have been received. It was offered, of course, to prove that the fender upon the car that killed the dog was either improperly constructed or had been permitted to become defective, and the jury might draw the inference that, if the fender had been of standard make or in good condition, the dog would not have been killed. But it was not competent to show that the fender on the car which killed the dog was defective by evidence to the effect that a fender on one of many cars was defective or out of repair. The evidence would be too highly conjectural. Especially is this so in this case, as it appears from all the evidence that the plaintiff would have had no difficulty in identifying the car which killed the dog. The statement of the plaintiff, too, that there were several different kinds of fenders on the different cars, and that those on the big cars were very different from those on the little cars, and that one of the latter killed the dog, did not amount to evidence of any kind pertinent to the case. It did not tend to show which were the superior fenders or which were defective fenders,—those on the big cars or those on the little cars. The evidence was misleading. And, besides, the very fact, if it existed, that the defendant had three or four different kinds of fenders, would make it quite clear that evidence of one kind of fender on one of the cars should not be used to show how another car was equipped as to the fenders. The motorman testified that the fender on the car which killed the dog was in good condition, and would do its work well, and there was no evidence to the contrary. The motion of the defendant to nonsuit the plaintiff because there was no evidence tending to show negligence on the part of the defendant, ought to have been allowed.

Error.

Douglas, J., concurs in result.

NORTH DAKOTA SUPREME COURT.

STATE of North Dakota *ex rel.* Charles J. FISK

v.

E. F. PORTER, Secretary of State.

(.....N. D.....)

*Section 491, Rev. Codes 1899, which prohibits the printing of the name of a candidate for office in more than one column of the official ballot, is, as to a candidate who is the nominee of a single political party and the nominee of electors by petition, a reasonable regulation of the manner of exercising the right of suffrage, and is valid and constitutional.

(October 24, 1904.)

APPPLICATION for a writ of mandamus to compel defendant to certify relator's name to the county auditors as a candidate for office. *Denied.*

The facts are stated in the opinion.

Messrs. Charles F. Templeton, Guy C. H. Corliss, and Tracy R. Bangs for plaintiff.

Messrs. C. N. Frick, Attorney General, John F. Philbrick, Newman, Spalding, & Stanbaugh, and R. H. Bosard for defendant.

Young, Ch. J., delivered the opinion of the court:

Upon the application of the Honorable C. J. Fisk an alternative writ of mandamus issued out of this court directed to the secretary of state, and commanding him to certify relator's name to the county auditors of Grand Forks and Nelson counties as a candidate by petition for the office of judge of the district court of the first judicial district, or show cause why he has not done so. It appears from the relator's affidavit upon which the alternative writ was issued, and from the return of the secretary of state, and there is no controversy as to these facts, that the relator was regularly nominated as the Democratic candidate for said office, and on September 23, 1904, a certificate of such nomination, in due form, was filed in the office of the secretary of state; that thereafter, and on the 5th day of October, 1904, a certificate of nomination of said C. J. Fisk by petition of electors

*Headnote by **YOUNG, Ch. J.**

NOTE.—For other cases in this series as to validity of statute forbidding candidate's name to appear more than once on official ballot, see *Todd v. Election Comrs.* 29 L. R. A. 330; *State ex rel. Bateman v. Bode*, 34 L. R. A. 498; *State ex rel. Runge v. Anderson*, 42 L. R. A. 239; and *Murphy v. Curry*, 59 L. R. A. 97.

for the same office was filed in the secretary's office; that upon receipt of the latter certificate of nomination the secretary of state requested the relator to designate the column on the official ballot in which he wished his name printed, and on the same day the said C. J. Fisk, in answer to said request, demanded that his name be placed twice on the official ballot, once in the column headed "Democratic," and once in a column to be headed "A Non-Partisan Judiciary;" that because of the relator's refusal to designate a column the secretary of state certified his name as the nominee of the Democratic party, and directed his name to be placed in the column headed "Democratic" upon the official ballot and in no other, and for the reason that the Democratic nominating certificate was first filed in his office.

Under the statutes of this state the name of a candidate for office secures a place and is printed upon the official ballot when such candidate is nominated by an "assembly or convention of delegates held for the purpose of making nominations," in accordance with the provisions of § 498, Rev. Codes 1899, or when he is nominated by a petition of electors pursuant to the provisions contained in § 501, Rev. Codes 1899. Our statute (§ 491), in addition to prescribing the form and contents of the official ballot, provides for separate party columns, "under the appropriate party designation for each," in which the names of the party nominees are to be placed, also provides for one or more columns for the names of persons nominated by petition of electors under the designation "Individual Nominations." It also provides that "when the same candidate has been nominated for the same office by more than one assembly, convention, or body of electors qualified to make nominations for public officers, such candidate shall file with the proper officer . . . a statement in writing, signed by himself, designating one of the columns upon such ballot allotted to one of the parties, assemblies, conventions, or bodies of electors by whom said candidate has been nominated, as to the column upon such ballot in which such candidate desires his name to appear upon such ballot, and such candidate's name shall be printed upon such ballot in such column, but in no other. But if such candidate shall refuse or neglect to give notice to the proper officer as above provided, specifying in which column he wishes his name printed on the ballot, then in such case the said officer shall cause his name to be printed in the column of the party or political organi-

zation from which he received first notice of such person's nomination."

It thus appears that the refusal of the secretary of state to certify the nomination last filed, *i. e.*, the nomination by petition of electors, was made in obedience to the legislative command contained in § 491, *supra*, prohibiting the printing of a candidate's name upon the official ballot in more than one column; and it is argued that nominations by petition of electors, such as that here in question, is within the prohibition of this section. Counsel for relator contend that the portion of the statute which prohibits the printing of a candidate's name in more than one column is unconstitutional and void, and that it is not within the power of the legislature to deny to him the right which he asserts, *i. e.*, to have his name printed in his party column as a party candidate by virtue of his party nomination, and also in a separate column by virtue of his nomination by petition of electors. This particular provision is not peculiar to this state, and the question of its constitutionality is not a new one to the courts. It is contained in the Australian ballot laws of Wisconsin, Ohio, and Michigan, and in each of these states it has been held constitutional. *State ex rel. Runge v. Anderson*, 100 Wis. 523, 42 L. R. A. 239, 76 N. W. 482; *State ex rel. Bateman v. Bode*, 55 Ohio St. 224, 34 L. R. A. 498, 60 Am. St. Rep. 696, 45 N. E. 195; *Todd v. Election Comrs.* 104 Mich. 474, 29 L. R. A. 330, 62 N. W. 564, 64 N. W. 496. California has a provision somewhat similar. In that state it was held unconstitutional by a divided court. *Murphy v. Curry*, 137 Cal. 479, 59 L. R. A. 97, 70 Pac. 461.

These cases which are cited by counsel in support of their respective contentions will be found upon inspection to have involved questions which are not in this case. In each of the cases referred to the same candidate was the nominee of two or more political parties or organizations, and the question in each case was whether the legislature could restrict the printing of the candidate's name to one party column. The solution of that question involved a consideration of the rights of a nominee of two or more parties, the rights of political parties, and of electors as members of political parties. It will be seen that the weight of judicial opinion sustains the right of the legislature to restrict the printing of a candidate's name in such cases to one column. But we are not called upon to express an opinion on that question in this case. We have no such condition, and it will be time enough to answer that question when it is presented. The relator is the nominee of

the Democratic party, and of no other party, and the secretary of state has certified his name to the county auditors as the Democratic nominee.

The only question which can arise in this case relates to the right of the relator or of the electors who signed the petition for his individual nomination to have his name printed in a separate column under the designation "Individual Nominations" as well as in his party column. The legislature has declared that it shall be printed in but one column. Does this deprive the relator or the electors of any constitutional right? We think not. Counsel have failed to point out any provision of the Constitution which is violated, and we know of none. If the relator were the nominee of two or more political parties, and were seeking a place on each party ticket, different questions would arise, such as were considered in the cases above referred to. But here the relator is the candidate of but one party or organization, and, under the statute and the facts as they exist, his name will appear in his party column. Hence no party interests or party question is involved. The electors who have nominated him by petition represent no party or organization. They merely represent themselves as electors. *Atkeson v. Lay*, 115 Mo. 538, 22 S. W. 481. They desire to have his name printed upon the ballot, so that they can vote for him without the annoyance of having to write or print his name upon the ballot. The state has afforded to electors this privilege, where a certain percentage or number of them join in a nominating petition, but at the same time has declared that it will print them in but one column, giving to the candidate the choice of columns in which his name shall appear. All authorities recognize the right of the legislature to regulate the manner of exercising the right of suffrage. The only restriction is that under the guise of regulating it shall not destroy the right. There is no ground whatever for contending that the electors' rights are either destroyed or impaired by the refusal to print the candidate's name in more than one column in a case like this, where the candidate has one party nomination and an individual nomination. It is altogether reasonable, under such circumstances, that the state should not be compelled to print a candidate's name in more than one column. The electors who join in making an individual nomination desire to vote for the man without regard to his party affiliations. If his name were printed under the head of individual nominations as well as in the party column, in order to vote for him they would have to designate

their choice by a mark, and they are required to do nothing more where, as in this case, their candidate's name is printed in a party column. For those who desire to vote the straight Democratic ticket a single mark at the head of the ticket is sufficient. For those affiliated with other parties, or those who wish to vote a mixed ticket, a mark in the square opposite his name is sufficient, and this would be necessary even if his name

appeared in a column under the head "Individual Nominations." Considered, then, entirely from the standpoint of convenience, no burden is added in this case by restricting the candidate's name to his party column.

The writ prayed for will be denied.

Engerud, J., concurs. **Morgan, J.**, not participating.

PENNSYLVANIA SUPREME COURT.

Eugene N. ALEXANDER, *Appt.*,
v.
NANTICOKE LIGHT COMPANY.

(209 Pa. 571.)

1. A corporation which contracts to light a building by electricity undertakes to protect its occupants from injury by the electrical current, so far as it can do so, by exercising the highest degree of care, skill, and diligence in the construction and maintenance of its plant.
2. Injury to a property owner whose building an electric lighting company has contracted to light by means of an equipment furnished by itself, by the escape of a current from the wires when he attempts to turn on light at a particular lamp, raises a presumption of negligence on the part of the company, and places the burden of rebutting the presumption upon it.
3. That electricity can be safely conducted and used as an agent for production of light, heat, and power is a matter of judicial notice.

(October 10, 1904.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Luzerne County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Henry A. Fuller and Edmund G. Butler, for appellant:

Plaintiff was not required to prove that the injury was caused by the negligence of the company.

Fitzgerald v. Edison Electric Illuminating Co. 200 Pa. 540, 86 Am. St. Rep. 732, 50 Atl. 161; *Devlin v. Beacon Light Co.* 198 Pa. 585, 48 Atl. 482; *Kane v. Philadelphia*, 196 Pa. 503, 46 Atl. 893.

The electric current is a dangerous agent. The company which uses it is bound, not only to know the extent of the danger, but to use the very highest degree of care practicable to avoid injury to everyone who may be lawfully in proximity to its wires, and liable to come accidentally or otherwise in contact with them.

Fitzgerald v. Edison Electric Illuminating Co. 200 Pa. 543, 86 Am. St. Rep. 732, 50 Atl. 161; *Heh v. Consolidated Gas Co.* 201 Pa. 443, 88 Am. St. Rep. 819, 50 Atl. 994; *Com. v. Northern Electric Light & P. Co.* 145 Pa. 117, 14 L. R. A. 107, 22 Atl. 839.

Where the thing that causes the injury is under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen, the burden of proof is on the defendant.

Shafer v. Lacock, 168 Pa. 497, 29 L. R. A. 254, 32 Atl. 44; *Fisher v. Ruch*, 12 Pa. Super. Ct. 247; *Kocisch v. Philadelphia Co.* 152 Pa. 355, 18 L. R. A. 759, 34 Am. St. Rep. 653, 25 Atl. 522; *Baker v. Westmoreland & C. Natural Gas Co.* 157 Pa. 593, 27 Atl. 789; *Henderson v. Allegheny Heating Co.* 179 Pa. 515, 36 Atl. 312; *Stoughton v. Manufacturer's Natural Gas Co.* 159 Pa. 64, 28 Atl. 227; *Mooney v. Luzerne*, 186 Pa. 161, 40 L. R. A. 811, 40 Atl. 311.

The accident and attendant circumstances gave rise to a presumption of negligence.

Campbell v. Consolidated Traction Co. 201 Pa. 167, 50 Atl. 829; *Dixey v. Philadelphia Traction Co.* 180 Pa. 401, 36 Atl. 924; *Fleming v. Pittsburgh, C. C. & St. L. R. Co.* 158 Pa. 135, 22 L. R. A. 351, 38 Am. St. Rep. 835, 27 Atl. 858; *Matthews v. Pittsburgh & L. E. R. Co.* 18 Pa. Super. Ct. 10; *Oller v. Bonebrake*, 65 Pa. 338; *Alton R. & Illuminating Co. v. Foulds*, 81 Ill. App. 322;

NOTE.—On the question of negligence as to electric wires in or on buildings, see also *note* to *Griffin v. United States Electric Light Co.* 32 L. R. A. 400, and the later cases in this series of *McLaughlin v. Louisville Electric Light Co.* 34 L. R. A. 812; *Brown v. Edison Electric* 47 L. R. A.

Illuminating Co. 46 L. R. A. 745; *Griffith v. New England Teleph. & Teleg. Co.* 52 L. R. A. 919; *Griffin v. Jackson Light & P. Co.* 55 L. R. A. 318; *Phoenix Light & Fuel Co. v. Bennett*, 63 L. R. A. 219; and *Cumberland Teleph. & Teleph. Co. v. Martin*, 63 L. R. A. 469.

Zahniser v. Pennsylvania Torpedo Co. 190 Pa. 350, 42 Atl. 707.

Messrs. Woodward, Darling, & Woodward, for appellee:

This is a case in which there did not exist between the defendant company and the injured person a relation imposing upon it an absolute duty, an obligation amounting to that of an insurer.

Smith v. East End Electric Light Co. 198 Pa. 19, 47 Atl. 1123; *Fitzgerald v. Edison Electric Illuminating Co.* 200 Pa. 540, 86 Am. St. Rep. 732, 50 Atl. 161.

Proof of the happening merely of an accident is not enough to establish the alleged negligence of a defendant.

1 Thomp. Neg. p. 46, § 45; 2 Shearm. & Redf. Neg. § 576; *Whitaker v. Delaware & H. Canal Co.* 87 Pa. 34; *Goshorn v. Smith*, 92 Pa. 435; *Huey v. Gahlenbeck*, 121 Pa. 238, 6 Am. St. Rep. 790, 15 Atl. 520; *Reese v. Clark*, 146 Pa. 465, 23 Atl. 246; *Mister v. Imperial Coal Co.* 152 Pa. 395, 25 Atl. 587; *Reese v. Hershey*, 163 Pa. 253, 43 Am. St. Rep. 795, 29 Atl. 907; *Brunner v. Blaisdell Bros.* 170 Pa. 25, 32 Atl. 607; *Wojteczowski v. Spreckels' Sugar Ref. Co.* 177 Pa. 63, 35 Atl. 596; *Davidson v. Humes*, 188 Pa. 335, 41 Atl. 649; *Baran v. Reading Iron Co.* 202 Pa. 274, 51 Atl. 979.

There can be no recovery unless the plaintiff proves by affirmative evidence that the cause of the accident was one for which the defendant was liable.

Snodgrass v. Carnegie Steel Co. 173 Pa. 234, 33 Atl. 1104; *Shafer v. Lacock*, 168 Pa. 497, 29 L. R. A. 254, 32 Atl. 44; *Alexander v. Pennsylvania Water Co.* 201 Pa. 252, 50 Atl. 991; *Price v. Lehigh Valley R. Co.* 202 Pa. 177, 51 Atl. 756.

The existence of a contractual relation between the plaintiff and the defendant company did not change the status of the parties.

Leidy v. Quaker City Cold Storage & Warehouse Co. 180 Pa. 323, 36 Atl. 851; *Davidson v. Humes*, 188 Pa. 335, 41 Atl. 649.

The doctrine of *res ipsa loquitur* applies where, under the circumstances shown, the accident presumably would not have happened if due care had been exercised.

Stearns v. Ontario Spinning Co. 184 Pa. 519, 39 L. R. A. 842, 63 Am. St. Rep. 807, 30 Atl. 292; *Zahniser v. Pennsylvania Torpedo Co.* 190 Pa. 350, 42 Atl. 707; *Todd v. Second Ave. Traction Co.* 192 Pa. 587, 44 Atl. 337; *Kepner v. Harrisburg Traction Co.* 183 Pa. 24, 38 Atl. 416; *Cochran v. Philadelphia & R. Terminal R. Co.* 184 Pa. 565, 39 Atl. 296.

Mr. James L. Morris also for appellee. 67 L. R. A.

Brown, J., delivered the opinion of the court:

The premises of the appellant, the proprietor of a china store in the borough of Nanticoke, were lighted by electricity. The electric light was furnished by the appellee, an electric light company. It had wired the store and cellar of the plaintiff, furnished the electric lamps, and made and maintained the connections. On the evening of August 19, 1898, he went into his cellar to show goods to a customer, and, while handling, in the usual way, an ordinary incandescent light bulb, suspended from the ceiling by a flexible extension cord, was severely shocked and seriously injured. From the facts submitted, it appeared that when he was shocked the electric wires on his premises were charged with a higher voltage than they should have carried, but the cause of this was not shown to have been any specific negligence of the defendant. Four theories were advanced as to what the negligence was, and four possible causes assigned for the accident. The learned trial judge, having been of opinion that the doctrine of *res ipsa loquitur* did not apply, and that the burden of showing affirmatively the cause of the accident was upon the plaintiff, directed the entry of a nonsuit and refused to take it off, for the reason that, as plaintiff had not shown the cause of the accident, the jury would have had to guess at it if the case had been submitted to them.

Though electricity is the most powerful and dangerous element known to science, it has become part of the commercial, industrial, business, and domestic life of the world, working the wonders of the age. It can neither be seen nor heard, and is as deadly as it is invisible and silent; but, though such are its qualities, the same science that discovered it can control it in the endless variety of uses to which it has been put, and neither death nor danger need be encountered from it, if properly guarded against by those whose duty it is to have it safely conducted to the points at which it becomes only a useful and harmless agency. The appellee was incorporated for the purpose of furnishing light by electricity to the public and individuals in the borough of Nanticoke. It entered into a contract with the appellant to furnish him with such light, and part of its contract—the implied part—was that it would do so safely. Apart from any representation by the superintendent, who assured him, according to his testimony, that the electric light would be perfectly harmless, as there “was not power enough in it to kill a mosquito,” it was the implied contract between the appellant and the company that it would supply his prem-

ises with a safe electric current for lighting them by lamps which it furnished. By this it is not to be understood that the company became an insurer to its patron against all danger in the use of its electrical appliances on his premises, but simply that it had contracted with him to protect him from injury by exercising the highest degree of care, skill, and diligence in the construction and maintenance of its plant and appliances. In *Fitzgerald v. Edison Electric Illuminating Co.* 200 Pa. 540, 86 Am. St. Rep. 732, 60 Atl. 161, in which a painter went upon the roof of a house in the lawful exercise of his business, and was killed by coming into contact with a defectively insulated wire, we said, through the present chief justice: "Wires charged with an electric current may be harmless, or they may be in the highest degree dangerous. The difference in this respect is not apparent to ordinary observation, and the public, therefore, while presumed to know that danger may be present, are not bound to know its degree in any particular case. The company, however, which uses such a dangerous agent, is bound, not only to know the extent of the danger, but to use the very highest degree of care practicable to avoid injury to everyone who may be lawfully in proximity to its wires, and liable to come accidentally or otherwise in contact with them. The defendant, in accord with the common practice of electric companies, recognized this obligation by insulating its dangerous wire. But the duty is not only to make the wire safe by proper insulation, but to keep it so by constant oversight and repair." That it is the imperative duty of an electric light company to perfectly insulate its wires at all points where persons have a right to be, on business or pleasure, and to use the utmost care to keep the insulation perfect, has been repeatedly held in other jurisdictions. Among the cases announcing this rule are *Schweitzer v. Citizens' General Electric Co.* 21 Ky. L. Rep. 608, 52 S. W. 830; *McLaughlin v. Louisville Electric Light Co.* 100 Ky. 173, 34 L. R. A. 812, 37 S. W. 851; *Geismann v. Missouri-Edison Electric Co.* 173 Mo. 654, 73 S. W. 654; *Lexington R. Co. v. Fain*, 24 Ky. L. Rep. 1443, 71 S. W. 628. But when, as here, one on his own premises handles an electric lamp furnished to him by an electric light company for the very purpose of being handled as a means of getting light, the high standard of duty required of the company is that it must, in the operation of its plant, protect its patrons from the perilous current which is the basis of its business, by doing all that human care, skill, and vigilance can suggest.

When the foregoing rule is observed by
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an electric light company, the presumption is that no such injury will befall its patrons as was sustained by the present appellant; but, on the other hand, when such injury does occur, the presumption is that the rule had been disregarded. This is manifestly reasonable, for it is within the common knowledge of mankind, and therefore a matter of judicial notice, that electricity can be safely conducted and used as an agent for the production of light, heat, or power. The rule on this subject is nowhere more clearly stated than in *Scott v. London & St. K. Docks Co.* 3 Hurlst. & C. 596: "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanations by the defendants, that the accident arose from want of care."

To say that one injured as the appellant was cannot recover unless he affirmatively proves, in the first instance, the specific act of negligence of the company which caused the injury, would in many cases be a denial of a right to recover at all, no matter how negligent the company might be. Against patent dangers, or against those as to which he may have been warned, the user of electricity must, of course, guard himself, and, if he dallies with them,—taking hold, by way of illustration, of an appliance emitting sparks, or handling an uninsulated wire after having been warned not to do so,—he voluntarily places himself in peril, and cannot recover, if injured; but when, as here, no danger was seen, and there was no reason to think it was lurking in the company's appliances, its patron took the lamp in his hand, and was severely shocked and injured, the only reasonable presumption instantly is that something was wrong, over which the company had exclusive control. The user of electricity, though having knowledge of its dangerous character, has no knowledge of how this danger can be controlled. He relies upon the company to control it, and when this appellant took the lamp in his hand he had a right to do so without a thought that it had not been controlled. What did he know of what it was necessary for the company to do, as a dealer in electricity, to protect its customers from the danger of its commodity? He is not presumed to know anything. As a rule, the man who takes in his hand an electric lamp or telephone receiver, starts an electric fan, or uses any other appliance which he has a right to use under his contract with an electric company, is helpless if the invisible and dangerous current has not been properly con-

trolled by the company's officers and employees, who are conclusively presumed to know how to control it.

One of the cases cited by appellant in support of his contention that there was a presumption of appellee's negligence, which it was bound to rebut, is *Alton R. & Illuminating Co. v. Foulds*, 81 Ill. App. 322. There the wife of the plaintiff below went into a cellar to turn on an electric light, and, on taking hold of the lamp, received a shock and was killed. At the trial the plaintiff did not show by any specific evidence how the increased voltage that caused his wife's death had got on the wire. In affirming the judgment on the verdict in his favor, the court said: "When appellant wired the basement or cellar of appellee's house, and agreed to furnish him light for hire, it well knew it was dealing in an element that, delivered in a current of high voltage, such as was carried on its primary wires, was almost certain to bring death to the person who turned on the lamp, if there was a ground of the current on the circuit; hence the law imposes upon it the duty to exercise a high degree of care and skill in the delivery of the element it had contracted for. If the injury itself furnishes a presumption of negligence, so as to require the defendant to show by evidence that it has been guilty of no negligence that caused it, then it logically follows that all that is necessary to be averred in the declaration to entitle the plaintiff to recover . . . is the agreement, a negligent breach of it, and the result; also that the plaintiff has not by any neglect on his part contributed to the result." There are a number of cases upon which the appellant could place greater reliance as to the high degree of care required of an electric light company, and as to the presumption of negligence in case of injury to its patrons in the ordinary use of its appliances, but reference will be made to only two of them:

In *Denver Consol. Electric Co. v. Lawrence*, 31 Colo. 301, 73 Pac. 39, which was an action against the company for injuries caused by an electric shock to plaintiff while turning on a light in his home, in holding that it was proper to charge that the plaintiff was not required to point out the specific negligence which caused the accident, the court said: "Ordinarily the allegations of duty and a breach thereof are not sufficient, but, if the duty results from the facts stated, then the allegations of duty may be discarded as surplusage, and the complaint held to be sufficient. If the allegations of the complaint concerning the relationship of the parties and the character of the injuries received make out a prima facie case of lia-

bility, then the complaint is good as against a general demurrer. We think the complaint does, from the very character of the accident as set forth therein, call upon the defendant to make defense to the case of negligence in supplying electricity to the residence, which the facts, as charged, make out. The business of the defendant is that of selling electricity to the people of Denver, —a business so fraught with peril to the public that the highest degree of care which skill and foresight can obtain, consistent with the practical conduct of its affairs under the known methods and present state of its particular art, is demanded. *Denver Consol. Electric Co. v. Simpson*, 21 Colo. 371, 31 L. R. A. 566, 41 Pac. 499. The plaintiff while attempting to do that which every patron of the company must do to make use of the electric light, received into his body a current of electricity, burning his hands and feet and permanently injuring him. Such injuries are not, under ordinary circumstances, received by persons who turn on an incandescent lamp, if the company supplying the current has not been negligent. The defendant, when it contracted with the father of the plaintiff to sell electricity for light, contracted to keep its plant and appliances in such condition that no greater volume of electricity would be carried into the house than was necessary for its proper lighting. The quantity of electricity required for lighting purposes in residences is not sufficient, if it pass through the body, to cause the injuries described by the plaintiff in his complaint. It follows, therefore, that the plaintiff must have received a very much greater quantity of electricity than the company contracted to supply. The court therefore did not err in overruling the demurrer to the complaint, nor in overruling the objections to the introduction of testimony. The company insists that it is not an insurer, and that its obligation is that of using ordinary care. We are not prepared to say that it is an insurer, but the patrons of the company have the right to presume that they will not be injured in attempting to use that which the company sells, and that it will do all that human care, vigilance, and foresight can reasonably do, consistent with the practical operation of its plant, to protect those who use its electric light."

The other case is *Royal Electric Co. v. Heye*, Rap. Jud. Quebec, 11 B. R. 436. The facts in that case are singularly analogous to those in the present one; and there, as here, on the trial, different theories were advanced as to the specific negligence of the company which caused the injury. One was accepted by the court below as correct, but

the appellate court thought another more probable. The case, however, was disposed of without regard to either: Hall, J., delivering the judgment of the court of King's bench, saying: "But in my opinion, it is a matter of indifference, legally speaking, where this current originated. The appellants should be held responsible for it under any circumstances. They deal in a commodity of a recognized dangerous character, the control of which is a matter of technical knowledge and experience, and entirely uncomprehended by the general public. When a company like the appellants' organized under the name of an electric company, hold themselves out to the public as dealers in and suppliers of that commodity, for gain, and make contracts with private individuals for furnishing light or power over a system constructed and controlled by themselves, they are bound to deliver it in a form and under conditions of safety for the person and property for whose use the company charge and receive compensation; and they are also bound, in the discharge of their part of the contract, to a supervision and diligence proportionate to the peculiar character and danger of the commodity in which they deal. In the case under consideration, the electric company not only had stipulated, but had exercised the right of supervision of their system within the premises of the deceased. As to that portion of the system outside of his premises, no one but their own employees had even the right of examination or interference. If their transformer was defective, or could become dangerous from the moisture of an ordinary rain storm, it was their business to have discovered and removed the cause of danger. If their system of wiring came within an inch of the wire of another company,—even if on a dead wire,—common prudence would have suggested their interference, either by

a protest against the other company, or by the removal of their own wires, while it is in evidence that the proximity of the two systems had existed for months prior to this accident. The fact that guy wires become, from accident, live wires of the most dangerous character, is one, unfortunately, of too frequent occurrence to be overlooked or ignored in the exercise of the constant supervision which an electric system exacts, and which the public has the right to enforce. The implied contract between the appellants and deceased was that they should supply his premises with a safe electrical current for lighting purposes by the lamps which they furnished. They failed in this respect, and in the use of their lamp he received a current of electricity by which he was instantaneously killed. The presumption is that it came over the same system and from the same source as that by which his ordinary supply was delivered to him by appellants. The burden of proof is upon them to show the contrary. This they have failed to do, and the judgment holding them responsible for the accident should be confirmed." To these utterances, reason responds, and they must therefore be the law.

The presumption that the appellee was negligent is not conclusive. The accident may have been due to causes over which it had no control, and, if so, not being an insurer, it is not liable. But the presumption is that it was blamable, and it can escape liability for appellant's serious injury only by persuading a jury that it had performed its duties as we have here defined them.

As the burden was upon the defendant to show that it had not been negligent, the last assignment of error is sustained. The rest need not be considered.

Judgment reversed and procedendo awarded.

RHODE ISLAND SUPREME COURT.

Mary F. DOW
v.

NATIONAL INSURANCE COMPANY OF
IRELAND.

(.....R. I.....)

A policy of insurance on the furniture of a house is void in toto if a large part of the furniture has been purchased on the

instalment plan and is not paid for, and the policy provides that it shall be void if the interest of the assured is other than unconditional and sole ownership.

(September 13, 1904.)

ON PETITION by defendant for new trial after verdict in plaintiff's favor in an action brought to recover the amount alleged

NOTE.—For a case in this series very similar to the one above, holding that a purchaser of property on the instalment plan is not the sole and unconditional owner thereof, and that in case of a policy on furniture so purchased the invalidity of the policy as to a portion thereof renders the entire policy void, see Du-67 L. R. A.

mas v. Northwestern Nat. Ins. Co. 40 L. R. A. 358.

For another case denying that title of one to property purchased on instalment plan is sole and unconditional, see Westchester F. Ins. Co. v. Weaver, 5 L. R. A. 478.

to be due on a policy of fire insurance. *Judgment in defendant's favor.*

The facts are stated in the opinion.

Messrs. John A. Tillinghast and James E. Smith for defendant.

Messrs. Henry F. Thompson and Thomas F. Farrell, for plaintiff:

It is not the fact that the interest of the assured is other than sole and unconditional that renders void the policy, but the withholding of that knowledge from the insurer. Plaintiff informed the agent of the company at the time she applied for the policy that some of the goods she owned, and a portion she had on instalment. In possession of this information, the company executed and delivered the policy in question and accepted the premium.

An insurance company will not be permitted to take advantage of a condition contained in a policy to avoid payment of loss when the facts rendering the policy void by its terms were known to the insurer at the time it issued the policy and accepted the premiums.

Elliott, Ins. § 188; Hartford F. Ins. Co. v. Ross, 23 Ind. 179, 85 Am. Dec. 452; *Wood, Fire Ins. § 497; May, Ins. § 497; Kerr, Ins. p. 714; Liverpool & L. & G. Ins. Co. v. Ende*, 65 Tex. 119.

Stiness, Ch. J., delivered the opinion of the court:

The question raised in this case is the validity of the policy, which covered household furniture of every description in the house occupied by the plaintiff. The policy is the standard form, as provided in Gen. Laws 1896, chap. 183, and contains a clause that the policy shall be void if the interest of the insured be other than unconditional and sole ownership, unless other ownership be assented to in writing. It is admitted that a considerable portion of the furniture was owned by others than the plaintiff, she holding it under what is called the instalment plan.

The plaintiff claims the right to recover on what she owned herself, and had a verdict under an instruction to that effect, to which the defendant takes exception. The condition of the policy is plain, and the breach of it is admitted. Ownership is an important element in a contract of insurance. As said by Marshall, Ch. J., in *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25, 7 L. ed. 335: "Underwriters do not rely so much upon the principals as on the interest of the assured; and it would seem, therefore, 67 L. R. A.

to be always material that they should know how far this interest is engaged in guarding the property from loss." Accordingly, when insurance is contracted upon property as a whole, it is no answer to say that the insured owned a part of it. A new element would be introduced into the contract. We cannot say that the contract would have been made as it was, or even at all, if the fact had been known that only a small part of the property belonged to the plaintiff. Such a fact is deemed to be so important that it is no longer merely a provision of contract, but of statute, for the statute prescribes the clause in question. The terms of it apply to the policy as a whole. The policy is made void, not void simply as to the part of the property in which there may not be absolute ownership and valid as to the rest. We see no room for such a construction of the terms of the policy.

In *Westchester F. Ins. Co. v. Weaver*, 70 Md. 536, 5 L. R. A. 478, 17 Atl. 401, 18 Atl. 1034, where one point raised in the case involved the ownership of a piano, which the assured held under an instalment agreement, with condition to pay the full value in case of destruction by fire, a stronger case than this, the court said: "The terms of the policy required him (the insured) to be the unconditional owner at the time of the insurance, and this, it appears, he was not."

The question was not raised in that case whether the policy was void as a whole, but the following cases are to the effect that a false statement as to the ownership of a part avoids the policy: *Cuthbertson v. North Carolina Home Ins. Co.* 96 N. C. 480, 2 S. E. 258; *East Texas F. Ins. Co. v. Brown*, 82 Tex. 631, 18 S. W. 713; *J. B. Ehrsam Mach. Co. v. Phenix Ins. Co.* 43 Neb. 554, 61 N. W. 722; *Home Ins. Co. v. Smith* (Tex. Civ. App.) 29 S. W. 264; *Waller v. Northern Assur. Co.* 2 McCrary, 637, 10 Fed. 232; *Mullin v. Vermont Mut. F. Ins. Co.* 54 Vt. 223; *Mt. Leonard Mill. Co. v. Liverpool & L. & G. Ins. Co.* 25 Mo. App. 259; *Catron v. Tennessee Ins. Co.* 6 Humph. 176.

We are of opinion that the refusal to charge that the policy was void was error, and, as this is conclusive of the plaintiff's right to recover, the case is remitted to the Common Pleas Division, with direction to enter judgment for the defendant.

Petition for rehearing denied.

SOUTH CAROLINA SUPREME COURT.

R. M. HAYS *et al.*, *Respts.*,
v.

WESTERN UNION TELEGRAPH COM-
PANY, *Appt.*

(.....S. C.....)

1. Change of the stated price in a telegram intended to notify a purchaser of the market price of mules so as apparently to quote them at \$10 a head less than their market price, which results in the sendee's directing the purchase of a certain number on his account, will render the telegraph company liable for the difference in the price paid and that stated in the telegram as delivered.
2. A nonsuit should not be granted in an action for breach of contract correctly to transmit a telegram, upon the ground that the action was not brought within the time limited by the conditions of the blank on which the message was written, since plaintiff has a right to prove waiver of such condition or estoppel to rely on it.
3. A local agent of a telegraph company, intrusted with the duty and responsibility of getting up all possible information with respect to claims for damages because of breach of contract to transmit messages, has power to bind the company by a waiver of a condition as to time within which the claim must be presented.
4. Seeking further information as to the merits of a claim against a telegraph company for damages for breach of a contract to transmit a message, long after receipt of verbal notice of it, and eight or ten days after receiving written notice, without disclosing any intention to rely on the fact that the claim was not presented in time, constitutes a waiver of that defense.

(Gary, A. J., *dissents.*)

(October 4, 1904.)

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Greenwood County in favor of plaintiffs in an action brought to recover damages for failure correctly to transmit a telegram. *Affirmed.*

The facts are stated in the opinion.

Messrs. Evans & Finley for appellant.

Messrs. Sheppards & Grier, for respondents:

The agent of the company could, on behalf of the company, waive the condition as to time of presenting claim.

Wilson v. Commercial Union Assur. Co. 51 S. C. 540, 64 Am. St. Rep. 700, 29 S. E. 245; *Hinkle v. Southern R. Co.* 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348; *Graham v. American F. Ins. Co.* 48 S. C. 224, 59 Am. St. Rep. 707, 26 S. E. 323; *Norris v. Hartford F. Ins. Co.* 57 S. C. 366, 35 S. E. 572.

There are many cases in which the profit to be made in the bargain is the only thing purchased, and in such cases the amount of such profit is, strictly speaking, the measure of damages.

Wood's Mayne, Damages, p. 82; *Hale, Damages*, p. 268; 5 Am. & Eng. Enc. Law, p. 32; *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81; *Jenkins v. Charleston Street R. Co.* 58 S. C. 373, 36 S. E. 703; *Copeland v. Western Assur. Co.* 43 S. C. 26, 20 S. E. 754; *Gandy v. Orient Ins. Co.* 52 S. C. 224, 29 S. E. 655; *McBryde v. South Carolina Mut. Ins. Co.* 55 S. C. 589, 74 Am. St. Rep. 769, 33 S. E. 729.

It is a question of fact for the jury to determine whether waiver has or has not been made in any case from the evidence in the case.

Hollings v. Bankers' Union, 63 S. C. 192, 41 S. E. 90.

The waiver need not be and seldom is expressed, but may be implied from conduct.

Wabash R. Co. v. Brown, 152 Ill. 484, 30 N. E. 273; *Hess v. Missouri P. R. Co.* 40 Mo. App. 202; *Illinois C. R. Co. v. Bogard*, 78 Miss. 11, 27 So. 879; *Hinkle v. Southern R. Co.* 126 N. C. 932, 78 Am. St. Rep. 685, 36 S. E. 348; *Harned v. Missouri P. R. Co.* 51 Mo. App. 482; *Rice v. Kansas P. R. Co.* 63 Mo. 314; *Hudson v. Northern P. R. Co.* 92 Iowa, 231, 54 Am. St. Rep. 550, 60 N. W. 608; *Gandy v. Orient Ins. Co.* 52 S. C. 227, 29 S. E. 655; *Kingman v. Lancashire Ins. Co.* 54 S. C. 603, 32 S. E. 762.

A verbal statement of this loss on account of the error in the message was made to the agent of the company in a short time after the message was received, and no objection was made that it was verbal.

Hudson v. Northern P. R. Co. 92 Iowa, 231, 54 Am. St. Rep. 554, 60 N. W. 608.

The provision as to time limit is void.

25 Am. & Eng. Enc. Law, p. 788; *Western*

NOTE.—As to measure of damages for delay or failure to deliver telegram relating to business transactions, see also cases in note to *Western U. Teleg. Co. v. Brown*, 2 L. R. A. 766, and the later cases in this series of *Alexander v. Western U. Teleg. Co.* 3 L. R. A. 71; *Pepper v. Western U. Teleg. Co.* 4 L. R. A. 660; *Postal Teleg. Cable Co. v. Lathrop*, 7 L. R. A. 474; *Western U. Teleg. Co. v. Collins*, 10 L. R. A. 67 L. R. A.

515, and note; *Western U. Teleg. Co. v. Wilson*, 22 L. R. A. 434; *Fererro v. Western U. Teleg. Co.* 35 L. R. A. 548; *Fergusson v. Anglo-American Teleg. Co.* 35 L. R. A. 554; *Western U. Teleg. Co. v. Eubank*, 36 L. R. A. 711; *McPeck v. Western U. Teleg. Co.* 43 L. R. A. 214; *Western U. Teleg. Co. v. Nye & S. Grain Co.* 63 L. R. A. 803.

U. Teleg. Co. v. Eubanks, 100 Ky. 591, 36 L. R. A. 711, 66 Am. St. Rep. 361, 38 S. W. 1068; *Francois v. Western U. Teleg. Co.* 58 Minn. 252, 25 L. R. A. 406, 49 Am. St. Rep. 507, 59 N. W. 1078; *Wallingford v. Columbia & G. R. Co.* 26 S. C. 267, 2 S. E. 19; *Johnson v. Charleston & S. R. Co.* 55 S. C. 152, 44 L. R. A. 645, 654, 32 S. E. 2, 33 S. E. 174.

Woods, J., delivered the opinion of the court:

The plaintiffs, R. M. Hays & Brother, were dealers in horses and mules at Greenwood, South Carolina. A. C. Hays, the junior partner, was sent to the St. Louis stock market, with the understanding that he should purchase only after he had telegraphed prices, and received instructions from his senior, R. M. Hays. On January 1, 1901, A. C. Hays delivered to the defendant, the Western Union Telegraph Company, in St. Louis, for transmission to R. M. Hays at Greenwood, a telegram in these words: "Fourteen half hands, ninety-five; fifteen hands, one hundred and five; fifteen half hands, one hundred seventeen fifty; pair for self, sixteen hands, two sixty,—all little less quality than before." As delivered to R. M. Hays, the telegram read "one hundred and seven fifty," instead of "one hundred and seventeen fifty," as written; and R. M. Hays was thus led to believe that mules 15½ hands high could be bought for \$107.50, instead of \$117.50. Acting on this impression, he telegraphed his partner to buy 24 mules of that size. R. M. Hays testified he was induced by the price to purchase mules of 15½ hands, instead of the cheaper mules of 15 hands, and that he could have sold in Greenwood the cheaper mules at about the same price; the market price there for the two classes of mules being about the same. The plaintiffs claimed of the defendant damages of \$10 for each of the 24 mules purchased, being the difference between the price stated in the telegram as delivered and the price actually paid. In sending the messages, plaintiffs agreed to the printed contract: "That the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." The claim was not presented in writing until more than sixty days had elapsed.

The defendant moved for a nonsuit: First, because there was no proof of any direct loss to the plaintiffs arising from the mistake of transmitting the telegram, but only of loss of profits: and, second, because plaintiffs did not present claim in writing

within sixty days after the filing of the message for transmission, as stipulated in his agreement. The refusal of the motion for a nonsuit is made the first ground of appeal.

In *Howard v. Stillwell & B. Mfg. Co.* 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500, the Supreme Court of the United States, after stating the rule that contingent or remote profits are not recoverable, says: "But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into." The general doctrine is well expressed in *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718: "The broad general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract,—that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed." See also *Jenkins v. Charleston Street R. Co.* 58 S. C. 373, 30 S. E. 703. The principle thus clearly stated is generally recognized, but there is often great difficulty in its application. In the case now under consideration, the telegram which defendant undertook to transmit indicated on its face the purpose to give information of the price of live stock by size, for the word "hands," as a term of measurement, is not usually applied otherwise. Such a message also gives notice that it will be used as a basis of business action or nonaction, and that loss or profit is liable to result. Indeed, the sole purpose of such telegrams is obviously to make profit by purchase and sale, and this purpose was within the understanding of the plaintiffs and the telegraph company when it undertook to deliver the message. Accordingly, the rule as to telegraph companies is thus stated in 27 Am. & Eng. Enc. Law, 2d ed. p. 1069: "When a message announcing prices, sent in contemplation of a trade, is erroneously transmitted, the party injured through acting upon the

erroneous message may recover the amount of his actual loss caused by the decrease in the price he obtained, or, in case he is a purchaser, the increase in price he is obliged to pay in consequence of the error." *Western U. Teleg. Co. v. Dubois*, 128 Ill. 248, 15 Am. St. Rep. 109, 21 N. E. 4. These views are not inconsistent with *Sitton v. MacDonald*, 25 S. C. 68, 60 Am. Rep. 484, where the profits claimed were not in the contemplation of the parties; nor with *Mood v. Western U. Teleg. Co.* 40 S. C. 524, 19 S. E. 67, where the special damages were held not sufficiently alleged; nor with cases like *Western U. Teleg. Co. v. Hall*, 124 U. S. 444, 31 L. ed. 479, 8 Sup. Ct. Rep. 577, where there was failure to deliver the telegram, and hence no purchase based thereon, leaving it entirely conjectural whether the plaintiff would have purchased if the telegram had been delivered, and would have subsequently sold on the rising market. Here there was evidence of an actual purchase on the faith of the telegram, and an actual loss of a profit which would have been made if the telegram had been correctly transmitted. In *Wallingford v. Western U. Teleg. Co.* 53 S. C. 410, 31 S. E. 275, the facts were entirely different, and that case is applicable only by analogy. There the defendant demurred to a complaint for damages, which alleged sale of a car load of mules would have been directed by one partner in answer to a telegram from another stating offer of purchase, if the telegram had been delivered; whereas, by reason of the failure to deliver the telegram, the firm was forced to hold the mules for some time at considerable expense, and then to sell for less than the price mentioned in the telegram. The mules were at Sheridan, Indiana, and the undelivered telegram related to an offer in that market. The court said: "The measure of damages in such a case as this is the difference between the market value of such mules on same terms at the time the message should have been delivered, and the price offered, in case such market value was less than the price offered. By market value is meant the price that could have been obtained in open market on fair competition on similar terms at Sheridan, Indiana, or, if there was no market price there, at any convenient market for mules, where there was at the time a market price." It is not necessary that the plaintiff should bring home to the defendant knowledge of the market conditions. In the case now under consideration, the market price of the mules in St. Louis, given in the telegram as delivered, was \$10 less for each mule than the actual market price in St. Louis, which plaintiffs had to

pay. There was evidence to the effect that plaintiffs would not have bought the mules they did buy if the telegram had been correctly transmitted, but would have bought the smaller mules at a price \$10 lower for each, which would have answered the same purpose in the conduct of the plaintiffs' business, as they were worth in the Greenwood market, where they were to be sold, as much as the larger mules. This means that the plaintiffs paid out \$240 on the faith of the telegram, and that they derived no substantial profit or advantage from the payment of this sum. Therefore, whether we regard the effect on the plaintiffs as a loss of profit, or the fruitless expenditure of money on the faith of the telegram, the result is the same. The difference in the price paid and the price stated in the telegram as delivered was, under the facts of this case, the true measure of damages.

The nonsuit could not have been granted on the second ground, because the plaintiffs had the right to prove in reply waiver or estoppel as to the stipulation that the claim should be presented in writing within sixty days. *Copeland v. Western Assur. Co.* 43 S. C. 26, 20 S. E. 754.

The charge of the circuit judge on the subject of profits was in accordance with the views above expressed in considering the motion for nonsuit, and was therefore not erroneous. The circuit judge refused the motion to direct a verdict, made on the ground that it was affirmatively proved that the claim had not been presented in writing within sixty days, and that there was no evidence of waiver. The jury were instructed that the contract requiring the claim to be presented in writing within sixty days was valid, and they were left to decide whether there was sufficient evidence of waiver of the stipulation. The question is, whether there was any evidence of waiver, for if there was no such evidence the jury should have been instructed to find for the defendant. Waiver is a voluntary relinquishment of a known right, and it does not require a new contract upon consideration to be effectual against the stipulation that the claim should be presented within sixty days. *Kingman v. Lancashire Ins. Co.* 54 S. C. 599, 32 S. E. 762. The transactions relied on as constituting waiver were altogether between the plaintiffs and Calhoun, the agent of the defendant at Greenwood, and hence it is necessary to determine how far the defendant should be bound by his course of conduct. A mere local telegraph operator, whose duty is confined to the receipt, delivery, and transmission of messages, cannot bind his principal by waiving its rights as to claims pre-

sented against it. *Gulf, C. & S. F. R. Co. v. Brown* (Tex. Civ. App.) 24 S. W. 918; 13 Am. & Eng. Enc. Law, p. 392; 4 Elliott, Railroads, § 1524. This is in accord with analogous cases in this state. *Petrie v. Columbia & G. R. Co.* 27 S. C. 63, 2 S. E. 837; *Garrick v. Florida C. & P. R. Co.* 53 S. C. 448, 69 Am. St. Rep. 874, 31 S. E. 334. In this case, Calhoun describes himself as "manager of the Western Union Telegraph Company at Greenwood." While too much importance should not be attached to an official designation, he testifies to the important fact that the company intrusted to him the duty and responsibility of getting up all possible information in such cases. After this claim was presented in writing, the company corresponded with him about it, but gave no special instructions to obtain further information. This correspondence furnished ample opportunity for the company to notify him not to exercise his usual duty of obtaining additional information from the plaintiffs. In the absence of such instructions, Calhoun was fully justified in acting on his general authority to seek information as to the merits of the claim as agent of the company, and defendant will be chargeable with the result of his action in that regard.

Waiver of contracts of forfeiture similar to this have been placed on several different grounds: (1) If some statement of proof has been furnished indicating the nature and grounds of the claim within the time prescribed, good faith requires notice of the defect relied on, so that it may be remedied in time, and failure to give such notice is waiver of the defect. *McBryde v. South Carolina Mut. Ins. Co.* 55 S. C. 589, 74 Am. St. Rep. 769, 33 S. E. 729; *Davis Shoe Co. v. Kittanning Ins. Co.* 138 Pa. 73, 21 Am. St. Rep. 904, 20 Atl. 838; *Rheims v. Standard F. Ins. Co.* 39 W. Va. 672, 20 S. E. 670. (2) The party to be charged waives the forfeiture if, with knowledge of all the facts, he requires the claimant to do some act or incur some trouble or expense inconsistent with the position that the contract had become inoperative in consequence of the breach of its conditions. *Madsen v. Phœnix F. Ins. Co.* 1 S. C. N. S. 24; *Kingman v. Lancashire Ins. Co.* 54 S. C. 603, 32 S. E. 762; *Trippe v. Provident Fund Soc.* 140 N. Y. 23, 22 L. R. A. 432, 37 Am. St. Rep. 529, 35 N. E. 316; *Hudson v. Northern P. R. Co.* 92 Iowa, 231, 54 Am. St. Rep. 550, 60 N. W. 608. In this proposition there is also the element of estoppel, and it is applicable to all contracts for forfeiture. (3) Where the statement or proof is presented after the time limited by the contract, and the claimant thereafter does nothing, and

incurs no expense or trouble in consequence of any demand of the party to be charged, yet waiver of the form of the claim and of the time limit will be implied, if the statement or proof is retained and considered on its merits, without notice that the time limit, or a lack of written demand in proper form, will be relied on. *McBryde v. South Carolina Mut. Ins. Co.* 55 S. C. 593, 74 Am. St. Rep. 769, 33 S. E. 729; *Western U. Teleg. Co. v. Stratemeyer*, 6 Ind. App. 125, 32 N. E. 871; *Illinois C. R. Co. v. Bogard*, 78 Miss. 11, 27 So. 879; *Wabash R. Co. v. Brown*, 152 Ill. 484, 39 N. E. 273; *Commercial Union Assur. Co. v. Hocking*, 115 Pa. 407, 2 Am. St. Rep. 562, 8 Atl. 589.

It is to be borne in mind that stipulations as to the form of such claims and the time within which they shall be presented do not relate to the merits. They do not affect the consideration or condition upon which liability or risk is assumed, nor are they contracts of exemption from particular risks or liabilities. These things—the consideration, the exemption from liability, and the conditions of liability—form the very basis of the contract, and are of its substance, and it is not reasonable to suppose known rights as to them will be lightly relinquished. Therefore, in many such cases waiver is based on the fact that the claimant has changed his position as a result of the conduct of the party to be charged. In this view it was held in *Joye v. South Carolina Mut. Ins. Co.* 54 S. C. 375, 32 S. E. 446, that the promise of the president of an insurance company to pay the loss did not constitute waiver, as it was followed by another letter, denying liability because the consideration of the policy had not been paid; no change in the condition of the insured having taken place in the meantime. On the contrary, provisions as to the form of claims and the time of presentation are intended only to secure the orderly conduct of the business of the company by giving it an opportunity to investigate while the facts may be ascertained, and hence any indication given to the claimant of its election to consider the claim on its merits will be regarded evidence of waiver. There was evidence here that before the expiration of sixty days the plaintiffs notified defendant's agent and manager at Greenwood of the loss, and that they would hold the company liable unless it should turn out that Calhoun, the Greenwood agent, had made a mistake. In these circumstances, long after the verbal notice, and when the telegraph company had had the written claim in hand eight or ten days, Calhoun, on behalf of the company, sought of the plaintiffs further

information about the merits of the claim. The evidence does not disclose any expression of intention to claim the time limit during these negotiations, or at any time until the answer was filed. The failure of the defendant to object that the first notice was not in writing, its subsequent receipt and retention of the written claim without objection after the time had expired, and the request for further information as to the merits while it had the written claim in hand, taken together, furnished evidence of waiver sufficient to go to the jury.

Under the views above expressed as to the scope of the duties and responsibilities imposed by defendant on Calhoun, its Greenwood agent, it was manifestly competent for the plaintiffs to prove the notice and presentation to him of the claim, and his demand for information concerning it.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

Gary, A. J., dissenting:

This is an action for damages alleged to have been sustained by the plaintiffs on account of an error in the transmission of a telegram. At the time hereinafter mentioned, the plaintiffs conducted the business of a general sale stables for the sale of horses and mules at Greenwood, South Carolina. On the 18th of January, 1901, A. C. Hays delivered to the defendant at East St. Louis the following telegram, to be transmitted to R. M. Hays, the other member of the firm, to wit: "Fourteen half hands, ninety-five; fifteen hands, one hundred and five; fifteen half hands, one hundred and seventeen fifty; pair for self, sixteen hands, two sixty,—all little less quality than before." The defendant erroneously, however, sent the following telegram to R. M. Hays: "Fourteen half hands, ninety-five; fifteen hands, one hundred and five; fifteen half hands, one hundred and seven fifty; pair for self, sixteen hands, two sixty,—all little less quality than before." R. M. Hays telegraphed to A. C. Hays: "Buy twenty-four mules. Fifteen, two hands; pair sixteen hands for farm. Get nice colors, fully half mare mules. Give Thomson preference. Wire when ship." The mules were purchased, shipped to Greenwood, and sold by the plaintiffs.

On cross-examination, R. M. Hays testified as follows:

Q. When you speak of your loss being so much, what do you mean by that; is that you made that much less than you expected to make?

A. I didn't mean that. I meant to say that I could have used fifteen hand mules

and sold the same mules at the price they were bought at.

Q. Did you, as a matter of fact, lose a dollar on this car load of mules?

A. I couldn't state that as a fact.

Q. Would you say you lost a dollar?

A. No, sir, I never figured it out. I stated this: I said that fifteen hand mules at \$105 sold for the same money on the market as fifteen and one-half hand mules.

The jury rendered a verdict in favor of the plaintiffs for \$240.

The appellant's ninth exception assigns error on the part of his honor, the presiding judge, as follows: "In charging the jury in accordance with the second, third, fourth, and fifth requests of the plaintiffs, that profits which are direct and immediate fruits of a contract may be recovered; the errors being that the contract out of which the profits might have come was not before the court for consideration, and that there was no pretense or claim on the part of the plaintiffs that they had actually lost anything by giving \$117.50 per head for the mules, but only that they had failed to make what they would have made by buying them at \$107.50." Those requests are as follows: "(2) Profits which are the direct and immediate fruits of a contract can be recovered. There are many cases in which the profits to be made by the bargain is the only thing purchased, and in such cases the amount of such profits is the measure of damages. (3) Where the profits are the direct and immediate fruits of the contract, they are free from the objection of being speculative, and can be recovered. (4) Whenever it is shown by the evidence that a telegraph company has by its fault in the transmission of a message caused the sender to fail to make some gain or profit which he otherwise would have made, and the amount thereof is shown with certainty by the evidence, the gain or profit thus prevented is a proper element of damages in an action against the company for its breach of contract. (5) Damages may be recovered for losses sustained or gain prevented when they are the proximate and certain results of the defendant's fault." There was no testimony that the defendant had notice of the fact that the first message related to the purchase of mules, nor that the mules were purchased for resale, nor as to the market value of the mules at the time the plaintiffs' right of action accrued. His honor, the presiding judge, erred in the test for the admeasurement of damages which he submitted to the jury for the reason that profits were not a proper element of damages in this case. In the

leading case of *Hadley v. Baxendale*, 9 Exch. 341, the following general rules are indicated: "First. That damages which may fairly and reasonably be considered as naturally arising from a breach of contract according to the usual course of things are always recoverable. Second. That damages which would not arise in the usual course of things from a breach of contract, but which do arise from circumstances peculiar to the special case, are not recoverable unless the special circumstances are known to the person who has broken the contract." Cited with approval in *Sitton v. Macdonald*, 25 S. C. 68, 60 Am. Rep. 484. In the earlier cases, both English and American, there was a general concurrence in excluding profits in actions of tort as well as on contract, which merely might have been realized had the injury not been done or the contract been performed. 8 Am. & Eng. Enc. Law, 2d ed. p. 617. "Profits which depend upon the fluctuations of the markets and the hazards and chances of business are considered too contingent and speculative to enter into a safe or reasonable estimate of damages. Thus any supposed successful operation the party might have made, if he had not been prevented from realizing the proceeds of the contract at the time stipulated, is a consideration not to be taken into the estimate of damages; for besides the uncertain and contingent issue of such an operation in itself, it has no legal or necessary connection with the stipulations between the parties, and cannot, therefore, be presumed to have entered into their consideration at the time of contracting." 8 Am. & Eng. Enc. Law, 2d ed. pp. 618, 619.

In the case of *Western U. Teleg. Co. v. Nye & S. Grain Co.* (Neb.) 63 L. R. A. 803, 97 N. W. 305, it was held that "where the negligent delay of a telegraph company in the delivery of a message delivered to it for transmission by the plaintiff results in the loss to the plaintiff of a sale of a quantity of corn at a price above the market value of the corn at the time and place it would have been delivered had such sale been made, the measure of damages is the difference in value between the price the plaintiff would have received for the corn had the sale been made and the market value of the corn at such time and place of delivery, unaffected by the price at which the plaintiff may have disposed of the corn after that time." In discussing the question of profits, the court uses this language: "In such cases the general rule is that, so far as it can be done by money, the injured party is to be placed in the same situation in which a performance of the contract would have placed him. But it would be

impossible to follow the labyrinth of remote results and consequences of a breach of contract, and determine either the ultimate situation of the party as affected thereby, or what such situation would have been had the contract been performed. The law, therefore, takes into account only proximate results, and disregards such as are remote, or are the product of intervening or independent causes. Hence the situation of the injured party which forms the basis of the comparison must be his situation when the breach of contract occurred, and before remote or independent causes had intervened to change it. His situation after that time can never be material as an ultimate fact in the case, because after the intervention of such causes it can never be known, with any reasonable degree of certainty, to what extent it is due to causes only remotely connected with the breach of contract, or wholly independent of it."

Whatever may be the rule elsewhere, the courts of this state have followed the earlier decisions, both English and American, which held that anticipated profits could not be recovered, for the reason that they were indefinite, uncertain, and too remote. In the case of *Sitton v. Macdonald*, 25 S. C. 68, 60 Am. Rep. 484, the plaintiff carried on the business of buying old cotton ties, and manufacturing them into new ones. In the operation of its machinery it used a peculiar kind of punch, which could not be repaired by a blacksmith. The plaintiff carried it to the defendant, who undertook to repair it. The defendant failed to carry out its contract, and the plaintiff brought an action for \$1,000 damages. Upon the trial the plaintiff offered to prove as damages the amount of profits he would have earned in the ordinary employment of the punch during the time it was detained by the defendant. The defendant objected to the testimony, on the ground that such damages were too speculative, remote, and contingent. The objection was sustained. The court said: "We are aware that there are circumstances under which one who, by a breach of contract, has delayed a sale until there is a fall in the marketable value of the property, may be charged as damages with the difference in price; but we do not see that such principle applies to a case where the only question is as to more or less profits, which as a whole as profits are excluded as too contingent, remote, and speculative." In commenting on the case of *Hunt v. D'Orval*, Dud. L. 180, the court uses this language: "In this latter well-considered case, it was held that 'for the breach of an executory contract, without fraud or imposition, the jury can only give such damages

as fairly and naturally result from it, and which can be measured by a pecuniary standard; remote and consequential damages cannot be allowed.'"

We desire to call special attention to the fact that profits were excluded in the case of *Sitton v. Macdonald*, 25 S. C. 68, 60 Am. Rep. 484, on the ground that they were too contingent, remote, and speculative. Are anticipated profits in the case under consideration less contingent, remote, and speculative than in the case just mentioned? They are in their very nature problematical, conjectural, uncertain, indefinite, speculative, and remote. They are dependent upon many contingencies,—fluctuations in the market, caprice of purchasers, value of services employed in selling the articles, interest on capital invested, and various other circumstances that cannot be contemplated with any degree of certainty.

The rule for the admeasurement of damages is correctly set forth in *Wallingford v. Western U. Teleg. Co.* 53 S. C. 410, 31 S. E. 275. In that case the plaintiff brought an action for damages on account of the failure on the part of the telegraph company to deliver seasonably a message whereby the plaintiffs lost the sale of a lot of mules. Mr. Justice Jones thus states the principle in the admeasurement of damages: "The measure of damages in such a case as this is the difference between the market value of such mules on same terms at the time the message should have been delivered and the price offered, in case such market value was less than the price offered." It certainly cannot be successfully contended that the plaintiffs are entitled, not only to profits, but likewise to the difference in the amount paid for the mules and their market value at the time their cause of action accrued. The law does not allow both measures of damages in one case. We therefore con-

clude that either the rule for the admeasurement of damages laid down in *Wallingford v. Western U. Teleg. Co.* 53 S. C. 410, 31 S. E. 275, is erroneous, or the principle announced in the opinion of Mr. Justice Woods is wrong.

The rule stated in *Wallingford v. Western U. Teleg. Co.* 53 S. C. 410, 31 S. E. 275, should, for a stronger reason, be applied in this case, because the error in transmitting the telegram did not prevent the plaintiffs from becoming the purchasers of the mules, nor deprive them of the opportunity of making whatever profit they saw fit by a resale of the mules. The direct and proximate result of the error in sending the message was to cause the plaintiffs to purchase the mules, for which they had to pay a larger sum than they contemplated as the purchase money thereof, and the measure of their damages was the difference in the market value of the mules at the time their right of action accrued and the amount they were compelled to pay by reason of said error. This mode of admeasuring damages is more certain than determining the amount of anticipated profits supposed to have been lost by the error. In 8 Am. & Eng. Enc. Law, 2d ed. p. 611, it is said: "Where the damages may be estimated in more than one way, that mode should be adopted which is most definite and certain." The quotation which Mr. Justice Woods makes from 27 Am. & Eng. Enc. Law, 2d ed. p. 1069, shows that when the person affected by an error in the transmission of a message is the purchaser, he is entitled to recover the increase in price which he is obliged to pay in consequence of the error; but it does not sustain the doctrine that the purchaser has the right to recover lost profits.

As I think the judgment of the circuit court should be reversed, I dissent from the opinion of Mr. Justice Woods.

TENNESSEE SUPREME COURT.

HERCULES POWDER COMPANY *et al.*
v.
KNOXVILLE, LAFOLLETTE, & JELICO
RAILROAD COMPANY *et al.*

(.....Tenn.)

1. Explosives consumed in grading a roadbed or driving a tunnel for a railroad

company are within the provisions of a statute giving a lien to contractors and material men for materials "furnished for grading the roadway, constructing culverts, laying tracks, or erecting buildings."

2. In case of an entire contract to furnish materials for construction of a railroad, under which shipments are made as material is ordered, a lien for the entire

NOTE.—For another case in this series holding that explosives used in doing work are "materials" within the meaning of a statute giving a right to a material man's lien, see *Grant Powder Co. v. Oregon P. R. Co.* 8 L. R. A. 700, with note on mechanic's lien law applicable to railroads.

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For other cases as to what are materials within the protection of the statute, see *Standard Oil Co. v. Lane*, 7 L. R. A. 191 (lubricating oil used on machinery in mill); and *Central Trust Co. v. Sheffield & B. Coal, Iron & R. Co.* 9 L. R. A. 67 (coal cars used in mine).

amount will be effected by giving notice within the time required by statute after the date of the last shipment.

3. **The consideration of the date of the last shipment** in determining whether or not notice has been given in time to perfect a lien for material furnished for the construction of a railroad is not prevented by the fact that the shipment is stopped *in transitu* because of the insolvency of the contractor who had ordered it.
4. **If material is delivered in good faith to a subcontractor** for use in the construction of a railroad the material man is entitled to his lien therefor in the absence of definite proof that it was not used for that purpose.

(October 29, 1904.)

CRoss APPEALS from a decree of the Court of Chancery Appeals reversing a decree of the Chancery Court for Anderson County which dismissed a bill filed to enforce a mechanic's lien on its railroad; the defendants appealing from so much of the decree as held that a lien existed; and plaintiffs appealing from so much as refused to recognize the lien for the full amount claimed. *Reversed on plaintiffs' appeal.*

The facts are stated in the opinion.

Messrs. Shields, Cates, & Mountcastle, for complainants:

The furnisher of material is only required to give his notice within ninety days from the time that the last material was furnished.

Green v. Williams, 92 Tenn. 220, 19 L. R. A. 478, 21 S. W. 520; *Cole Mfg. Co. v. Falls*, 92 Tenn. 607, 22 S. W. 856; *Basham v. Toors*, 51 Ark. 309, 11 S. W. 282; Phillips, *Mechanics' Liens*, 2d ed. p. 530; *Stewart-Chute Lumber Co. v. Missouri P. R. Co.* 28 Neb. 39, 44 S. W. 47; *Daniel v. Weaver*, 5 Lea, 392.

In addition to the part denominated roadbed, the roadway includes whatever space of ground is allowed by law to the company in which to construct its roadbed and lay its track, i. e., the right of way.

24 Am. & Eng. Enc. Law, 2d ed. p. 998.

This lien is given to every person who furnishes material for the "grading" of the railroad company's right of way so as to make its roadway or foundation on which the superstructure of the railroad is to be built.

14 Am. & Eng. Enc. Law, 2d ed. p. 1108; *Smith v. Washington*, 20 How. 148, 15 L. ed. 861; *Bladen v. Marietta & N. G. R. Co.* 97 Tenn. 393, 37 S. W. 135; *Rapauno Chemical Co. v. Greenfield & N. R. Co.* 59 Mo. App. 6; *Hazard Powder Co. v. Byrnes*, 21 How. Pr. 189; *Keystone Min. Co. v. Gallagher*, 5 Colo. 23; *Elliott, Railroads*, p. 1597, § 1068; *Giant Powder Co. v. Oregon* 67 L. R. A.

P. R. Co. 8 L. R. A. 700, 14 Sawy. 560, 42 Fed. 474; *Central Trust Co. v. Sheffield & B. Coal, Iron & R. Co.* 9 L. R. A. 67, 42 Fed. 106.

Messrs. X. Z. Hicks and Cornick, Wright, & Frantz, with **Messrs. J. H. Frantz and Norman B. Morrell**, for defendants:

A tunnel is a mere hole in the ground, and it would be just as appropriate to talk about building a well as building a tunnel. A tunnel is not constructed, but dug or bored out. A tunnel is not a structure. The material man's lien is based upon the idea that something is put into a structure. A well or hole in the ground is not a structure within the meaning of the mechanic's lien law, upon which a laborer or furnisher may have a lien.

Guise v. Oliver, 51 Ark. 356, 11 S. W. 515; *Davis v. Wood*, 1 Del. Co. Rep. 382.

Powder is not material within the meaning of the statute.

20 Am. & Eng. Enc. Law, 2d ed. p. 232; *Moyer v. Pennsylvania Slate Co.* 71 Pa. 293; *Standard Oil Co. v. Lane*, 75 Wis. 636, 7 L. R. A. 191, 44 N. W. 644; *Knapp v. St. Louis, K. C. & N. R. Co.* 6 Mo. App. 205; *Oppenheimer v. Morrell*, 118 Pa. 189, 12 Atl. 307; *Central Trust Co. v. Texas & St. L. R. Co.* 27 Fed. 178.

Where materials were ordered for a railroad by a subcontractor in carload lots, each order being separate and each invoice payable on shipment or at any particular time thereafter, no lien exists for any material furnished more than ninety days prior to filing the account, notwithstanding a part was furnished within such time.

Heltzell v. Chicago & A. R. Co. 77 Mo. 315; *Liberty Perpetual Bldg. & Loan Co. v. M. A. Furbush & Son Mach. Co.* 26 C. C. A. 38, 42 U. S. App. 496, 80 Fed. 631; *Central Trust Co. v. Richmond, N. I. & B. R. Co.* 41 L. R. A. 458, 15 C. C. A. 273, 31 U. S. App. 675, 68 Fed. 90.

Wilkes, J., delivered the opinion of the court:

This bill seeks to fix a lien upon the railroad company for the cost of powder and other blasting material furnished to construct the railroad and blast a tunnel on its line known as "Dossett's tunnel."

Mason, Hoge, & Company had a contract with the railroad company to build the road, excavate the tunnel, and furnish all the necessary material for that purpose. They sublet the excavating and boring of this tunnel to Cole & Company, who, in terms, agreed to do all the work and furnish all necessary material and labor for that purpose. Cole & Company made a contract

with each of the complainant companies, to wit, the Hercules Powder Company and the Repauno Chemical Company, by which they agreed to buy from these companies all of the explosives and explosive supplies which would be required in the excavation or boring of said tunnel.

The powder company furnished, under its contract, four bills or lots,—one October 13, 1902, amounting to \$2,200; one May 27, 1903, \$2,200; one July 8, 1903, \$480; and the last September 18, 1903, \$384.36.

Cole & Company paid on account \$721.46, leaving due \$4,543.90. All of the material bought by this company was used in the construction and boring of this tunnel.

The chemical company furnished in March, 1903, \$4,534.03 of explosive material, and Cole & Company paid it on account \$3,636.76, leaving a balance unpaid of \$897.36.

About October 1, 1903, Cole & Company announced to its creditors that they were insolvent, and could not complete their contract with the railroad.

On October 10, 1903, each of complainant companies notified the railroad company that they had furnished explosive materials to Cole & Company, for which they had not been paid, as before stated, and that they claimed liens upon the railroad company for the amounts due them.

Upon the hearing the chancellor held that complainants had no lien for the explosive materials furnished Cole & Company as against the railroad, and dismissed the bill, and complainants appealed.

In the court of chancery appeals the majority of that court were of the opinion that explosives used in excavating a roadway through a tunnel in building a railroad was material within the meaning of the acts of 1883 and 1891, and that complainants under these acts were entitled to liens upon the railroad property, provided proper notices were given the railroad as provided by those acts.

It held, however, that the Repauno Chemical Company had not given such notice, and was entitled to no lien, and that the Hercules Powder Company was entitled only to a lien for the explosives furnished Cole & Company within ninety days of November 10, 1903, when notice of the lien was given the railroad company; and under this holding adjudged the powder company entitled to a judgment for \$384.36.

The Hercules Powder Company assigns as errors that part of the holding and decree of the court of chancery appeals which finds and adjudges that it is only entitled to a lien upon the Knoxville, Lafollette, & Jellico Railroad Company's railroad and 67 L. R. A.

property for the blasting materials furnished to Cole & Company within ninety days from November 10, 1903, the date of said notice, and that it is not entitled to a lien for the whole balance due to it for blasting materials furnished under its said contract with Cole & Company, amounting to \$4,543.90.

The court of chancery appeals found that G. H. Cole & Company agreed and contracted with the Hercules Powder Company to buy from it all of the explosives needed in the excavation of Dossett's tunnel under their contract with Mason, Hoge, & Company; that said explosives were to be furnished in the quantities and as ordered by G. H. Cole & Company, and were to be paid for within thirty days after they were used; that the Hercules Powder Company actually delivered goods to Cole & Company under said contract on September 18, 1903, and that on October 10, 1903, the Hercules Powder Company gave the notices required by the acts of 1891 of the fact that it had furnished said material and claimed said lien.

It is assigned as error that under these facts the court of chancery appeals should have held, and erred in not holding, that the contract to furnish said blasting material was an entirety, and that the Hercules Powder Company had ninety days from the date that the last material was delivered under said contract within which to give said notice, and that the giving of said notice on October 10, 1903, entitled the complainant to a lien for the full balance due to it for the material furnished as aforesaid, which is found by the court of chancery appeals to be the sum of \$4,543.90.

The Repauno Chemical Company assigns as error that part of the decree of the court of chancery appeals which finds and adjudges that it is not entitled to a lien upon the Knoxville, Lafollette, & Jellico Railroad Company's railroad and property for the balance due it for the materials furnished by it to Cole & Company, with which to excavate said Dossett's tunnel. It is claimed that said court should have held, and erred in not holding, that the Repauno Chemical Company was entitled to a lien upon said railroad company's railroad and property under chapter 220, p. 296, of the Acts of 1883, as amended by chapter 98, p. 215, of the Acts of 1891, and should have decreed, and erred in not decreeing, that complainant was entitled to have said railroad company's railroad and property sold for the satisfaction and payment of complainant's said claim.

The court of chancery appeals based its decree denying the Repauno Chemical Com-

pany said lien on the ground that it did not deliver any of said material within ninety days of the date of its said notice to the railroad company that it claimed said lien. With reference to the facts governing this claim the court of chancery appeals said:

"The complainant Repauno Chemical Company made a contract with Cole & Company, as before stated, to furnish all the explosives and explosive supplies needed in their contract with Mason, Hoge, & Company, and all the material actually furnished under this contract by the Repauno Chemical Company was shipped on March 9 and March 17, 1903, to Cole & Company, and aggregated in value the sum of \$4,534.03. Under its contract with Cole & Company the powder used in each month was to be paid for by Cole & Company in the following month. Cole & Company are entitled to credit on said amount of \$3,636.76, leaving a balance due the Repauno Chemical Company of \$897.27.

"About October 1, 1903, Cole & Company announced to their creditors that they were insolvent, and could not complete their contract. At this time Cole & Company had ordered other goods from the Repauno Chemical Company under their contract with it and said goods were in transit to Cole & Company. The delivery of the same, however, was stopped by the Repauno Chemical Company upon receiving information that Cole & Company were insolvent, and they afterwards sold to Mason, Hodge, & Company."

The Repauno Chemical Company gave its notice October 10, 1903.

The complainants assign as error that part of the decree of the court of chancery appeals dismissing the bill as to the Repauno Chemical Company, and denying the Hercules Powder Company a lien for the full amount of the balance due it for explosive materials furnished to G. H. Cole & Company and in taxing complainants with a part of the costs.

It is contended that the court of appeals should have found and decreed, and erred in not finding and decreeing, that the complainants were entitled to a lien against the railroad and property of the Knoxville, La-follette, & Jellico Railroad Company for the full amount of the respective claims sued for by them in this cause, together with interest and all the costs of this cause.

The defendant, by its assignments of error, and in defending against complainants' assignments, raises the question whether the explosive supplies furnished by complainants constitute material within the sense and meaning of the statutes and laws of 67 L. R. A.

Tennessee relating to liens of furnishers of materials used in the construction of railroads as set out in the acts of 1883 and 1891.

The complainants rely for their liens upon the provisions of the Acts of 1883, chap. 220, p. 296, the 1st section of which is in the words and figures following: "Section 1. Be it enacted by the general assembly of the state of Tennessee, that where any railroad company contracts with any person or persons, for the grading of its roadway, the construction or repair of its culverts and bridges, the furnishing of cross-ties, the laying of its track, the erection of its depots, platforms, wood or water stations, section houses, machine shops, or other buildings, or for the delivery of material for any of these purposes, or for engineering or superintendence, there shall be a lien upon such railroad in favor of the person or persons with whom the railroad company contracts for the performance of the work, or the delivery of the materials to the amount of the debts contracted therefor, which lien shall continue in force for six months after the performance of the work or the delivery of the material, and until the terminal of any suit commenced within the time for its enforcement;" and upon the provisions of chapter 98, p. 215, of the Acts of 1891.

That act provides, in substance, as follows: "Section 1. Be it enacted by the general assembly of the state of Tennessee that § 3 of the act passed March 29, 1883, as referred to in the caption of this bill, the same being § 2778 of Milliken and Vertrees' Compilation of the Laws of Tennessee, be and the same is hereby so amended as to provide that hereafter every subcontractor, laborer, material man, or other person who performs any part of the work in grading any railroad company's roadbed," etc., "or for the delivery of material for any of these purposes, . . . all and every such person or persons shall have a lien on such railroad, its franchises, and property for the value of such work and labor done, or material furnished, or services rendered as hereinbefore set out and specified, in as full and ample a manner as is now provided by law for persons contracting directly with such railroad company for any such work and labor done."

In other words, the act of 1891 was passed for the express purpose of extending to all subcontractors and furnishers of material the same lien that was guaranteed by the act of 1883 to persons contracting directly with the railroad company.

For the railroad it is insisted that the term "materials," as used in these acts,

means something which enters into the construction of the roadway and forms a part of it, and cannot be held to apply to such material as is consumed in constructing the roadway, and, being consumed, it constitutes no part of the roadbed or roadway after it is constructed.

We are of opinion that the general assembly intended to give persons who furnished materials for grading the roadbed a lien, as well as those who furnished such material as was used in the superstructure placed upon the roadbed after it was graded, such as cross-ties, culverts, etc.

The fact that the materials were consumed in the use, and were thus destroyed in the construction, we think does not deprive the furnisher of his lien. The consumption of explosives is the only use that can be made of them, and their consumption is absolutely necessary to the excavation of tunnels through rock. In other words, they are material which enter into the building and grading of the road, as much so as trestles, bridges, and culverts, contain materials which are necessary to the grading of the road at such places as require trestles and bridges and culverts.

It is difficult to see what other material than explosives could be used in boring a tunnel and grading a road through stone.

While the general definition of the word "materials," as given by the lexicographers, may not go to this extent, and there are some cases holding, apparently, a different doctrine, we think the word must be defined in the connection and for the purposes for which it is used and intended to be applied.

In *Knapp v. St. Louis, K. C. & N. R. Co.* 6 Mo. App. 210, the court said: "The theory of statutory liens of this class [on railroads] is that the laborer or material man is entitled to a certain beneficial interest or security in the structure whose value is increased by his labor or materials actually incorporated therewith."

Yet in the later case of *Rapauno Chemical Co. v. Greenfield & N. R. Co.* 59 Mo. App. 6, it was said, construing a Missouri statute similar to ours, as follows: "The rule to be deduced from the foregoing authorities is that, in order to maintain a lien for materials furnished, it is not necessary in all cases that such materials should actually have gone into the structure and formed a part thereof. It is sufficient if their use was necessary, and they were in fact used or consumed in the making of the improvements. Hence we think that the argument is unsound that the lien in the case here must fail because the powder was entirely consumed, and therefore could not have been actually incorporated in the work." 07 L. R. A.

Such a construction of the statute we conceive to be a strained one, and not within its equity or spirit. What was said on this subject by the supreme court in the case of *Simmons v. Carrier*, 60 Mo. 581, must be read in the light of the particular facts of that case. There the claim was for lumber. The court held that a lien could not be maintained for such material unless it actually entered into the construction of the building. This was undoubtedly a proper construction of the statute as applicable to lumber and such like materials to be used in or on the improvements; but, in our opinion, it is unreasonable to apply such a test to powder which is entirely consumed in its use."

The lien statute of Missouri (Rev. Stat. 1889, § 6741) reads as follows: "All persons who shall do any work or labor in houses, depots, bridges, or culverts of any railroad company, incorporated under the laws of this state or owning or operating a railroad within this state, and all persons who shall furnish ties, fuel, bridges, or material to such railroad company, shall have, for the work done and labor performed, and for the material furnished, a lien," etc.

The question under consideration has been before the New York courts. *Hazard Powder Co. v. Byrnes*, 21 How. Pr. 189. The statute of New York provides that any person who shall, in conformity with the terms of the contract between the owner and contractor, furnish to the contractor any materials in building any house or building shall have a lien on the improvement. In the case above cited the plaintiff claimed a lien for powder and fuses furnished the contractor for the purpose of blasting rock preparatory to laying the foundation walls for the defendant's building. In delivering the opinion of the court, Judge Hilton said: "I think the fair and reasonable interpretation of such language is that the right of lien extends to all such materials as ordinarily enter into or are used in the construction of buildings, and which are within the express or implied terms of the building contract made between the owner and contractor. *Wood v. Donaldson*, 17 Wend. 550; *McDermott v. Palmer*, 8 N. Y. 383. Here the contract imposed upon the builder the duty of removing rock from the surface of the land preparatory to laying the foundation walls, and hence the powder and fuses furnished became necessary for the purpose of blasting the rock and enabling the contractor to construct the contemplated building. Such materials, when thus impliedly contracted for, and actually furnished and used, must, I think, be classed within the list of things which

are denominated in the lien law as 'materials in building,' and for which a lien may be acquired."

In Colorado there is a lien statute applicable particularly to mines, wherein it is provided that any person furnishing "timber or other materials to be used in or about the mines shall have a lien therefor." In *Keystone Min. Co. v. Gallagher*, 5 Colo. 23, one of the claimants had furnished powder, steel, and candles, which were used in working the mine, and for which he claimed a lien on the mine. In disposing of the objections made to this claim the court said: "It is objected that the decree as to Boettcher's claim is erroneous, because the articles furnished by him were not of the character comprehended by the lien law, specifying 'timber or other materials to be used in or about the mine.' The testimony shows that the articles furnished were powder, steel, and candles for the use of the mine. These articles are as clearly within the meaning of the statute as anything we can conceive of essential to the working of a mine."

In the last edition of Mr. Elliott's *Work on Railroads*, under the heading, "For what lien may be obtained," the rule is laid down as follows: "The nature of the claim for which a lien may be acquired depends, of course, upon the governing statute in each particular case. It is generally required that the labor should be performed or the material used in the construction of the road. Under such a statute it has been held that giant powder furnished to be used, and used, by the contractor in constructing the road is 'material' for the value of which a lien may be acquired; but a lien cannot be obtained for machinery furnished to a contractor to be used in doing the work upon a bridge. under a statute authorizing a lien for all materials 'used in and about' the construction of the bridge. So, of course, groceries and food furnished for the workmen, while in a sense used in the construction of the road, are not materials which so enter into its construction that a lien can be based upon them." Elliott, *Railroads*, p. 1597, § 1068.

All of the decisions upon this subject draw a clear distinction between the explosives and explosive supplies used in the construction of a railroad company's roadway, and which are necessarily consumed in the use thereof, and machinery and tools furnished for that purpose, which are held to be a part of the contractor's plant, and which do not go into the building of the roadway, but retain their identity and fitness for future use, saving the limited and gradual wear and tear incident to such use. 67 L. R. A.

The explosives which are necessarily consumed in the use are held to be liens, while the tools and equipment which constitute the contractor's plant do not constitute liens under the several lien statutes. This distinction is forcibly drawn and fully discussed in the case of *Giant Powder Co. v. Oregon P. R. Co.*, reported in 8 L. R. A. 700, 14 Sawy. 560, 42 Fed. 474. In that case the Giant Powder Company brought suit to recover the value of powder sold by it for use, which was used in the construction of the roadway of the Oregon Pacific Railway Company, and to have the same declared a lien upon the defendant's railroad and property under § 1 of the acts of the Oregon legislature for the year 1885.

In deciding that case, Judge Deady, of the United States circuit court, said: "Was this material 'used' in the construction of this section on this road, within the meaning of this statute? In *Basshor v. Baltimore & O. R. Co.* 65 Md. 99, 3 Atl. 285, cited by counsel for the demurrer, it was held, under a statute giving a lien on a bridge for all materials 'used in or about' its construction, that a person furnishing a contractor with machinery wherewith to build a bridge could not have such lien. Admitting the correctness of this decision, as I do, the cases are not, in my judgment, parallel. The machinery and appliances furnished the contractor in that case, although 'used' in the construction of the bridge, did not enter into the structure and become a part of it. They were the contractor's 'plant,' and retained their identity and fitness for further use, saving the limited and gradual wear and tear incident to such use. This powder was not only 'used' in the construction of this road, but it was thereby necessarily consumed, and it was so intended. It was furnished to be so used in the construction of this road. Nice questions may arise as to whether material is 'used' in the construction of a road as a tool or plant simply, or so used and consumed as to entitle the furnisher to a lien on the result for its value. The food furnished a contractor for his workmen may be said to be 'used' and 'consumed' in the construction of the road on which they work, but this is only so in a remote and consequential way or sense. The food does not enter directly into the structure, and is not so used. Mason work may be done on a road in a dry country or season, when large quantities of water must be hauled many miles for the preparation of the necessary mortar. Upon the completion of the structure and the hardening of the mortar the water has as thoroughly disappeared as the powder after the blast. Again, lumber

may be used in the construction of a building for the purpose of scaffolding. However, it does not thereby literally enter into the composition of the building, nor, so to speak, become a part of it. But, in my judgment, both it and the water have been 'used' in the construction of the building and mason work, within the meaning of the lien law, and the purpose for which it was enacted. And so I think this powder was 'used' in the construction of this section of the road, whereby it was consumed, not gradually and incidentally as a tool or part of a contractor's plant, but wholly and at once, in aiding to clear and fix the roadway for the reception of the ties and rails."

It may be that the statutes under which these decisions are made are somewhat broader than our own statute, but the principle involved is the same, and to such statutes the courts will give a liberal construction in favor of the laborer or material man.

Thus, in *Bladen v. Marietta & N. G. R. Co.* 97 Tenn. 393, 37 S. W. 135, it was held, construing the act of 1891, that a book-keeper of a bridge contractor and the cook and cook's helpers employed by him for the bridge gang had a lien on the railroad for salary and wages under the provision giving a lien to anyone who performs any valuable service, manual or professional, by which any railroad company receives a benefit.

We are of opinion, therefore, that explosives used in blasting rock in tunnels and in the grading of the road are materials for which, under the act, the furnisher is entitled to a lien.

We pass now to the question whether complainants gave the notice which the statute requires.

The provision of the statute in regard to notice is: "Provided, that within ninety days after such work and labor is done or completed, or such materials are furnished, or such services are rendered, such subcontractor, laborer, material man, or other person or persons rendering the hereinbefore-mentioned service, shall notify in writing any such railroad company," etc.

The shipments by the Hercules Powder Company to Cole & Company were made as follows: October 13, 1902, \$2,200; May 27, 1903, \$2,200; July 8, 1903, \$480; and September 18, 1903, \$384.36. Only the last sale and shipment of \$384.36 was delivered within the ninety days next before the notice was given, November 10, 1903.

It is evident that the account between the powder company and Cole & Company was a running account; that the powder was furnished from time to time as was demanded by Cole & Company; and the sales were 67 L. R. A.

not separate and distinct, but the contract was an entirety, to be performed by shipments from time to time as might be desired.

The whole of the explosives furnished by the Repauno company were furnished before the ninety days. A shipment made within the ninety days was stopped in transit, and it is not in controversy in this case. On October 10, 1903, Cole & Company notified their creditors of their insolvency. At that time the Repauno Chemical Company had a shipment in transit to them, which was stopped only because of this insolvency. It was being shipped in pursuance of that company's contract to furnish the explosives, and, if they had been received, the case presented would be identical with that of the powder company, as the Repauno Chemical Company gave their notice on the same day, November 10th.

We think that this contract must also be regarded as an entirety, and in each case the ninety days must be reckoned from the date of the last shipment in pursuance of the entire contract.

The fact that the last shipment was not delivered was due to the abandonment of the work by Cole & Company and their notice of insolvency, and within ten days after the contract was terminated by the wrongful conduct of Cole & Company, and within ten days from the time when the last delivery would have been made but for their failure, the notice was given.

Under the construction given to this act by the court of chancery appeals with reference to the claims of both of the complainants, in order to obtain a lien under said act it is necessary that furnishers of material should give notice every time within ninety days after they deliver a wagon or a car load of material, although they had an agreement with the contractor to furnish all of the material necessary to complete the contract. Not only this, but, carrying this construction forward to the other parties who are given liens by said acts, it would be necessary for the laborer, or engineer, or superintendent, in whose favor liens are provided by said acts, to give notice within ninety days after the end of each day's work, although they continue to work and had a contract to work until the whole contract was completed.

Section 3540 of Shannon's Code gives liens to furnishers of material for the erection of buildings and improvements on real estate, provided notice is given within thirty days to the owner of the property; and this court had held that the furnisher of material has thirty days after the last articles furnished for said improvements

were delivered, or thirty days after the completion of the contract, within which to give said notice. *Daniel v. Weaver*, 5 Lea, 393; *Green v. Williams*, 92 Tenn. 220, 19 L. R. A. 478, 21 S. W. 520; *Cole Mfg. Co. v. Falls*, 92 Tenn. 607, 22 S. W. 856.

In the case of *Basham v. Toors*, 51 Ark. 309, 11 S. W. 282, the supreme court of that state said: Where a contractor abandons a contract when partially completed, the time for presentation of subcontractors' notice begins to run from such abandonment, and not from the completion of the building by the owner under another contract.

The contract in reference to notice, where the contract is an entirety, is laid down in Phillips on Mechanics' Liens, 2d ed. p. 530, as follows:

"So, where a party furnishes materials for a building at different times, but in pursuance of one contract, he is in time if he commence proceedings to establish his lien within the period allowed by the statute, counting from the date of the last act done in execution of the contract. As where persons made a contract in May, 1857, with machinists, for all machinery and materials required to build a mill, and received them all at that time excepting the bolting cloth, it being uncertain what kind of cloth would be needed, they informed the machinist that they would order it from them afterwards, which was done, and received in the following September. The machinists commenced proceedings to enforce their lien within the statutory period, counting from the last item, but not if from the former; and it was held that, as the cloth had been furnished under the same contract as the other materials, the proceedings were commenced in time to enforce the lien for the whole amount of materials furnished."

So where, in the fall of 1868, plaintiffs contracted with W. to furnish him lumber for the erection of a new dwelling house and the repair of an old one, and they commenced furnishing lumber for that purpose the same season, and continued doing so until the last day of August, 1868. In August, 1868, W. became owner of a second lot immediately adjoining that first mentioned, and removed the old house upon it, and made the repairs on said house in the spring of 1869. In that spring, also, the contract for lumber was enlarged by plaintiffs agreeing to furnish lumber to build a barn. It was held that, for the purpose of enforcing the lien against W., it was but a single contract for the whole lumber, and the time within which it could be enforced was to be counted from the last delivery.

But it is said that the Repauno Chemical Company cannot recover, because all the ma-

terial furnished by it was not used in the excavation of said tunnel by Cole & Company. It is true that Cole & Company did sell \$1,332 of explosives that had been furnished to them by the Repauno Chemical Company, and the court of chancery appeals so finds, but with reference to this sale the court of chancery appeals says: "The proof does not make it appear when this sale was made to Walton, Wilson, & Company and it also fails to show whether or not the explosives sold by Cole & Company to said Walton, Wilson, & Company were paid for to the Repauno Chemical Company out of the actual cash paid by Cole & Company to said Repauno Chemical Company."

Section 1, chap. 98, p. 215, of the Acts of 1891, gives the lien claimed in this case to the material man "for the delivery of material for any of these purposes" (that is, for any of the improvements in the act); and all that is necessary, it is claimed, to entitle the furnisher to a lien, is that he should prove that he delivered said material to the contractor or subcontractor in good faith, to be used for any of the purposes provided for in said act.

In the case of *Stewart-Chute Lumber Co. v. Missouri P. R. Co.* 28 Neb. 39, 44 N. W. 48, the supreme court of Nebraska, quoting their own act, and deciding the question now under consideration, said, in substance: Under Neb. Comp. Stat. 1887, chap. 54, § 2, which provides that, "when material shall have been furnished or labor performed in the construction, repair, and equipment of any railroad, canal, bridge, viaduct, or other similar improvement, such labor and material man, contractor, or subcontractor shall have a lien therefor," the lien of a material man attaches upon the delivery in good faith of the material to the contractor or subcontractor, and it is not necessary that the material furnished should have been actually used in the improvement.

Plaintiff furnished lumber and other material to a subcontractor for the erection of shanty boarding houses for his men and stables for his horses. These shanties and stables were not erected on the right of way, but at convenient points 150 yards from the line of the road. Held, that the lumber and other materials so supplied was material furnished in the construction of the railroad within the meaning of the Nebraska statute, and that plaintiff was entitled to a lien therefor. See 39 Am. & Eng. R. Cas. p. 566.

The question presented upon this feature of the case is one of extreme difficulty. The act gives the lien "for the delivery of the material." It nowhere makes a condition that the material shall be used in the com-

struction of the road. It clearly contemplates that the delivery shall be in good faith for purposes of construction. But does it require that the furnisher shall follow up his material, and see that it is actually used in the construction? To hold this doctrine would well-nigh defeat the lien, since the furnisher would be obligated with a duty which would be burdensome, if not impossible, to comply with.

On the other hand, it is a hardship to hold the road liable for material that it did not get the benefit of, and to fix the lien upon its property, although such material was neither used nor consumed upon it.

The question is rendered still more difficult in this case by the indefinite findings of fact by the court of chancery appeals. That court finds that not all of the material furnished by the Repauno company was used upon the road, but that \$1,332 worth of explosives furnished by them were sold by Cole & Company to Walton, Wilson, & Company. They do not find that the explosives for which the present charge is made were not used in constructing the road. They do not find that Walton, Wilson, & Company did not pay for the material they bought to Cole & Company, and that Cole & Company did not turn over the proceeds to the Repauno company. So that we have no definite finding of fact that the explosives for which recovery is now sought were not used upon the road. Now, if the delivery alone is the act which gives the lien, the chemical company is entitled to their lien.

Our mechanic's lien law provides that every journeyman or other person employed by such mechanic, founder, or machinist to work on the buildings, fixtures, machinery, or improvements, or to furnish machinery for the same, shall have a lien, etc., and this court, in construing this act, said: "It is not the actual use of lumber in repairs to a building by the owner that gives the furnisher a lien, but the furnishing under a contract for that use, and the lien exists whether the lumber was used or not." *Daniel v. Weaver*, 5 Lea, 392.

That was a case, however, where the material was furnished to the lessee of a mill-dam, and the court held that the lien would extend to the leasehold interest, but not to the owner's or lessor's interest in the premises. In that case the material was furnished to the party against whom the lien was sought, but here it was delivered to a subcontractor, who stood two removes from the railroad, against whom the lien was sought.

The question resolves itself into this: Who shall be responsible for the good faith of the subcontractor who buys the material, 67 L. R. A.

and to whom it is delivered,—the furnisher, who sells the material, or the railroad, which expects to use it and receive benefit from it?

The subcontractor, while not the agent of the road, stands in the place of the railroad company as to the construction of the road, and does his work under the superintendence and direction of the road authorities. It is to be presumed that they will, better than anyone else, know what materials go into the construction of the road, and certainly better than the furnisher, who never gets to the premises, and is not concerned further than to sell and get pay for his material.

In addition, the railroad has ample opportunity to protect itself against such defaults by taking proper bonds from its contractors, while, if a furnisher were required to protect himself by such bonds, it would prevent him in many, if not all, cases from making sales.

Without deciding this question, we are content to hold, under the findings of the court of chancery appeals, that this material for which the present action is brought was in good faith delivered to Cole & Company to be used on the railroad, and there is no definite proof that it was not so used.

The result is that both companies are entitled to the amount sued for, and interest, and all costs, and for these amounts liens are declared, and a decree will be entered accordingly reversing and modifying the decree of the Court of Chancery Appeals and the decree of the chancellor.

Petition for rehearing dismissed.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY, Impleaded, etc.,
Appt.,

v.

Faustina ROBERTS, by Next Friend.

SAME, Appt.,

v.

Edista ROBERTS, by Next Friend.

(.....Tenn.....)

An appellate court may, instead of reversing a judgment for damages in an action for tort in which the verdict is so excessive as to evince passion, prejudice, or caprice, require the prevailing party to remit the portion which it deems excessive upon

NOTE.—As to power of appellate court to require remittitur of excessive damages, see also, in this series, *Burdick v. Missouri P. R. Co.* 26 L. R. A. 384, and note, and the later case of *Sloane v. Southern California R. Co.* 32 L. R. A. 193.

penalty of a reversal for refusal to comply, and affirm the judgment for the smaller amount in case the plaintiff assents to it.

(October 8, 1904.)

A PPEALS by defendant from a judgment of the Circuit Court for Hamilton County in favor of plaintiffs in actions brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed on condition of remittitur.*

The facts are stated in the opinion.

Messrs. Shepherd & Frierson for appellant.

Messrs. Thomas & Thomas, for appellee:

Where a verdict has been reached, and the trial judge has approved the fact of the verdict, its amount will not be disturbed by the appellate court, unless it is made to appear, from the record, that there was a manifest abuse of their trust by the jury, such as to indicate passion, prejudice, partiality, or unaccountable caprice or corruption.

It is not the province of either the trial judge or the appellate court to interfere with a verdict, even though thought by them to be excessive upon the facts, unless, in their opinion, it is so excessive as to indicate passion or prejudice.

Tennessee Coal & R. Co. v. Roddy, 85 Tenn. 400, 5 S. W. 286.

Wilkes, J., delivered the opinion of the court:

These are two separate cases heard together in the court below by consent, and involving damages for personal injuries caused by a collision between the cars of the Rapid Transit Company and the Alabama Great Southern Railroad Company. The plaintiffs are both minors, Faustina at the time of the injury being about thirteen years of age, and Edista being about nine years old. The suit was brought for the benefit of the minors by their father as next friend against the Alabama Great Southern Railroad Company, the Rapid Transit Company, and the Belt Line Company. There was a verdict in favor of the latter two, but against the Alabama Great Southern Railroad Company, in favor of Faustina for \$2,000, and in favor of Edista for \$800, and the railroad has appealed and assigned as the only error that the verdict in each case is so excessive as to evince passion, prejudice, or caprice on the part of the jury. Counsel for the railroad company admitted that his company was liable for some damages, and expressed his willingness to pay what was reasonable, and that the jury might fix the amount.

67 L. R. A.

There was no claim made in the case for vindictive, punitive, or exemplary damages. The court below ruled that only compensatory damages could be received under the agreement of the parties, and to this there was no exception by plaintiff.

The court charged the jury to take into consideration the mental and physical pain and suffering resulting to each from the accident, and let their verdict be for a reasonable compensation for the actual injuries sustained in each case, taking into consideration the mental and physical pain and suffering, and from the proof determine whether the injuries received were permanent or temporary, looking to the proof to ascertain the nature, character, and extent of the injuries in each case, and from the proof make up their report.

No exception was made to this charge in the court below, nor is any made in this court.

Counsel for the plaintiff, in his brief, states that the proof in the court below was confined to the mere question of compensatory damages, and insists that the amount found is only compensatory, and not subject to the assignment that it is so excessive as to evince passion, prejudice, or caprice on the part of the jury.

We have before us, therefore, cases of verdicts upon facts which, it is conceded, make a case of liability in which the element of exemplary or punitive damages is not involved, but only what is compensatory for personal injuries. The liability of the defendant being conceded, the only question is whether the amounts found by the jury for the two girls are so excessive as to evince passion, prejudice, and caprice on the part of the jury; and in our opinion they are so excessive as to fall within the rule, and should be abated—that of plaintiff Faustina from \$2,000 to \$1,250, and that of Edista from \$800 to \$400; and for these amounts only, together with all costs, are they entitled to judgment.

This court therefore suggests to plaintiff's counsel that the recoveries be reduced to these amounts; and, in the event they consent thereto, judgments will be so entered, and ten days is granted to them, and each of them, respectively, to accept or reject this suggestion. In the event either of said plaintiffs, by their attorneys, shall not accept this suggestion of the court, and agree thereto, the judgment of the lower court will be reversed as to such one, and a new trial awarded as to her, and the appellee not agreeing will pay costs of her appeal.

Inasmuch as this is to some degree a new practice in Tennessee, the court deems it proper to state the reasons for adopting it and the law applicable to it.

It has heretofore been held that, when a verdict of a jury is special, and a certain part thereof is not lawfully recoverable, this court will allow the verdict to stand if a remittitur is entered as to the objectionable part. *Memphis v. Kimbrough*, 12 Heisk. 133. So, when there is apparent an error of calculation in an action of debt, this court will not reverse and remand, but will remit the erroneous part. *McKinley v. Beasley*, 5 Sneed, 170. See also *Louisville & N. R. Co. v. Wallace*, 91 Tenn. 35, 14 L. R. A. 548, 17 S. W. 882.

When the judgment in the court below is for an amount greater than that laid in the suit and declaration, this court will reverse unless the appellee remit the excess, as he might have done in the court below. *Crabb v. Nashville Bank*, 6 Yerg. 332. So when a verdict is based upon several items, and is divisible, this court may remit so as to reduce the total amount by such items as have been improperly allowed by the jury. *Louisville & N. R. Co. v. Wallace*, 91 Tenn. 35, 14 L. R. A. 548, 17 S. W. 882.

This is perhaps the full extent to which this court has heretofore gone in causing or suggesting remittiturs; and the usual practice in damage suits for personal injuries, when there is a gross verdict or judgment to cover all damages, has been, in case the verdict is so excessive as to evince passion, prejudice, or caprice on the part of the jury, to set aside the judgment and verdict and award a new trial. The consequence has been to prolong litigation, to swell bills of cost, to delay final adjudication, and, in a large number of instances, to have such excessive judgments repeated over and over, upon the new trial. It is believed that this is a result which may be remedied by adopting the practice herein suggested, and which already prevails in the majority of the states of the Union. This practice will conform to that of the court below, and we can see no good reason why it should not prevail.

The rule in the lower court is that the trial judge may suggest a remittitur to the plaintiff, and, if he assents thereto, he may avoid a setting aside of the verdict and a new trial. *Branch v. Bass*, 5 Sneed, 366. But such remittitur cannot be entered over the protest of the successful plaintiff, and if he do not assent thereto the circuit judge must set aside the judgment and grant a new trial. *Massadillo v. Nashville & K. R. Co.* 89 Tenn. 661, 15 S. W. 445.

The general rule is stated as follows: The trial judge may, as the condition of denying the motion for a new trial, made by the defendant in an action of debt, require a remittitur of part of the verdict which he

deems excessive, but it is optional with the plaintiff to comply with such condition or suffer a new trial. *Young v. Cowden*, 98 Tenn. 588, 590, 40 S. W. 1088, Citing *Branch v. Bass*, 5 Sneed, 366; *Nashville & D. R. Co. v. Jones*, 9 Heisk. 27; *Massadillo v. Nashville & K. R. Co.* 89 Tenn. 661, 15 S. W. 445; *Louisville & N. R. Co. v. Wallace*, 91 Tenn. 35, 14 L. R. A. 548, 17 S. W. 882; *Louisville & N. R. Co. v. Garrett*, 8 Lea, 450, 41 Am. Rep. 640; *Nashville, C. & St. L. R. Co. v. Foster*, 10 Lea, 366, Approved in *Western U. Tele. Co. v. Frith*, 105 Tenn. 174, 58 S. W. 118.

In *Louisville & N. R. Co. v. Garrett*, 8 Lea, 438, 41 Am. Rep. 640, it was held to be an error, but not reversible under the facts of that case, to require a remittitur if the defendant would abide by the judgment and not appeal, and when the defendant would not agree the judgment was allowed to stand.

The defendant in case of remittitur cannot be required to abandon or waive his right of appeal as a condition to acceptance by plaintiff. *Nashville, C. & St. L. R. Co. v. Foster*, 10 Lea, 357; *Tennessee Coal & R. Co. v. Roddy*, 85 Tenn. 400, 5 S. W. 286.

These cases show the extent to which this court has gone in suggesting remittiturs in this court and approving remittiturs in the court below. As before stated, the practice in this court has heretofore been, in cases of excessive judgments for damages for personal injuries, to set them aside and remand for a new trial, if the verdict is so excessive as to evince passion, prejudice, or caprice. When the excess does not go to this extent, the verdict of the jury and judgment of the court below is not disturbed by this court. *Tennessee Coal & R. Co. v. Roddy*, 85 Tenn. 400, 5 S. W. 286.

The rule prevailing in a large number of states of the Union is that a remittitur may be required as well in this court as in the trial court. 18 Enc. Pl. & Pr. p. 137, and authorities there quoted.

It is also laid down in 18 Enc. Pl. & Pr. p. 125, that the great weight of authority is that a court may permit or require the entry of a remittitur in actions for unliquidated damages for torts. See cases cited. Again it is said: "It is also a very common practice for an appellate court, when it deems the damages recovered to be excessive, and this is the only error, to require a remittitur of the amount considered excessive as a condition to the affirmance of the judgment."

In support of this, a large number of cases are cited from the following states: Arkansas, California, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas,

Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, Ohio, Oregon, Texas, Washington, Wisconsin, and cases from the Federal and United States Supreme Court. In many of these states the rule has been adopted in later cases over a contrary holding in earlier cases. Notably is this the case in Missouri, as is shown by the case of *Burdick v. Missouri P. R. Co.* 123 Mo. 221, 26 L. R. A. 384, 45 Am. St. Rep. 528, 27 S. W. 453.

This is a well-considered case and extensively annotated, and the different holdings in the several courts are distinguished and illustrated. In some states, as in Louisiana, it is held that the court has power to cut the verdict without the assent of the parties; but the great weight of authority is that it cannot be done over the protest of the successful plaintiff. See our own cases heretofore cited, especially *Massadillo v. Nashville & K. R. Co.* 89 Tenn. 661, 15 S. W. 445.

The doctrine of remittitur applies to damages in torts as well as to damages for breach of contract. The judge may set aside the verdict in such cases *in toto*. It follows that he may determine what would be a reasonable amount. Such is not a usurpation by the court of the province of the jury. The facts have been passed on by a jury, and the right to recover has been determined by the jury, and not by the court. The judge expresses his opinion as to the reasonableness of the amount, the plaintiff accedes to the justice of the judge's estimate, and agrees to accept it; and, while the judgment is for an amount smaller than that found by the jury, it is a judgment based upon facts which the jury have found fixes liability, and not upon facts found by the court. *Branch v. Bass*, 5 Sneed, 369; *Young v. Cowden*, 98 Tenn. 589, 40 S. W. 1088; *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U. S. 69, 32 L. ed. 854, 9 Sup. Ct. Rep. 458; 18 Enc. Pl. & Pr. p. 127; *Burdick v. Missouri P. R. Co.* 123 Mo. 221, 26 L. R. A. 384, 45 Am. St. Rep. 528, 27 S. W. 453.

It may be said that this practice of requiring a remittitur is the exercise of original jurisdiction by this court; and, in the same connection, it may be said that, if this court has the right to reduce the judgment of the court below, it has the right to increase it. Neither of these objections is well grounded. This court cannot, and does not, render any judgment as an exercise of original jurisdiction when it reduces the verdict and judgment of the court below. 67 L. R. A.

It merely reviews and corrects the judgment rendered to the extent of the excess; and, as to this excess, it may very well be said there is no evidence to sustain it. But it cannot give judgment for an amount in excess of what the jury has found, which the jury has not found, for that would be the exercise of original jurisdiction.

In the cases of *Hutchins v. St. Paul, M. & M. R. Co.* 44 Minn. 5, 46 N. W. 79, it is said, in substance, that, while no court has any right to substitute its own estimate of the damages for that of a jury, yet it has the right to determine the amount beyond which there is no evidence, upon any reasonable view of the case, to support the verdict.

In a number of cases it has been held that when the damages are so excessive as to evince passion, prejudice, or caprice, the error cannot be corrected by remittitur, because such passion, prejudice, and caprice will be presumed to have permeated the entire verdict, and to have influenced or caused the finding of the question of any liability on the facts. See cases cited in 18 Enc. Pl. & Pr. p. 144.

We cannot admit the soundness of the view of these cases under our practice. If a jury, through passion, prejudice, and caprice has given a judgment, whether excessive or not, when the facts do not warrant any judgment, it is the practice of this court to set aside the verdict because there is no evidence to support it. But when the court can see that there is liability, and especially when that liability is conceded for some amount, as in the present case, and the only error is the amount of damages awarded, certainly there is no good reason to set aside the verdict *in toto* if justice and right can be reached by reducing the damages. There may be cases where a verdict for any amount whatever would evince passion, prejudice, or caprice, and these cases can readily be reached under the rule of this court to reverse when there is no evidence to support the verdict. The courts are not uniform in the mode of submitting or requiring remittiturs, and the practice in each state is modified by other rules touching the same errors.

We are of the opinion, therefore, that it is good law, sound policy, and no invasion of the rights of parties or the province of the jury, and no exercise of original jurisdiction, to adopt the practice of requiring remittiturs in this court at the option of the appellee, to the end that justice may be reached and an end put to litigation.

TEXAS COURT OF CRIMINAL APPEALS.

A. J. MOORE, *Appt.*,

v.

STATE of Texas.

(.....Tex. Crim. App.....)

1. Defendant in a criminal case may be required to testify that he had married the state's main witness just prior to the trial, even though he married her for the purpose of suppressing her testimony.
2. The state cannot place on the stand the wife of one on trial for a crime, and ask her questions as to the commission of the crime, for the purpose of forcing defendant to object to her testimony against him in order to prejudice his case, by supporting a theory that he married her to suppress her testimony under a statute making her incompetent to testify against him.

(Henderson, J., *dissents.*)

(June 23, 1903.)

NOTE.—Effect of marrying a witness in order to prevent her from testifying.

- I. Competency at common law, 409.
- II. Competency under statutory provisions, 501.

I. Competency at common law.

At common law a husband or wife was held incompetent to testify for or against each other. Several reasons have been given for this rule, as, that the testimony of such witnesses for each other would contradict the maxim, *Nemo in propria causa testis esse debet*, and, if they testified against each other, it would be contrary to another maxim, *Nemo tenetur seipsum accusare*. Another reason given for the enforcement of the rule was that it would be a cause of discord and dissention and the means of great inconvenience. An exception was early grafted upon this rule in prosecutions against the husband for unlawfully taking away and marrying an heiress, under 3 Hen. VII., chap. 2, making such offense a felony, and the weight of authority is that the woman was a competent witness in such a case, though some doubt has been expressed as to whether she would be competent if the cohabitation had been mutual and with her voluntary consent. The reasons for the adoption of this exception are various. It was early held to be an exception to the general rule that the wife could testify against the husband in matters of personal violence, beginning with Lord Audley's Trial, 8 How. St. Tr. 414, although some doubt has been thrown upon this case in T. Raym. 1, and 1 Vent. 244; and it was claimed that the abduction of an heiress was an act of violence continuing up to the time of the marriage. It was also asserted as a rule for allowing this exception that she, in reality, was not his wife, because consent was lacking; and it has been contended by some of the writers that this evidence was admissible under the maxim that no man can take advantage of his own wrong. Another ground for making this an exception to the general rule is laid down in 1 Hale's P. C. 301, that, if she

APPEAL by defendant from a judgment of the District Court for Hill County convicting him of murder. *Reversed.*

The facts are stated in the opinion.

Mr. C. M. Smithdeal for appellant.

Messrs. B. Y. Cummings, C. F. Greenwood, and Howard Martin for the State.

Davidson, P. J., delivered the opinion of the court:

This is the second appeal from a conviction of murder. *Moore v. State*, 44 Tex. Crim. Rep. 526, 72 S. W. 595. While testifying in his own behalf, appellant was permitted, over objections, to testify that he had married, on the day before his trial began, the state's witness Susie Jones. The bill is explained by the court as follows: "The court was then and is now of the opinion that the question and answer were proper, as the state had a right to show why

was not competent, the statute would be vain and useless.

In 1 Bl. Com. 443, it was said: "But in trials of any sort they are not allowed to be evidence for or against each other: . . . But, where the offense is directly against the person of the wife, this rule has been usually dispensed with; and, therefore, by statute 3 Hen. VII., chap. 2, in case a woman be forcibly taken away and married, she may be a witness against such her husband, in order to convict him of felony. For in this case she can with no propriety be reckoned his wife; because a main ingredient, her consent, was wanting to the contract; and also there is another maxim of law, that no man shall take advantage of his own wrong, which the ravisher here would do if, by forcibly marrying a woman, he could prevent her from being a witness, who is perhaps the only witness to that very fact."

The author was evidently mistaken in using the word "by statute 3 Hen. VII.," or else he used the word "by" as synonymous with the word "under," as she was competent in prosecutions under the statute, but was not made competent by the statute.

In Wakefield's Case, 2 Lewin, C. C. 1, 279, which was a prosecution for conspiring to take away an heiress against her will and to cause her to marry one of the defendants, the wife, who had been decoyed into the marriage, was offered as a witness. It was objected that the validity of the marriage could be established by other evidence than that of *voir dire*, and the defendant sought to prove the validity of the marriage so as to exclude his wife. But it was held that she was a competent witness upon the *voir dire*, and was required to testify to the facts on the ground that the wife was competent to testify against her husband in all cases affecting her liberty and person. The court said: "It would be unreasonable to exclude the only person capable of giving evidence in certain cases of injury. Our law recognizes witnesses *ex necessitate*; and it would be strange, indeed, that the husband should be allowed to exercise every atrocity against the

Susie Jones, the only immediate eyewitness to the homicide, was not put on the stand; and this tended to show that fact." That appellant had married the main state's witness on the day before his trial began is a legitimate subject of inquiry, and it was not error to require defendant to state that fact while testifying in his own behalf, even though he married her, as insisted by the court, for the purpose of suppressing her testimony.

The state also placed Sheriff Satterfield upon the stand, and asked him if Susie Jones was then in attendance upon the court. He stated he did not know whether she was present or not, whereupon the county attorney required the witness to go out and ascertain whether she was present

in attendance upon the trial. After going to the witness's room, he returned with Susie Jones. After he had brought her in the courtroom, the county attorney placed her upon the witness stand. Objection was urged because it had already been shown that she was the wife of appellant, and the state had no right to call her to the witness stand; that it was done for no legitimate purpose, and only for the purpose of prejudicing defendant in the minds of the jury. The court failed to rule upon these objections, "and the county attorney proceeded to ask said Susie Jones certain questions with reference to this case; and the defendant was compelled to and did object to said Susie Jones testifying on the ground that she was his wife, and therefore not a

wife, and her evidence not be admitted. . . . I am not convinced, by what Mr. M'Niel has said, that this marriage is valid in Scotland. If it is not, the witness, Miss Turner, is admissible, of course. If not, I still think her so, for the reasons I have stated."

In *Queen v. Yore*, 1 Jebb. & S. 563, on an indictment for fraudulently alluring and carrying away, against the will of the mother, an heiress, and marrying her, it was objected that the wife was not a competent witness against the accused because she was his wife; and on the further ground that she had an interest in convicting him, under 10 Geo. IV., chap. 34, § 23, providing that her property, upon conviction, should be vested in trustees for her sole use. It was held that the wife was a competent witness. The court did not discuss the competency at length, but followed *Wakefield's Case*, 2 Lewin, C. C. 1, 279. The prosecution contended that, on general principle, a wife could not give evidence against her husband on the ground that it would give rise to domestic disturbances, but claimed that the rule did not extend to the case of a wife *de facto*, and that such evidence in this case was admissible from necessity, and that the traverser had no right by his own criminal act to exclude her testimony.

In *Brown's Case*, 1 Vent. 243, the wife, of the age of fourteen years, was held to be a competent witness on an indictment for forcibly taking her away and marrying her, she being an heiress. The court said: "First, for that there was one continuing force upon her, from the beginning till the marriage, wherefore, whatsoever was done while she was under that violence was not to be respected. Secondly, As such cases are generally contrived, so heinous a crime would go unpunished, unless the testimony of the woman should be received."

And in *Fulwood's Case*, Cro. Car. 482, 484, 488, 493, the defendants were indicted for violently and with force taking and carrying away an heiress, a ward of chancery, and marrying her to one of the defendants. The wife was introduced as a witness, and objection does not seem to have been made as to her competency. In this case it was pretended that she married him by reason of his threats, and when she was in such fear that she did not know what she did.

But in *Rex v. Locker*, 5 Esp. 107, which was an indictment against defendants for conspir-

acy in procuring a young lady, a ward of chancery, to marry one Locker, the counsel for another defendant proposed to call Mrs. Locker to show that his client was not guilty; but it was held that she was not admissible on the ground that the wife could not be called as "an evidence for or against her husband." Lord Ellenborough said: He was clearly of opinion that she was not admissible. A joint crime was imputed, in which her husband was implicated; and who would be benefited by it? It was a clear rule of the laws of England that a wife could not be called as an evidence for or against her husband, except in the excepted case of *Lord Audley*; and, whether her evidence was mediately or immediately to affect him, the legal objection equally applied.

And in *Rex v. Serjeant, Ryan & M.* 352, where it was held that a husband was not a competent witness in a prosecution of the wife for conspiracy in procuring the husband to marry, it was said: "There is no doubt but the wife was a competent witness in the cases which have been cited from the State Trials; and in *King v. Perry* (1795) 1 Hawk. P. C. chap. 41, § 13, a case of abduction tried before the late Chief Justice Gibbs when recorder of Bristol, the evidence of the wife was received. But these cases are very distinguishable from the present. *Rex v. Locker*, 5 Esp. 107, has decided that, in an indictment for a conspiracy in procuring a lady, then a ward of chancery, to marry, the wife was not a competent witness for one of the codefendants, if her evidence might inure to the acquittal of her husband. I think, therefore, upon the whole, it is the safest course in the present case not to receive the evidence of the husband. In the case tried before Lord Chief Justice Gibbs, to which I have alluded, the wife was called as a witness for her husband, and that learned judge stated that he could see no distinction between admitting a wife for or against her husband, that the principle was exactly the same; and I entirely concur in his opinion. *King v. Perry* was much talked about at the time, and Chief Justice Gibbs expressed his surprise that any doubt should have been entertained that a wife was in all cases a competent witness for her husband when admissible against him."

In 4 Bl. Com. 208, it was said: "It is held that a woman thus taken away and married may be sworn and give evidence against the offender, though he is her husband *de facto*,

competent witness." The court finally sustained this objection. The court says that the reason he failed to rule upon the first objection was that there was nothing upon which to rule, "and the court could not know what state's counsel wanted to know, what Susie Jones was present for, and did not feel authorized and required to prevent the county attorney from asking the sheriff, in the presence of the jury, whether Susie Jones was present and in attendance upon the court, nor from placing her on the witness stand. Defendant, while on the stand, had stated that he had married Susie the day before, but this was by no means conclusive; and when Susie was placed on the stand, and objection made to her testifying on the ground that she was the wife of de-

fendant, the court then asked her if she had been married to defendant, and upon her answering that she had been and was his wife the court sustained the objection. The state certainly had the right to explain why the only immediate eyewitness to the shooting was not placed upon the stand by the state. Besides this, the state had the right to show by her that she was not the wife of defendant, and competent to testify; and, if she had answered that she had not been married to defendant and not his wife, she could have testified, notwithstanding defendant's statement, the question being one for the jury in case of an issue of the kind." The witness Satterfield could have been required to testify that Susie Jones was in attendance upon the trial and in the jury

contrary to the general rule of law, because he is no husband *de jure*, in case the actual marriage was also against her will. In cases, indeed, where the actual marriage is good, by the consent of the inveigled woman, obtained after her forcible abduction, Sir Matthew Hale seems to question how far her evidence should be allowed; but other authorities seem to agree that it should even then be admitted, esteeming it absurd that the offender should thus take advantage of his own wrong, and that the very act of marriage, which is a principal ingredient of his crime, should (by a forced construction of law) be made use of to stop the mouth of the most material witness against him."

In 1 East, P. C. 454, it was said; "A woman so taken away and married may without doubt be a witness against the offender, if the force were continuing upon her till the marriage; because then he is no husband *de jure*; and she herself may prove such continuing force; accordingly, it was so done in Fulwood's Case [M. 13 Car. I.] Cro. Car. 488, in Brown's Case [Tr. 25 Car. II.] 1 Vent. 243, and in Haagen Swendsen's Case [M. 1 Ann.] 5 St. Tr. 456. Upon the second of these Lord Hale observes that there were other witnesses who proved the taking by force, though none but the child herself proved the marriage to be forcible. And most, he adds, were of opinion that, if she had lived with him any considerable time, and assented to the marriage by any free cohabitation, she could not have been admitted as a witness. This reasoning seems to imply that, if the woman after her forcible abduction give her consent to the marriage, her testimony could not be received. Yet Mr. Justice Blackstone [4 Bl. Com. 209], on a review of the several authorities, thinks that it should even be allowed where the marriage is good by the previous consent of the inveigled woman after her forcible abduction; adverting to the absurdity of otherwise permitting the offender thus to take advantage of his own wrong. And surely there can be no doubt of her competency where the marriage was against her will at the time, notwithstanding her subsequent assent; for, if she were a competent witness at any time after the crime committed, I know not by what rule of law her subsequent assent to the crime can incapacitate her; much less how, by any lapse of time, she can be incapacitated. However, these circumstances may and ought to weigh with the jury 67 L. R. A.

who are to decide upon the credit of her testimony. But further, I conceive it to be now settled that in all cases of personal injuries committed by the husband or wife against each other the injured party is an admissible witness against the other."

In *Pedley v. Wellesley*, 3 Car. & P. 558, it was held that the wife of the defendant, who was sued in assumption for work and labor, was incompetent to testify against her husband, where he had married her after the act had been committed and she had been subpoenaed as a witness. Best, Ch. J., said: "I will allow the witness to be examined if the defendant consents, but not without." It was claimed by the plaintiff in this case that a party to a suit could not, by marrying his adversary's witness, deprive him of the benefit of the evidence of such witness.

II. Competency under statutory provisions.

In this country the statutes generally provide that the husband or wife is incompetent to testify in actions against the other party, with an exception in cases of personal violence. Construing these provisions of the statutes, it seems to be generally held that the wife is incompetent to testify against her husband in regard to matters occurring prior to the marriage. Most of the cases in which the question arose were those of sexual crimes occurring before the marriage, and prosecutions under the polygamy laws, and a prosecution for murder. Under the polygamy laws it was held that the wife was incompetent to testify as to her husband's former marriage to another party; but under a different statute it was held that the wife was in contempt where she refused to testify in regard to this before the grand jury; and it was held that the grand jury had a right to the evidence in order that they might determine whether or not the witness was a lawful wife, and so determine whether she was competent.

The wife was held incompetent to testify in a prosecution against her husband for the commission of a rape on her prior to the marriage, she being under the age of fourteen years at the time of the alleged offense. *State v. Evans*, 138 Mo. 116, 60 Am. St. Rep. 549, 39 S. W. 462.

This was under Mo. Rev. Stat. 1889, § 4218, authorizing the wife to testify for the husband, at his option, but not against him. It

room, and the state could have shown by any witness other than appellant's wife the matters about which the inquiry was made. The fact that appellant had married Susie Jones the day prior to his trial was also the subject of legitimate inquiry from proper sources. But here the statute expressly prohibits the use of the wife as a witness against her husband; and this though he had married her for the express purpose of suppressing her testimony against him. *Miller v. State*, 37 Tex. Crim. Rep. 575, 40 S. W. 313; *United States v. White*, 4 Utah, 499, 11 Pac. 570. It makes no difference at what time the relation of husband and wife begins. The exclusion of their testimony under our statute, and to its fullest extent, operates wherever the interests of either are directly concerned (1 Greenl. Ev. §§ 334, 336), and this although he married the witness after she was placed under process (*Pedley v. Wellesley*, 3 Car. & P. 558; *State v. Armstrong*, 4 Minn. 335, Gil. 251). And the question of public policy is not an argument to the contrary. Public policy must be in accord with our

statutory enactment. When the marriage ceremony is performed, no matter what the motive was or may be, the witness thenceforward becomes the lawful wife of defendant, and is prohibited under our statute from testifying against her husband, except where the offense is by the husband against her person. It will be observed in this case that the county attorney called the witness in behalf of the state, and asked her several questions in regard to the case, when, upon objection by appellant that she was his wife, the court then asked her the question if she was his wife, and, receiving an affirmative reply, excused her from the witness stand. This whole proceeding seems to have been a spectacular performance to force defendant to object to his wife testifying against him, in order to get the benefit of her testimony thus far in aid of the supposition and theory that appellant had married her to suppress her testimony. The point insisted upon by the state in regard to this whole matter of proving the recent marriage of appellant to Susie Jones was to convince the jury, first, that Susie Jones was the only eyewitness to

was contended that it was an exception to the general rule, on the ground that it was a criminal injury to the wife. The court said: "*Ex vi termini* a wife is only admitted to testify concerning criminal injuries to herself as a wife, not to a woman who was not at the time of the injury the wife of the defendant."

And under Cal. Penal Code, § 1322, providing that, except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, it was held that the wife was not a competent witness against her husband to prove the crime of rape committed by him prior to the marriage in having sexual intercourse with her while under the age of sixteen years. *People v. Curiale*, 137 Cal. 534, 59 L. R. A. 588, 70 Pac. 468. In this case she had subsequently married the man freely, and lived with him as his wife. The court said: "In the case at bar, if the girl had never freely consented to the marriage and cohabitation with defendant, the question would be different." The court further said: "The statute is founded upon public policy. It prohibits, in general terms, the examination of one spouse against the other without his or her consent. For the purpose of protecting one against the criminal violence of the other, the statute provides further that the prohibition shall not apply to cases of criminal violence by one upon the other,—that is, by one spouse upon the other spouse. The exception does not extend to acts committed before the marriage. This has been the uniform interpretation of similar statutes in other states, so far as we are advised."

And under Minn. Gen. Stat. 1894, § 5662, the wife was held not to be a competent witness in a prosecution against her husband for carnally knowing her, a female child under the age of sixteen years, prior to the marriage. *State v.* 67 L. R. A.

Frey, 76 Minn. 526, 77 Am. St. Rep. 660, 79 N. W. 518.

This statute provided that the wife cannot be examined for or against her husband, without his consent, but this exception does not apply to a criminal action or proceeding for a crime committed by one against the other. The court said: "It prohibits, on grounds of public policy, in general terms, the examination of one spouse as a witness against the other without his or her consent; but, for the protection of the one against the criminal acts of the other, the statute further provides that the prohibition shall not apply to a criminal action or proceeding for a crime committed by one spouse against the other. The statute deals with the parties in the marriage relation, and not as to acts committed before the marriage."

So it was held that the wife was an incompetent witness against her husband upon a prosecution for rape occurring before their marriage, when she was under sixteen years of age. *People v. Schoonmaker*, 117 Mich. 190, 72 Am. St. Rep. 560, 75 N. W. 439.

This was under 3 How. Anno. Stat. (Mich.) § 7546, providing that a wife is incompetent to testify against her husband, except where the cause of action arose out of a personal wrong or injury done by one to the other. The court, speaking of this statute, said: "This provision is declaratory of the common law, and has its origin in the recognized necessity of protection to the injured spouse."

And under Tex. Code Crim. Proc. 1895, arts. 774, 775, providing that the husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other, except in a criminal prosecution for an offense committed by one against the other, it was held that a wife was incompetent to testify against her husband in a prosecution for an abortion committed by the husband on the wife before marriage. *Miller v. State*, 37 Tex. Crim. Rep. 575, 40 S. W.

the homicide for which appellant was being tried; second, that he had married her for the express purpose of suppressing her testimony; and, third, her evidence was of a damaging character to him. Any fact drawn from the wife proving, or tending to prove, that appellant had married her for the purpose of suppressing her testimony was directly against him. The county attorney had no right to call her as a witness against him. It is thoroughly demonstrated by the facts that appellant had married her; and, if the court and the county attorney were not satisfied with the statement of appellant that he had married the witness, it was a matter easily ascertained without calling the wife, and the good or bad faith of appellant in marrying her, and whether the court believed what the defendant testified in regard to it, would make no difference. The fact that she was the wife of defendant put the seal upon her lips, and excluded her being called as a witness against him. The fact that appellant had married the witness, and the further fact that it was done for the purpose of suppressing her testimony,

were so intimately blended under the peculiar facts that they could not be separated; and the fact that he had married her was one of the main facts relied upon by the state to show appellant's act in what the state contended was suppressing the testimony of the wife. It is well settled in cases of bigamy that the lawful wife cannot be called to prove her marriage with the accused, nor for the purpose of identifying him. *Boyd v. State*, 33 Tex. Crim. Rep. 470, 26 S. W. 1080, and authorities cited; *Law of Evidence*, by Burr W. Jones, vol. 3, § 752, authorities collated in note 1. See also § 753, note 18. There is no question of the injurious effect of this action of the county attorney as sustained by the court, because it tended to uphold with fearful effect the contention of the state that by reason of his marriage with the witness the day before his purpose was to suppress her testimony, and that her evidence was of a seriously damaging effect against him. It was admitted upon the theory that it was a suppression of the testimony, and the wife was the most important witness in regard to the

313. The court said that "at common law the principle of exclusion applies in its fullest extent, wherever the interest of either of the spouses is directly concerned. Where the defendant married one of the plaintiff's witnesses after she was actually summoned to testify in the suit, she was held incompetent to give evidence." The court further said: "If it be conceded that the acts constituting the abortion stated in the record were acts of personal violence, they were not at the time directed against his wife."

In a prosecution for polygamy a wife was held incompetent to testify against her husband, under Utah Laws 1884, § 1156, p. 259, providing that the wife cannot be examined for or against her husband without his consent; but this exception does not apply to a criminal action or proceeding for a crime committed by one against the other. *United States v. White*, 4 Utah, 499, 11 Pac. 570. In this case the accused was charged with the crime of unlawfully cohabiting with Diana and Jane White. Diana was his first wife and died in 1886, and the defendant, who had been cohabiting with Jane for ten years, married her in April, 1886. The sole object in having the marriage ceremony performed was to close the mouth of the witness and to prevent the government from obtaining her testimony, and it was argued that it was contrary to public policy to permit parties to defeat the ends of justice by entering into the marriage relation for the sole purpose of suppressing testimony. But it was held that, no matter what the motive was, the witness was the lawful wife of the defendant, and could not testify against his objection.

The second wife was held incompetent as a witness, in a prosecution of her husband for polygamy, to prove that he had previously married another wife, who was still living. *Miles v. United States*, 103 U. S. 304, 26 L. ed. 481. The court said: "The result of the authorities is that, as long as the fact of the first marriage is contested, the second wife cannot be admitted to prove it. When the first marriage is duly established by other evidence to the satisfaction of the court . . . [the second] may be admitted to prove the second marriage, but not the first; and the jury should have been so instructed. In this case the injunction of the law of Utah that the wife should not be a witness for or against her husband was practically ignored by the court."

In *Ex parte Hendrickson*, 6 Utah, 3, 21 Pac. 396, under a prosecution for polygamy, the wife of the accused refused to testify before the grand jury as to whether or not the defendant was married to another woman on the same day that he was married to her. It was held, under the Edmunds-Tucker law of Congress (24 Stat. at L. 635, chap. 397, U. S. Comp. Stat. 1901, p. 3635, Comp. Laws of Utah, 1888, p. 114), providing that a lawful wife could not, in a case against her husband, be compelled to testify against his consent, that she could not refuse to answer, as the question was one to establish her competency or incompetency, and that the grand jury had a right to be satisfied that this witness was not the first wife. The court said: "If she had answered that she knew of no one else having been married to the accused on that day the answer could have tended to confirm her claim of exemption, but, had she made answer that another woman was married to the accused on that day, further inquiry may have disclosed that such marriage was prior to her marriage. She would then not have been the first wife, and her claim to being the lawful wife would have been invalid. She had been instructed, as had the grand jury, that such evidence was simply to ascertain her competency, and could not be used by the grand jury against the accused. Her claim of exemption from giving testimony could not be set up as against such a question. It was not a question as to her giving evidence against the accused. The investigation had not reached the

riage is contested, the second wife cannot be admitted to prove it. When the first marriage is duly established by other evidence to the satisfaction of the court . . . [the second] may be admitted to prove the second marriage, but not the first; and the jury should have been so instructed. In this case the injunction of the law of Utah that the wife should not be a witness for or against her husband was practically ignored by the court."

killing; and it would seem that the state placed the wife on the stand to get whatever of benefit there could arise from the objection urged by appellant that she was his wife in support of the theory of suppression of evidence. This is made patent by the reason it was the subject of a considerable portion of the argument of state's counsel before the jury. It was held in *Brock's Case*, 44 Tex. Crim. Rep. 335, 60 L. R. A. 465, 100 Am. St. Rep. 859, 71 S. W. 21, that the use of the wife against accused was reversible error, whether exception was reserved or not. Certainly it could not be held less an error where appellant was urging his objection from the time this matter became involved in the case until its final termination.

Because of this error the judgment is reversed, and the cause remanded.

Henderson, J., dissenting:

I do not agree to the reversal of this case, and because I believe the question is an important one I will express my views.

On the trial the state was permitted to prove by appellant on cross-examination that on the day before the trial he had married Susie Jones. The state was also permitted to prove by Sheriff Satterfield that Susie Jones was present in court. The state then called her to the witness stand, and proved by her that on the day preceding she

had married appellant, and then proceeded to ask her certain questions concerning the case. Appellant objected to any interrogation of the witness by the state because she was his wife. This objection was sustained by the court, all of the other objections leading up to this having been overruled by the court. Appellant insists that when it was first disclosed that Susie Jones was the wife of appellant the conduct of the state in bringing her to the witness stand, and again proving by her that she was appellant's wife, and then proceeding to ask her questions regarding the case, and compelling appellant to object to her testimony on the ground that she was his wife, was not in good faith, but was a spectacular performance on the part of the state, calculated to prejudice appellant before the jury, and was really the use of appellant's wife against him as a witness. I believe it was proper for the state to assure itself that Susie Jones was really the wife of appellant, and that she had married him only the day before; and it was not only competent to elicit this fact from appellant himself in cross-examination, but the state was authorized to show that Susie Jones was in attendance on the court, and to prove by her also that she had married appellant. And I cannot say that this conduct on the part of counsel for the state was not done in good faith. If she had not been presented to

point where her claim of exemption could be set up."

In *Ex parte Hendrickson*, 6 Utah, 3, 21 Pac. 396, the court distinguished the case of *Miles v. United States*, 103 U. S. 804, 26 L. ed. 481, saying: "It is true that in the *Miles Case* the court said that 'the testimony of the second wife to prove the only controverted issue in the case, namely, the first marriage, cannot be given to the jury on the pretext that its purpose is to establish her competency.' That rule was laid down under a former territorial statute, which said: 'A husband shall not be a witness for or against his wife, nor a wife a witness for or against her husband.' Utah Comp. Laws 1876, § 1604. Under that statute the court in the *Miles Case* recognized that the wife was *prima facie* incompetent. The court said in that case: 'Witnesses who are *prima facie* competent, but whose competency is disputed, are allowed to give evidence on their *voir dire* to the court upon some collateral issue on which their competency depends; but the testimony of a witness who is *prima facie* incompetent cannot be given to the jury upon the very issue in the case, in order to establish his competency, and at the same time prove the issue.' Our local statute then absolutely disqualified the wife, and the accused could object to her testifying. But the later act of Congress—the Edmunds-Tucker act, above referred to—has changed this completely. The accused cannot raise any valid objection, but as to him she is a competent witness. The exemption is wholly a personal privilege of the witness. The Ed- 67 L. R. A.

Edmunds-Tucker law reads as follows: 'Section 1. That in any proceeding or examination before a grand jury, a judge, justice, or a United States commissioner, or a court, in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, the lawful husband or wife of the person accused shall be a competent witness, and may be called; but he or she shall not be compelled to testify in such proceeding, examination, or prosecution without the consent of the husband or wife, as the case may be,' etc. 24 Stat. at L. 635, chap. 397, U. S. Comp. Stat. 1901, p. 3635. 1 Utah Comp. Laws, § 1, pp. 114, 115. Had this statute been in existence when the *Miles Case* was decided, it is evident that the ruling of the court would have been different, as the first wife is, under this latter statute, a competent witness."

In *MOORE v. STATE* a man was prosecuted for murder, and had married the prosecuting witness on the day before the trial. The marriage was proved by the defendant. It was held error for the prosecution, during the trial, to place defendant's wife upon the stand, requiring him to object to her testimony, as this would bias the jury in believing that he had married her for the purpose of suppressing her evidence. Texas Code Crim. Proc. § 775, provides that the husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other.

I. T.

the jury, they would not have been apprised of the fact that she was then present, and in a situation to testify for appellant, and her absence might have been accounted for on various pretexts. If any fact regarding the homicide had been elicited from her, of course a different question would be presented; but here we have in evidence, strongly, it is true, the fact of her intermarriage with appellant on the day before, and her presence then in court. This was not using her as a witness against appellant, but was affording the jury an insight into his conduct with reference to her, which they had a right to know. The circumstances here shown, to wit, the fact of appellant's intermarriage with the principal state's witness only the day before, would tend to show—at least it would bear that construction—that he had married her for the purpose of suppressing her testimony. I understand it is a rule of universal application that it can always be shown that a defendant has fabricated or suppressed testimony.

Appellant further maintains that the court committed an error in allowing state's counsel to animadvert on the failure of appellant to use his wife as a witness on his behalf, and in this connection he complains that the court refused to give certain requested special instructions on this subject. It has long been the doctrine in this state, that argument could be made on the failure of a defendant to use his wife as a witness. *Mercer v. State*, 17 Tex. App. 452; *Armstrong v. State*, 34 Tex. Crim. Rep. 250, 30 S. W. 235; *Smith v. State* (Tex. Crim. App.) 65 S. W. 186; and *Locklin v. State* (decided at present term) 75 S. W. 305; *Boyd v. State*, 33 Tex. Crim. Rep. 470, 26 S. W. 1080; and authorities cited in that connection in the majority opinion, are not in point, because the question there was bigamy, and the former and subsequent marriages were the material issues in the case, and of course the first wife was not a competent witness against the husband to prove the marriage. *Graves v. United States*, 150 U. S. 118, 37 L. ed. 1021, 14 Sup. Ct. Rep. 40, also cited by appellant's counsel, is not in point. There it was held by a majority of the court that, inasmuch as the wife could not be a witness for appellant, her absence from his side during the trial could not be

argued before the jury to his prejudice. That is not the character of case here presented, for our statute authorizes the wife to be a witness for the husband, and his failure to produce her, where the record shows she was present at the homicide, is both upon principle and authority a legitimate subject for criticism on the part of the state. In this case she was present at the homicide, and had been used on a former trial as a witness on behalf of the state. Appellant was shown to have married her on the day before. Under the circumstances the state could not use her. *Miller v. State*, 37 Tex. Crim. Rep. 575, 40 S. W. 313. But it was entirely proper that the jury should be informed of the reason that prevented the state from placing her on the stand, and this although it might suggest very strongly appellant had married her for the express purpose of suppressing her evidence. Any other view would overrule the line of cases already referred to in which it has been uniformly held by this court that it was competent for counsel in argument to refer to the failure of appellant to use his wife as a witness, where the facts show that she was present at the time of the alleged offense, and would be a material witness for him if his theory is true. If an argument of this character can be made on inferences merely, it would certainly indicate that so much of the facts can be proved from which the inferences or deductions can be drawn. In this particular case no fact was proved in regard to the case by appellant's wife. The facts developed by other witnesses showed that she was present at the time of the homicide, and was a witness for the state on the former trial, and it was merely shown by her that she had married defendant on the day previous to the trial. On objection being made to her testifying, the court declared her disqualified, and sustained the objection. I cannot regard this as using the wife as a witness against her husband. Only the disqualifying fact was shown by her, and no more. Therefore I do not believe the court is correct in holding this case should be reversed, inasmuch as the wife testified to no fact in the case in regard to the homicide, and consequently was not used as a witness against him, which is the language of the statute.

UTAH SUPREME COURT.

August JOHNSON, *Respt.*,
v.

UNION PACIFIC COAL COMPANY, *Appt.*

(.....Utah.....)

1. To justify a consideration of the manner in which a particular class of work is usually performed by other employers, in determining whether a particular employer was negligent in its performance, so as to be liable for injuries to a servant, it must be shown that the conditions under which the work is performed by the respective employers are similar.
2. The term "common law of England," as used in a statute adopting such law as a rule of decision in a state, does not include judicial decisions of English courts rendered subsequently to the independence of America.
3. Decisions of the English courts, rendered since the independence of America, are entitled to respect upon the question as to what the common law is, and in particular cases may properly be regarded as conclusive.
4. The common law of England at the time of its adoption by Wyoming had no relation to the master's liability for injuries to his servants and decisions by the English courts subsequently rendered are not binding in determining the question of the liability of the master for injuries occurring within that state.
5. If rails, loaded under the supervision of a foreman, to be sent down an incline into a mine, are negligently loaded so that one falls from the car and injures an employee, the negligence is that of the foreman, and not of the servant working under him, and the master will be liable for the resulting injury.
6. Persons engaged in the service of a master, who are intrusted by him with the management or direction of his general work, or with some particular part thereof, are not fellow servants with the subordinate employees, but are vice principals, for whose negligence, resulting in the injury of employees, the master is liable.
7. When the evidence, as to whether or not a master has promulgated suitable rules for the government of his employees, is such that reasonable men might differ as to whether or not the duty has been performed, the question must be determined by the jury.
8. Under an allegation that, by reason of the character of the work and the conditions under which it is done, the letting down into a mine of cars loaded with rails

NOTE.—For vice principalship considered with reference to the superior rank of a negligent servant, see also *Stevens v. Chamberlin*, 51 L. R. A. 513, and *note*, and the later cases in this series of *Norton Bros. v. Nadebok*, 54 L. R. A. 842; *Southern P. Co. v. Schoer*, 57 L. R. A. 707; *Canney v. Walkelne*, 58 L. R. A. 33; and *Illinois Southern R. Co. v. Marshall*, 66 L. R. A. 297.
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was dangerous to employees, and resulted in an injury for which the action is brought, evidence is admissible to show the manner of doing the work, although it is not limited to the trip on which the accident occurred.

9. A question calling for the opinion of an expert witness upon a matter not in issue before a court is properly excluded.

(May 28, 1904.)

APPEAL by defendant from a judgment of the District Court for Summit County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Le Grand Young and W. H. Hatteroth, for appellant:

To entitle plaintiff to recover, the defendant must have been guilty of negligence which was the proximate cause of his injury, and to constitute proximate cause it must be "a cause from which a person of ordinary intelligence would anticipate some accident."

Wilber v. Follansbec, 97 Wis. 577, 72 N. W. 741, 73 N. W. 559; *Dougan v. Champlain Transp. Co.* 56 N. Y. 1; *Cleveland v. New Jersey S. B. Co.* 68 N. Y. 307; *Davis v. Chicago, M. & St. P. R. Co.* 93 Wis. 470, 33 L. R. A. 654, 57 Am. St. Rep. 935, 67 N. W. 16, 1132; *Block v. Milwaukee Street R. Co.* 89 Wis. 378, 27 L. R. A. 365, 46 Am. St. Rep. 840, 61 N. W. 1101.

The defendant could not have anticipated any danger from this method of lowering rails, as it was not shown that any such accident prior to this one had ever happened in that way, or from this cause. The manner in which the rails were loaded was the usual and ordinary way, and surely there was no negligence in doing this in such way.

Delaware River Iron-Ship Bldg. & Engine Works v. Nuttall, 119 Pa. 149, 13 Atl. 65; *Lehigh & W. B. Coal Co. v. Hayes*, 128 Pa. 294, 5 L. R. A. 441, 15 Am. St. Rep. 680, 18 Atl. 387; *Burke v. Witherbee*, 98 N. Y. 562; *Stringham v. Hilton (Stringham v. Stewart)* 111 N. Y. 188, 1 L. R. A. 483, 18 N. E. 870; *Sutton v. New York C. & H. R. R. Co.* 66 N. Y. 249; *Fritz v. Salt Lake & O. Gas & E. L. Co.* 18 Utah, 493, 56 Pac. 90; *Boyle v. Union P. R. Co.* 25 Utah, 420, 71 Pac. 991.

The manner of lowering rails into the mine not having been shown to have been negligent, no rules requiring them to be tied or fastened on were necessary.

Morgan v. Hudson River Ore & Iron Co. 133 N. Y. 666, 31 N. E. 234; *Kudik v. Le-*

high Valley R. Co. 78 Hun, 492, 29 N. Y. Supp. 533; *Larow v. New York, L. E. & W. R. Co.* 61 Hun, 11, 15 N. Y. Supp. 384; *Berrigan v. New York, L. E. & W. R. Co.* 131 N. Y. 583, 30 N. E. 57.

What is a reasonably safe way to do a thing or perform an act is the way and manner that people engaged in the same business have adopted for doing like work.

Fritz v. Salt Lake & O. Gas & E. L. Co. 18 Utah, 493, 56 Pac. 90; *Boyle v. Union P. R. Co.* 25 Utah, 420, 71 Pac. 991; *Lehigh & W. B. Coal Co. v. Hayes*, 128 Pa. 294, 5 L. R. A. 441, 15 Am. St. Rep. 680, 18 Atl. 387.

The failure to adopt rules is not proof of negligence, unless it appears, from the nature of the business in which the servant is engaged, that the master, in the exercise of reasonable care, should have foreseen and anticipated the necessity of such precautions.

Morgan v. Hudson River Ore & Iron Co. 133 N. Y. 666, 31 N. E. 234; *Kudik v. Lehigh Valley R. Co.* 78 Hun, 492, 29 N. Y. Supp. 533; *Berrigan v. New York, L. E. & W. R. Co.* 131 N. Y. 583, 30 N. E. 57.

It was clearly erroneous to admit testimony as to the jerking movement on other occasions.

Sullivan v. Salt Lake City, 13 Utah, 122, 44 Pac. 1039; *Parker v. Portland Pub. Co.* 69 Me. 173, 31 Am. Rep. 262; *Robinson v. Fitchburg & W. R. Co.* 7 Gray, 92.

Plaintiff assumed all the obvious risks of the business, including the risk of injury from objects falling down the slope.

Dresser, Employers' Liability, §§ 90, 91, 95, pp. 406, 415, 430, 431; *Linton Coal & Min. Co. v. Persons*, 15 Ind. App. 69, 43 N. E. 651; *Evansville & R. R. Co. v. Henderson*, 134 Ind. 636, 33 N. E. 1021; *McGlynn v. Brodie*, 31 Cal. 376; *Denver Tramway Co. v. Nesbit*, 22 Colo. 408, 45 Pac. 405.

The men engaged in loading rails upon the trip cars, and lowering them into the mine, and pulling coat out of the mine were fellow servants with the plaintiff in this case.

Stoll v. Daly Min. Co. 19 Utah, 271, 57 Pac. 295; *Buckley v. Gould & C. Silver Min. Co.* 8 Sawy. 394, 14 Fed. 833; *McBride v. Union P. R. Co.* 3 Wyo. 247, 21 Pac. 687; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 441; *Wood, Mast. & S.* § 425; *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339; *Alaska Treadwell Gold Min. Co. v. Whelan*, 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40; *New England R. Co. v. Conroy*, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85; *Davis v. Trade Dollar Consol. Min. Co.* 54 C. C. A. 636, 117 Fed. 122, 67 L. R. A.

Messrs. Mahlon E. Wilson and John A. Street, with Mr. Lindsay R. Rogers, for respondent:

If the evidence of plaintiff tended to show that defendant failed in a single element of duty substantially charged in the complaint, then the question was one for the jury on motion for a nonsuit, and likewise on motion to direct a verdict.

Plaintiff had the right to rely that his master would exercise such diligence in all operations going on above him in the slope as plaintiff's powerless situation demanded.

Pool v. Southern P. Co. 20 Utah, 210, 58 Pac. 326; *Northern P. R. Co. v. Peterson*, 162 U. S. 353, 40 L. ed. 997, 16 Sup. Ct. Rep. 843; *Hough v. Texas & P. R. Co.* 100 U. S. 213-217, 25 L. ed. 612-615; *Wabash R. Co. v. McDaniels*, 107 U. S. 454-459, 27 L. ed. 605-607, 2 Sup. Ct. Rep. 932; *Shearm. & Redf. Neg.* § 189; 2 *Thomp. Neg.* p. 972, § 3; *Choctaw, O. & G. R. Co. v. Holloway*, 191 U. S. 334, 48 L. ed. 207, 24 Sup. Ct. Rep. 102; *Wright v. Southern P. Co.* 14 Utah, 392, 46 Pac. 374; *Keddon v. Union P. R. Co.* 5 Utah, 344, 15 Pac. 262; *Union P. R. Co. v. Daniels* (*Union P. R. Co. v. Snyder*) 152 U. S. 688, 689, 38 L. ed. 600, 14 Sup. Ct. Rep. 756; *VanDusen v. Letellier*, 78 Mich. 502, 44 N. W. 572; *Richmond & D. R. Co. v. Norment*, 84 Va. 176, 10 Am. St. Rep. 827, 4 S. E. 211.

The place to work must not only be reasonably safe, but the master must constantly use reasonable diligence and care to keep it so.

Pool v. Southern P. Co. 20 Utah, 216, 58 Pac. 326; *Shearm. & Redf. Neg.* § 194; 2 *Thomp. Neg.* p. 972, § 3; *Boyle v. Union P. R. Co.* 25 Utah, 431, 71 Pac. 988.

Where the nature of the business is such as to require it, the law also imposes upon him the duty of making and promulgating suitable rules.

Pool v. Southern P. Co. 20 Utah, 217, 58 Pac. 326; *Abel v. Delaware & H. Canal Co.* 103 N. Y. 581, 57 Am. Rep. 773, 9 N. E. 325; *Cooper v. Central R. Co.* 44 Iowa, 135; *Pittsburgh, C. & St. L. R. Co. v. Henderson*, 37 Ohio St. 549; *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill. 109; *Bailey, Master's Liability for Injuries to Servant*, p. 72; *Shearm. & Redf. Neg.* § 202; *Ford v. Lake Shore & M. S. R. Co.* 124 N. Y. 493, 12 L. R. A. 454, 26 N. E. 1101.

The test of negligence is the presence or absence of that degree of care which ordinarily prudent persons are accustomed to observe about the same or similar affairs or business in the same or similar circumstances.

Boyle v. Union P. R. Co. 25 Utah, 431, 71 Pac. 988; *Prybilski v. Northwestern Coal*

R. Co. 98 Wis. 413, 74 N. W. 118; *Guinard v. Knapp-Stout & Co.* Co. 95 Wis. 482, 70 N. W. 672.

Wherever the master should, as a reasonably prudent man, see that there is a probability of injury to some individual servant, or to some class of servants, if they and their fellow employees are left to regulate their own actions according to their own ideas of what is proper, he is charged with the obligation of protecting them as far as possible, both by prescribing the lines upon which the ordinary routine of their work shall be conducted, and by declaring what precautions shall be taken by them to minimize the danger arising from special emergencies.

Labatt, Mast. & S. (1904) § 210; *Ford v. Lake Shore & M. S. R. Co.* 124 N. Y. 493, 12 L. R. A. 454, 26 N. E. 1101; *Abel v. Delaware & H. Canal Co.* 128 N. Y. 662, 28 N. E. 663; *Slater v. Jewett*, 85 N. Y. 73, 39 Am. Rep. 627; *Doing v. New York, O. & W. R. Co.* 151 N. Y. 579, 45 N. E. 1028; *Reagan v. St. Louis, K. & N. W. R. Co.* 93 Mo. 348, 3 Am. St. Rep. 542, 6 S. W. 371; *Shearm. & Redf. Neg.* § 93; *Richlands Iron Co. v. Elkins*, 90 Va. 249, 17 S. E. 890; *Texas & N. O. R. Co. v. Echols*, 87 Tex. 339, 27 S. W. 60, 28 S. W. 517; *Wood, Mast. & S.* § 403; 3 Wood, Railway Law, § 382; *Pittsburg, Ft. W. & C. R. Co. v. Powers*, 74 Ill. 341; *Eastwood v. Retsof Min. Co.* 86 Hun. 91, 34 N. Y. Supp. 196.

Even if plaintiff had been aware of all the facts, the rule in this jurisdiction and of many other states would exonerate him from imputation of assumption of the risk, unless he was aware of the defects and knew and appreciated the risks resulting therefrom.

Mangum v. Bullion, B. & O. Min. Co. 15 Utah, 547, 50 Pac. 834.

Baskin, Ch. J., delivered the opinion of the court:

It is alleged, in substance, in the complaint, that the plaintiff, as an employee of the defendant, was, on the 5th of December, 1901, engaged in working in defendant's coal mine, in the state of Wyoming, at the bottom of a shaft in said mine, which extended from the surface, on an incline of 25 degrees, a distance of about 800 feet; that on said day the defendant was, and for a long time prior thereto had been, engaged in constructing a railway track down said shaft; that in doing so the iron rails necessary to the construction of said track were loaded upon the top of an ordinary pit car, and let down to the place where needed by means of a wire cable operated by machinery at the surface; that by reason of the weight of the rails, and the downward slope of said shaft, and the

jerking of the cable, the letting down of the rails was extremely dangerous to the plaintiff, working at the bottom of the shaft, by reason whereof it became and was the duty of the defendant to securely fasten the rails to the top of the car by means of ropes, cables, or otherwise, and carefully work and operate the machinery, and to warn the plaintiff at the bottom of the shaft before letting down the pit car loaded with rails, and that the defendant had full notice of such risks, dangers, and hazards, and was well aware of its said duties; that on said day said defendant, in violation of its duty to the said plaintiff, negligently and carelessly, and without any notice or warning to the plaintiff, used said pit car in letting down said rails to the bottom of the shaft, and carelessly and negligently failed and omitted to fasten or secure said rails to the top of said car, but left the same loose and unfastened upon the top of said car, whereby and by consequence of which one of the said rails, being loose and unfastened, as aforesaid, on the top of said car, slipped from and over the end of said car, and fell down the slope of the shaft to the bottom thereof, where it struck the said plaintiff and injured him. In addition to the foregoing, it is alleged in the second count of the complaint that it became and was the duty of the defendant to make, prescribe, promulgate, and enforce rules among its said employees who were engaged in letting down said rails to the bottom of the shaft, requiring that said rails were by said employees to be securely fastened or tied to said pit or trip car by and with the said cables, ropes, or other effective appliances before said pit car loaded with said rails was started down the slope of the shaft. It is further, in substance, alleged that the defendant negligently failed and omitted to perform said duties. A verdict and judgment were entered in favor of the plaintiff.

At the close of the plaintiff's evidence the defendant moved for a nonsuit, which was denied. Defendant also requested the court to instruct the jury to return a verdict in favor of the defendant, which was also denied. The denial of each of these motions is assigned as error.

Without stating the evidence in detail, as it is very voluminous, it is sufficient to say that, after a careful consideration of the whole of it, we are fully satisfied that it, as well as the evidence of the plaintiff in chief, standing alone, is such as required the case to be submitted to the jury, and that, therefore, the trial court did not err in denying either the motion for the nonsuit or the request to instruct the jury to find a verdict for the defendant.

2. The refusal of the court to give the following instructions, requested by the defendant, is also assigned as error, *viz.*: "The court further charges you, in the matter of what is a reasonably safe way to do a thing or perform an act, may be defined to be the way and manner that people engaged in the same business have adopted for doing like work. If you find from the evidence that the defendant adopted the ordinary and usual way of lowering the rails into its mines, which was the way that was adopted generally by mine owners in like cases, then in that event it would not be deemed carelessness or negligence on defendant's part to lower rails into the mine in this manner; and, if an accident occurred thereby, it would be an accident incident to the business, and one for which the defendant is not liable." It is well settled that the master is required to exercise "reasonable or ordinary" care for the safety of his servants while performing their duties. Reasonable care and ordinary care, which in law have the same meaning, "is the care which reasonable and prudent men use under like circumstances" (*Cayzer v. Taylor*, 10 Gray, 274, 69 Am. Dec. 317), and must be measured by the character, risk, and exposure of the business; and the degree required is higher where life or limb is endangered. As stated by Mr. Justice Field in *The Nitro-glycerine Case* (*Parrott v. Wells, F. & Co.*) 15 Wall. 524-538, 21 L. ed. 206-211: "The measure of care against accident, which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own interests were to be affected and the whole risk were his own." In the case of *Boyle v. Union P. R. Co.* 25 Utah, 422, 430, 71 Pac. 988, 991, which the appellant has cited as supporting its contention, Mr. Justice McCarty, speaking for this court, correctly stated the rule upon this subject as follows: "The rule has become elementary that it is a duty the master owes to his servant to use reasonable care and prudence for his safety by providing the machinery in use with such appliances as will enable the servant, with ordinary and reasonable care on his part, to perform the duties required of him without danger, except as may be reasonably incident to the business or employment engaged in. That is, the master is required to provide the same kind of appliances, or appliances equally as safe, as those in general use by men of ordinary prudence who are engaged in the same kind of business. Bailey, Master's Liability for Injuries to Servant, pp. 15, 16, and cases cited; Shearm. & Redf. Neg. § 194; *Pool v. Southern P. Co.* 20 Utah, 210, 58 Pac. 326. It is not only the master's duty to provide

his servants with reasonably safe appliances, but it is also his duty to use ordinary care in looking after, inspecting, and keeping them in repair. Shearm. & Redf. Neg. § 195; Bailey, Master's Liability for Injuries to Servant, p. 101." The same rule is stated in *Titus v. Bradford, B. & K. R. Co.* 136 Pa. 618, 626, 20 Am. St. Rep. 944, 20 Atl. 517, 518, which the appellant also cited, as follows: "No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man." In *Dickert v. Salt Lake City R. Co.* 20 Utah, 394, 59 Pac. 95, this court held that, "However unusual the method of a common carrier, such as a street railway company, in starting its cars, if that method is dangerous, and its use violative of the high degree of care which the carrier is required to observe regarding its passengers, and in the use of that method a passenger is injured, the carrier is liable." Reasonable or ordinary care cannot be determined abstractly, for what would be such care in one case might be gross negligence in another, and therefore whether such care has been exercised depends upon, and can only be determined by, the facts in each particular case, and is generally a question of fact for the jury to determine. Under the well-settled rule upon the subject before mentioned, the instructions so as aforesaid requested are erroneous in this: That they are not limited in their application to the reasonable or ordinary manner in which similar work as that in which the defendant was engaged is generally performed, under similar circumstances, by reasonable and prudent persons engaged in the same occupation. As there was no proof that the conditions under which the work of the defendant was performed were the same as those under which reasonable and prudent persons engaged in the same occupation as the defendant generally perform their work, the instructions requested were not proper for that reason.

3. Defendant's attorney asked M. J. Blake, a witness for defendant, "What was the general method of letting down rails in those mines you say you have worked in, in the state of Wyoming, prior to the time of this accident?" To this question counsel for plaintiff objected on the ground that it was incompetent, and did not include conditions existing at the time and place of the accident. This and several objections of the same kind were sustained, and the ruling of the court is assigned as error. It follows from what has been said under the second head of this opinion that these objections were properly sustained.

4. The refusal of the court to give each of the following instructions, requested by the defendant, is assigned as error:

"(5) You are instructed that when the plaintiff engaged in the employment of the defendant for compensation he took upon himself the risks and perils ordinarily incident to the performance of the service for which he was employed. That one of the risks and perils, under the laws of Wyoming, so assumed by the said deceased, is that resulting from the carelessness and negligence of the other servants in the same general employment. If you therefore find from the evidence that the accident resulted from the negligence of the engineer operating the hoisting engine, or from the negligence of any of the men who were employed in taking rails down the slope, then and in either of said cases plaintiff could not recover in this case, for the reason that the accident was caused by the omission or act of a fellow servant with the deceased, for which omission or negligence the said defendant is not liable."

"(9) The court instructs you that the defendant in this case is not liable for any neglect or misconduct of the fellow servants of plaintiff which may have caused his injury, and further charges you that Mr. Tate and Mr. McDonald and other men under Mr. Blake were fellow servants, with the plaintiff, and if, therefore, the accident happened because of the negligence of these men to obey the orders of Mr. Blake, the mine boss, to fasten the rails upon the car, you will find no cause of action against the defendant."

"(12) You are instructed that where two or more persons are employed in the same general work by a company, if one is injured by the negligence of the other his employer is not responsible. The court further charges you that Mr. Blake, the mine foreman, and Mr. Tate, his assistant, and Mr. McDonald, and the others loading the cars with the iron rails in question, were fellow servants of the plaintiff in this case."

The first sentence of the fifth request was given in the court's charge. Appellant's counsel contend that the case at bar is governed by the common law of England on the subject of the liability of the master for injuries to the servant, as adopted by § 2695 of the Revised Statutes of 1899 of the state of Wyoming, and for that reason the requests should have been given. Said section is as follows: "The common law of England as modified by judicial decisions, so far as the same is of a general nature and not inapplicable, and all declaratory or remedial acts or statutes made in aid of, or to supply the defects of the common law, 67 L. R. A.

prior to the fourth year of James the First (excepting the 2d section of the 6th chapter of 43d Elizabeth, the 8th chapter of 13th Elizabeth and 9th chapter of 37th Henry VIII.), and which are of a general nature and not local to England, shall be the rule of decision in this state when not inconsistent with the laws thereof, and shall be considered as of full force, until repealed by legislative authority." This court has held that the law of the state where the injury occurs governs. *Sartin v. Oregon Short Line R. Co.* 27 Utah, 447, 76 Pac. 219. To determine the question thus presented it is necessary to ascertain what the phrase "common law of England," as used in said section, includes. Blackstone, in defining the "common law of England," uses the following language: "The municipal law of England . . . may with sufficient propriety be divided into two kinds: The *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written or statute law. The *lex non scripta*, or unwritten law, includes, not only general customs, or the common law properly so called, but also the particular customs. . . . Their original institution and authority are not set down in writing, as acts of Parliament are, but they receive the binding power and the force of laws by long and immemorial usage, and by their universal reception throughout the Kingdom. . . . Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This is it that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this Kingdom." 1 Sharswood's Bl. Com. 63-66. See also Broom, Common Law, 4th ed. p. 7. The *lex non scripta*, or common law, of England, was brought over to the American colonies by our ancestors, and was adopted by them so far as applicable to their new conditions, and has been adopted by most of the states in the Union substantially in the same form as by the state of Wyoming. It is stated in 8 Cyc. Law & Proc. 386, that, "in determining what the common law is, the courts will consider as evidence, although not as conclusive, Blackstone's and Kent's Commentaries and other standard works on the subject; and will examine and weigh the reasoning of the decisions of the state and Federal courts down to the present time. English decisions rendered prior to July 4, 1776, if they are clear and consistent, while they do not constitute a part of the common law, are usually considered conclusive evidence of what the common law

is; but those rendered after that date, while entitled to great respect, are not binding upon us. The courts will also, in ascertaining the principles of the common law, consider English statutes amendatory or declaratory of the common law. English decisions construing English statutes adopted in the United States, made prior to their adoption, or prior to the Revolution, but not afterwards, will generally be followed." In 6 Am. & Eng. Enc. Law, 2d ed. p. 279, it is stated that "English decisions are freely used in deciding cases in the Federal and state courts in the United States, and are deemed of great value in these tribunals; and where such decisions were rendered prior to the war of the Revolution they form a part of the common law of the United States, and are binding upon American courts. But, though binding, they do not constitute the law itself, but are only evidence of what the law is, and hence should be clear and unequivocal. On the other hand, it is equally well settled that decisions of English courts, rendered since that time, though entitled to respect, and at times regarded as persuasive, are not authoritative, and will be disregarded should the exigency so require." In *Murdock v. Hunter*, 1 Brock. 135-140, Fed. Cas. No. 9,941, Mr. Chief Justice Marshall, in the opinion, said: "On passing from principle to authority, it may not be improper to premise that, as the common law of England was and is the common law of this country, and as an appeal from the courts of Virginia lay to a tribunal in England, which would be governed by the decisions of the courts, the decisions of those courts, made before the Revolution, have all that claim to authority which is allowed to appellate courts. Those made since the Revolution lose that title to authority, which was conferred by the appellate character of the tribunal which made them, and can only be considered as the opinions of men distinguished for their talents and learning, expounding a rule by which this country, as well as theirs, professes to be governed." The same doctrine was announced by the same distinguished judge in the cases of *Livingston v. Jefferson*, 1 Brock. 203-210, 211, Fed. Cas. No. 8,411, and in *Cathcart v. Robinson*, 5 Pet. 264, 8 L. ed. 120. Chief Justice Shaw, in *Com. v. York*, 9 Met. 93-110, 43 Am. Dec. 373, announced the same doctrine in the following language: "If we consult English decisions made since the Revolution, it is not because they have any binding force as rules, but because they are expositions of the rules and principles of the common law by men of great experience and judgment in the knowledge and applica-

tion of the same laws which we are seeking to expound. And, if we read the digests and treatises of reputable authors published since we ceased to be English subjects, it is because they contain the authentic records of the precedents and judicial proceedings which furnish the evidence of the common law." See also *Koontz v. Nabb*, 16 Md. 549; *Robert v. West*, 15 Ga. 122; 1 Kent, Com. 13th ed. 473. Judge Cooley, in his work on Const. Lim. 7th ed. laid down the same doctrine, and on page 53 stated: "The opening of the war of the Revolution is the point of time at which the continuous stream of the common law became divided, and that portion which had been adopted in America flowed on by itself, no longer subject to changes from across the ocean." In *Cowhick v. Shingle*, 5 Wyo. 87, 95, 25 L. R. A. 608, 63 Am. St. Rep. 17, 37 Pac. 689, 692, Mr. Justice Clark, speaking for the court, said: "As a rule, the term 'common law' means both the common law of England as opposed to statute or written law, and the statutes passed before the emigration of the first settlers of America. *Patterson v. Winn*, 5 Pet. 241, 8 L. ed. 111; *Com. v. Leach*, 1 Mass. 61. And, applying this definition to the matter in hand, I am unable to perceive that there is any 'common-law' rule upon the subject." The 1st. section of the Washington Code of 1881 (2 Hill's Anno. Statutes & Codes, § 108, p. 34) is as follows: "The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state." In the case of *Sayward v. Carlson*, 1 Wash. 29-40, 23 Pac. 830, 833, which involved the question of whether the plaintiff's injury was caused by a fellow servant, the court, in its opinion, said: "Plaintiff in error maintained that § 1 of the Code of 1881, which makes the common law of England the rule of decision in all the courts of Washington territory, was decisive as to the first step of the inquiry, namely, where the court should look for the proper rules. We agree to this. But we do not subscribe to the next proposition,—that resort can be had only to the decisions of English courts, or to those of American courts which have followed them, to ascertain what the common law of England is or was, unless the English decisions commend themselves to reason, or have been so long and generally followed that to depart from them would tend to unsettle what has, by 'immemorial and universal usage,' been understood to be settled. . . . And we un-

derstand by § 1 of the Code that, where there are no governing provisions of the written laws, the courts of the late territory, and of this state, are, in all matters coming before them, to endeavor to administer justice according to the promptings of reason and common sense, which are the cardinal principles of the common law; but not that the decisions of the English courts are to be taken blindly, and without inquiry as to their reasoning or application to the circumstances. We have been led to these remarks because of the fact that this question of injuries by servants of the same master, negligently inflicted upon each other, has given rise to extensive discussion and wide divergence of decision in both English and American courts."

In view of the foregoing authorities, I am clearly of the opinion that the phrase "common law of England," as used in § 2695 of the Wyoming Revised Statutes of 1899, was not intended to and does not include the judicial decisions of England upon the subject rendered subsequently to the independence of America. But, notwithstanding such decisions are not a part of the common law adopted by the state of Wyoming, and are not, therefore, binding upon the courts of that state, yet, as evidence of what the common law, as so adopted, is, they are entitled to respect, and in particular cases may properly be regarded as conclusive. This brings us to the consideration of whether the common law so adopted is applicable to the case at bar.

The first decision in England upon the subject of the master's liability was rendered in 1837, in the case of *Priestley v. Fowler*, 3 Mees. & W. 1. The declaration in the case stated that "the plaintiff was a servant of the defendant in his trade of a butcher; that the defendant had desired and directed the plaintiff, so being his servant, to go with and take certain goods of the defendant in a certain van of the defendant then used by him, and conducted by another of his servants, in carrying goods for hire upon a certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was proceeding, and being carried and conveyed by the said van, with the said goods; and it became the defendant's duty to use proper care that the van should be in a proper state of repair, and should not be overloaded, and that the plaintiff should be safely and securely carried thereby. Nevertheless, that the defendant did not use proper care that the van should not be overloaded, or that the plaintiff should be safely and securely carried, in consequence of the neglect of which duties the van gave way and broke down, and 67 L. R. A.

the plaintiff was thrown to the ground, and his thigh fractured." The judgment rendered upon the verdict for the plaintiff was, on motion, arrested. Lord Abinger, in the opinion said: "It has been objected to this declaration that it contains no premises from which the duty of the defendant, as therein alleged, can be inferred in law; or, in other words, that from the mere relation of master and servant no contract, and therefore no duty, can be implied on the part of the master to cause the servant to be safely and securely carried, or to make the master liable for damage to the servant arising from any vice or imperfection unknown to the master, in the carriage, or in the mode of loading and conducting it. . . . It is admitted that there is no precedent for the present action by a servant against a master. We are therefore to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision the one way or the other."

The next decision on the subject in England was made in 1850, in the case of *Hutchinson v. York, N. & B. R. Co.* 5 Exch. 343, and in the opinion it is said: "This case appears to us to be undistinguishable in principle from that of *Priestley v. Fowler*, 3 Mees. & W. 1. . . . That case was fully considered, and the court, after a verdict for the plaintiff, arrested the judgment on the ground that a master is not, in general, liable to one servant for damages resulting from the negligence of another.

. . . The principle is that a servant, when he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both. . . . Though we have said that a master is not, in general, responsible to one servant for an injury occasioned to him by the negligence of a fellow servant while they are acting in one common service, yet this must be taken with the qualification that the master shall have taken due care not to expose his servant to unreasonable risks."

While, as a general principle, it has been well settled by the decisions of the courts of both England and this country that the master is not liable for an injury to the servant caused by the negligence of a fellow servant, it has likewise been settled that it is the duty of the master to exercise due care, and use all reasonable and ordinary means to prevent the servant from being exposed to unnecessary danger, and, if the master neglects to perform that duty, he is

liable whenever such neglect either directly causes or materially contributes in causing the injury. But as to what specific duties the master is bound to perform in order to avoid liability, and as to who are fellow servants, under these general principles, the decisions of the courts of England, prior to the employer's liability act of 1880 (43 & 44 Vict. chap. 42; Digest of Cases and Statutes [2d vol.] 2236), as also the decisions of the courts of this country up to the present time, widely differ. Some of the English cases upon the subject previous to said act are as follows: In the case of *Tarrant v. Webb* (decided in 1856) 18 C. B. 797, it was held that "a master is not generally responsible for an injury to a servant from the negligence of a fellow servant; but that rule is subject to this qualification, —that the master uses reasonable care in the selection of the servant." Lord Jervis, in the opinion, quoting from the opinion of Lord Cranworth in the case of *Paterson v. Wallace*, 1 Macq. H. L. Cas. 748, 751, says: "When a master employs a servant in a work of a dangerous character, he is bound to take all reasonable precautions for the safety of that workman. This is the law of England no less than the law of Scotland. It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure, when in fact the master knows, or ought to know, that it is not so. And if, from any negligence in this respect, damage arise, the master is responsible." In *Murphy v. Smith* (decided in 1865) 10 C. B. N. S. 361, it was held that, "to render a master liable for an injury to one in his employ through the negligence of another person, also in his employ, it must be shown that the latter was placed by the master in such a position of trust and authority as to be fairly considered as his representative in the establishment." In *Vose v. Lancashire & Y. R. Co.* (decided in 1858) 2 Hurlst. & N. 728, it is said: "A servant in the employment of the E. L. Company, engaged in repairing a carriage on a siding at a station in the joint occupation of the E. L. Company and the L. & Y. Company, was killed by an engine of the L. & Y. Company being shunted into the siding at which he was at work. It appeared that rules for the regulation of the station were published, headed in the joint names of the two companies, and that the servants employed in shunting the engines were the joint servants of the two companies, but the engine drivers and persons employed, as the deceased was, in repairing the carriage, were the separate servants of each company. It was found that the rules as to the precautions to be

taken before shunting trains into sidings had been observed, and that there had been no negligence on the part of the deceased, the shuntsman, pointsman, or engine driver, but that the accident was occasioned by the rules being defective. Held, that the L. & Y. Company were liable to an action at the suit of the administratrix of such servant." *Clarke v. Holmes* (decided in 1862) 7 Hurlst. & N. 937: "The plaintiff was employed by the defendant to oil dangerous machinery. At the time the plaintiff entered upon the service the machinery was fenced, but the fencing became broken by accident. The plaintiff complained of the dangerous state of the machinery, and the defendant promised him that the fencing should be restored. The plaintiff, without any negligence on his part, was severely injured in consequence of the machinery remaining unfenced. Held, in the exchequer chamber (affirming the judgment of the court of exchequer), that the defendant was liable for the injury." In the opinion Cockburn, Ch. J., said: "I consider the doctrine laid down by the House of Lords in the case of the *Bartonshill Coal Co. v. Reid* as the law of Scotland with reference to the duty of a master as applicable to the law of England also, namely, that where a servant is employed on machinery from the use of which danger may arise it is the duty of the master to take due care, and to use all reasonable means, to guard against and prevent any defects from which increased and unnecessary danger may occur." Byles, J., also said: "I think the master liable on the broader ground, to wit, that the owner of dangerous machinery is bound to exercise due care that it is in a safe and proper condition. The case of *Priestley v. Fowler* introduced a new chapter into the law, but that case has since been recognized by all the courts, including the court of error and the House of Lords. So that the doctrine there laid down, with all the consequences fairly deducible from it, are part of the law of the land. But the principles laid down in *Priestley v. Fowler*, and all the examples there given of their application, relate to the conveniences and casualties of ordinary or domestic life, and ought not to be strained so as to regulate the rights and liabilities arising from the use of dangerous machinery. . . . To hold that the master is responsible to his workman for no absence of care, however flagrant, seems to me in the highest degree both unjust and inconvenient. . . . It may be true that some of the cases cited at the bar are not quite consistent with this rule, particularly those which seem to make the personal misconduct or personal knowledge of the master a nec-

essary ingredient in his responsibility. But we are a court of error, at liberty to decide on principle, and fortified by higher authority. Why may not the master be guilty of negligence by his manager or agent, whose employment may be so distinct from that of the injured servant that they cannot with propriety be deemed fellow servants? And if a master's personal knowledge of defects in his machinery be necessary to his liability, the more a master neglects his business and abandons it to others the less will he be liable." To the same effect is the case of *Murphy v. Phillips* (decided in 1876) 35 L. T. N. S. 477.

The following quotation from the opinion in *Hough v. Texas & P. R. Co.* 100 U. S. 221, 25 L. ed. 612, further shows the views of English courts upon the subject, as well as the view of the Supreme Court of the United States up to the date of that decision, viz.: "The question came before the House of Lords in *Paterson v. Wallace*, 1 Macq. H. L. Cas. 748, and again in 1858, in *Bartonhill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266. In the last-named case Lord Cranworth said that it was a principle, established by many preceding cases, 'that when a master employs his servant in a work of danger he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks.' This he held to be the law in both Scotland and England. At the same sitting of the House of Lords, *Bartonhill Coal Co. v. McGuire*, 3 Macq. H. L. Cas. 307, was determined. In that case Lord Chancellor Chelmsford delivered the principal opinion, concurring in what was said in the *Reid Case*. After referring to the general doctrine as announced in *Priestley v. Fowler*, and recognized subsequently in other cases in the English courts, he said: 'In the consideration of these cases it did not become necessary to define with any great precision what was meant by the words "common service" or "common employment," and perhaps it might be difficult beforehand to suggest any exact definition of them. It is necessary, however, in each particular case to ascertain whether the fellow servants are fellow laborers in the same work, because, although a servant may be taken to have engaged to encounter all risks which are incident to the service which he undertakes, yet he cannot be expected to anticipate those which may happen to him on occasions foreign to his employment. Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the other by carelessness or negligence in the course of his peculiar

work is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servant stood in no such relation to him.' "

The particular acts of the master which entitle the servant to recover for injury caused thereby, were not definitely fixed by the law in England previously to the passage of the employer's liability act in 1880, the 1st and 2d sections of chapter 42 of which are as follows:

"Section 1. Where after the commencement of this act personal injury is caused to a workman, (1) by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer; or (2) by reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence; or (3) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed; or (4) by reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or (5) by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway, the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

"Sec. 2. A workman shall not be entitled under this act to any right of compensation or remedy against the employer in any of the following cases: . . . (1) Under subsection 1 of § 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition. (2) Under subsection 4 of § 1, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned: Provided that, where a rule or by-law has been ap-

proved or has been accepted as a proper rule or by-law by one of Her Majesty's principal Secretaries of State, or by the Board of Trade or any other department of the government, under or by virtue of any act of Parliament, it shall not be deemed for the purposes of this act to be an improper or defective rule or by-law. (3) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence."

2 Digest of Eng. Cas. pp. 2236, 2237.

It follows from the foregoing facts and the decisions mentioned upon the subject that the common law of England, at the time of its adoption by the state of Wyoming, had no relation whatever to the master's liability for injuries to the servant, and that the decisions of the English courts prior to the adoption of the employer's liability act are not binding upon us in the case at bar.

It appears that the engineer mentioned in the fifth request was at the time the plaintiff was injured, and previously thereto had been, in charge of the defendant's engine, but there was no evidence whatever tending to show that he was negligent in any respect. It also appears that the witness Blake at the time of the injury was and had been defendant's "mine foreman," and that both he and the witness Tait, who was assistant foreman, were present while the rails (among which was the rail by which the plaintiff was injured) were being loaded.

Mr. Blake, as appears from the following questions asked him by defendant's counsel and his answers to the same, directed the loading of the rails, and knew the manner in which it was done:

Q. Mr. Blake, you say you were present the morning—afternoon at least—this party was injured, and I will ask you again now if you were there when the rails were loaded that went down the trip from which Mr. Johnson was hurt?

A. I had been around there.

Q. Were you present at the time?

A. Not all the time.

Q. Were you there at all?

A. Yes, sir; part of the time.

Q. State whether or not you superintended loading those rails, or instructed them to be done.

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A. I instructed them. I didn't personally superintend.

Q. State how those rails were loaded so far as you know.

A. They were loaded on the trip of about five empty cars.

Q. How?

A. On the last car, front end of the trip going down the slope. There were two pieces of 3x10 and one piece of 3x12 plank placed in the end of the car, and in the bed of the car—

Q. Did they stand endways?

A. Yes, stand endways in the bed of the car. The bed of the car was then filled up within 3 or 4 inches of the top with mine ties.

Q. Three or 4 inches of the top?

A. Yes, sir.

Q. And then what?

A. And the rails were loaded on top of the trip and placed against the plank.

Q. Did you see the men load the rails?

A. Yes, sir.

Mr. Tait testified that he was present and assisted in loading the rails, and in answer to the question by defendant's counsel, "Under whose supervision were the rails loaded?" said, "Mr. Blake's." Mr. Tait, as assistant foreman, had control over the miners and track layers, and Mr. Blake, the mine foreman, had control over all of the men, and had power to hire and discharge them. No one engaged in the work had authority superior to that of Mr. Blake's. There was no evidence to show that the employees in conducting the cars down the shaft were negligent, or did it in any different way than required by their instructions.

No statute of Wyoming upon the subject of the master's liability has been called to our attention, and the only decision in that state relating thereto which we have been able to find was rendered in the case of *McBride v. Union P. R. Co.* 3 Wyo. 248, 21 Pac. 687, cited by appellant's counsel as supporting their contention. In that case the "plaintiff had been ordered by the gang boss to assist in lowering an engine in defendant's shops. The engine was hoisted above the track, and was resting on timbers, which in turn were resting on the rails, and above a pit 2 or 3 feet deep. In removing the last timber but three men were employed, plaintiff being on the right-hand side, and J. and E. on the left. By order of the boss, J. left the work, and the end of the timber held by E. dropped into the pit, causing the other end to fly up and hit plaintiff, inflicting the injuries complained of. The jury found that the gang

boss had immediate control of the work, but that he was under the general control of the master mechanic; that the latter was not in the shops at the time, but that the foreman, who superintended the work in the shops under the general directions of the master mechanic, was present. Held, that the defendant could not be held liable for the negligence of the gang boss as a vice principal in the exclusive control of a department." In the opinion, delivered by Mr. Justice Corn, it is said: "None of the authorities, we believe, go to the length of holding the master liable for the negligence of an employee as vice principal in control of a department, when there is in the same department, and present at the time of the accident, a superior under whose orders and control such employee perform his duties. There is, however, a class of cases where the employee is the representative of the master, though not in control of a separate department; and where the master is liable for his negligence, not upon any ground of superior rank or grade in the service, but from the character of the service which he is designated to perform. 'One of the exceptions to the general rule of the common law that the master is not liable to one employee for the negligence of a co-employee in the same service arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master.' *Hannibal & St. J. R. Co. v. Fox*, 31 Kan. 597, 3 Pac. 322. Such proper diligence imposes upon the master such duties as to furnish to the men a reasonably safe place in which to work, to furnish them proper and safe machinery and materials with which to work, to exercise reasonable care and diligence in making sufficient regulations for the safe running of trains, so as to avoid injury from collisions, etc., to furnish sufficiently skilful coemployees and in sufficient number for the safe performance of any particular piece of work in which an employee is called upon to take part," etc. The same exceptions referred to by Justice Corn have been made in the statutes of several of the states, are the same as those mentioned in some of the English cases before cited, and are among the exceptions set out in the employer's liability act of 1880. Independent of statute, they are, in principle, correct, and are sustained by public policy and the decisions of many well-considered cases by the courts in this country. Under these exceptions a person intrusted by the master with the management of his general busi-

ness, or with some special part of it, is not a fellow servant with the subordinate employee. The duties imposed by these exceptions are personal duties of the master, which can in no way be delegated by him so as to relieve him from liability. Nor is the negligence of the person to whom the management of the master's business is intrusted among the risks of the employment which the servant assumes. As Blake, the foreman, and his assistant, were both present when the rails were being loaded, the former directing and the latter assisting the men engaged in the work, if the manner of loading the rails upon the cars was negligent, and in consequence thereof, as alleged in the complaint, one of the rails on the top of the cars, being loose and unfastened, fell down the slope, and injured the plaintiff, it was the negligence of the foreman and his assistant, and not that of the employees working under them. Whether the manner was negligent was in issue, and, under the evidence, was a question for the jury to determine. The case at bar is distinguishable from the Wyoming case in this: The plaintiff was not, as in that case, present and assisting in the operation which caused the injury. Nor was the head foreman in that case, as in the case at bar, present and directing the operation.

It follows from what we have said that all of the requests under consideration were properly refused, first, because it is not the law in the state of Wyoming that "persons employed in the same general work" of the master are fellow servants, and on principle, and by the weight of authority, persons engaged in the service of the master, who are intrusted by him with the management or direction of his general work, or with some particular part thereof, are not fellow servants with the subordinate employees, but are vice principals; and, second, under the evidence the alleged negligence is not attributable to either the engineer or the subordinate employees who assisted in loading the rails upon the cars.

5. The appellant also has assigned as error the giving of the following instruction: "(7) It is the duty of the master, when the nature of the business required it, to make and promulgate rules for the protection of his servants, and to use due care and diligence, after the making and promulgating of a necessary rule, to have it enforced; and if you should find from the evidence in this case that the nature of the defendant's business was such as, in the exercise of due care and prudence for the safety of its employees, required the making and promulgating of rules, and should further find that the defendant failed to make

and promulgate such rules, or, having made and promulgated the same, failed to use due care and diligence to have them enforced, and should further find that the injuries, if any, received by the plaintiff were caused by such failure, you should find for the plaintiff." The following rule, stated in *Barrows on Negligence*, p. 102, § 40, is generally sustained by both courts and text writers, to wit: "It is the duty of the master to prescribe and publish such suitable rules as the circumstances may reasonably require for the proper and safe transaction of the business. This duty of the master to protect his servants by making suitable rules for the safe management of the business becomes more imperative in proportion to the danger and complication of the work; but whether any rule at all is required, in the exercise of ordinary care, in a particular case, or whether the one in effect at the time of the injury was reasonably sufficient, are generally questions of fact for the jury. . . . And the master must also exercise ordinary care to see that the rules and regulations are enforced." A failure upon the part of the master to perform this duty is negligence *per se*. *Wood, Mast. & S. § 403*. Whether this duty has been performed depends upon the circumstances of each particular case; and when the evidence, as in this case, is such as reasonable men might differ as to whether the duty has been performed, it is a question for the jury. In *Eastwood v. Retsch Min. Co.* 86 Hun, 91, 96, 34 N. Y. Supp. 196, 198, the court said: "It is quite clear in this case that the question whether or not the case was a proper one for requiring the defendant to establish rules for the government of its employees in drawing salt from this bin when men were engaged inside of it was one as to which reasonable men might differ. . . . In every case its duty is performed by the exercise of reasonable care in deciding in the first place whether rules are necessary, and, in the second place, in making such rules as appear to be sufficient. But the question in either case may be for the jury whether, in the first place, the company took reasonable care to conclude whether rules were necessary, or, in the second place, if they were, whether the rules thus made were proper for the purpose for which they were intended. When the question is whether the case was one in which rules ought to have been made, the fact that other people or corporations engaged in the same business had or had not found it necessary to make rules upon that subject, is one which might well be considered. But the fact that no such rules had been made is not conclusive 67 L. R. A.

against the necessity of making them. It is simply a fact to be considered." Under the circumstances disclosed by the evidence, the instruction under consideration correctly stated the law, and properly submitted to the jury the question as to whether the defendant, in respect to the matter of making, promulgating, and enforcing necessary rules, was negligent.

6. In addition to the instructions hereinbefore mentioned, requested by the defendant, ten others were asked for by it, and the refusal of each is assigned as error. As the instructions given by the court covered the whole case, and properly submitted it to the jury, the other ten requests being of minor importance, it is not necessary to pass upon them. *State v. Hairorth*, 24 Utah, 398-425, 68 Pac. 155, and cases there cited; *Holland v. Oregon Short Line R. Co.* 26 Utah, 209, 72 Pac. 940.

7. In the examination in chief of a witness for the plaintiff the following occurred:

Q. Now tell just the movement of that car when it was in operation down that slope?

A. I could not say for that car or that trip at that time.

Q. Other trips?

Defendant's counsel objected to these questions as incompetent in this: That what may have been done at other times was not evidence of what was done on the occasion of the injury. The objection was overruled, and the witness answered: "I was with it at various times and places in that slope during my employment prior to this accident. At times it would run steady, and at other times it kind of jerked." It is, in substance, alleged in the complaint that on the day of the injury, and long prior thereto, by reason of the weight of the rails, the downward slope of the shaft, and the jerking of the cable, the letting down of the rails was very dangerous to the plaintiff, and that the defendant had full notice thereof. These allegations were denied in the defendant's answer. In view of that fact the objection was properly overruled.

8. A witness for the defendant was asked by its counsel the following question: "Mr. Hopkins, after your experience and investigation in these matters, which is the better or safer way of letting down those rails in the mine in question, by placing, as was done formerly, against plank—the end of the rail against plank—raised above the surface of the car behind (that is, the one in vogue at the time of the accident), or the one you now say they adopted by hanging

them on an iron rod?" This question was objected to by the plaintiff as incompetent, and calling for an opinion upon a matter which it was the province of the jury to decide. As to which of the methods referred to in the question was the safest was not an issue in the case, and the opinion called for related to a matter which, if it had been in issue, would have been a question exclu-

sively for the jury, and therefore not the subject of expert opinions.

Upon a careful examination of the whole record we fail to discover any reversible error.

The judgment is affirmed with costs.

McCarty, J., concurs. **Bartch, J.**, concurs in the judgment.

FLORIDA SUPREME COURT.

HARTFORD FIRE INSURANCE COMPANY, *Plff. in Err.*,

v.

Joseph H. REDDING *et al.*

(.....Fla.....)

*1. **Chapter 4173, p. 101, act approved June 3, 1893**, which authorizes the recovery of attorneys' fees in certain cases against insurance companies, is constitutional.

2. **The attorneys' fees provided for** by chap. 4173, p. 101, act approved June 3, 1893, may, under the 2d section of that act, be recovered in the same suit and included in the same judgment as the amount due upon the policy of insurance.

3. **Chapter 4173, p. 101, act approved June 3, 1893**, which authorizes the recovery of attorneys' fees in certain cases against insurance companies, was not repealed by chap. 4677, p. 33, act approved May 31, 1899.

4. **Chapter 4677, p. 33, act approved May 31, 1899**, does not deprive the insurer of the right to plead that the fire was caused by the criminal conduct of the insured, or that the insurable value thereby required to be fixed and written in the policy was procured to be so fixed by fraud on the part of the assured.

5. **Chapter 4677, p. 33, act approved May 31, 1899**, is not repugnant to the Constitution of this state, nor to that of the United States.

6. **Leave to amend** a pleading may be granted during a term of court without notice to the opposite party of the application therefor, even though the cause has been

submitted upon demurrer by brief at such term.

7. **Where an amendment of the declaration is permitted** pending the hearing of a demurrer thereto the court should permit the defendant to plead or demur to the amended declaration, and it will be error for the court to apply the demurrer on file to the amended declaration without defendant's consent.

8. **Errors without injury** are not ground for reversal.

9. **The requirements in the standard insurance policy** that the insured shall give notice of loss and make proofs of loss are conditions precedent to the right to sue; but a failure to give the notice or to make the proofs within the time stipulated will not invalidate the policy, or work a forfeiture of the rights of the insured, in the absence of a stipulation to that effect, but will merely postpone the day of payment, where such notice is given and proofs of loss made within such time as will enable the insured to bring his suit within the time limited by the policy.

10. **Where proofs of loss required to be made** and served upon the company by the policy are sufficiently full to give the company notice of the loss required by another provision in the policy, the same document will be sufficient as a notice of the loss, as well as proofs of loss.

11. **Proofs of loss served upon an insurance company, signed and sworn to** by the insured, stating that the fire occurred at a stated hour on a day named; that it originated in the roof or attic of the building, but how it originated, or the cause thereof, was to the insured entirely unknown; that the fire did not originate by any act.

*Headnotes by CARTER, P. J.

NOTE.—As to constitutionality of provision for attorneys' fees in a particular class of cases, see also *note* to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L. R. A. 586, and the later cases in this series of Union Cent. L. Ins. Co. v. Chowning, 24 L. R. A. 504; Hocking Valley Coal Co. v. Rosser, 29 L. R. A. 386; Vogel v. Pekoc, 30 L. R. A. 491; Cameron v. Chicago, M. & St. P. R. Co. 31 L. R. A. 553; Dell v. Marvin, 45 L. R. A. 201; Davidson v. Jennings, 48 L. R. A. 340; Gano v. Minneapolis & St. L. R. Co. 55 L. R. A. 263; Missouri, K. & T. R. Co. v. Simonson, 57 L. R. A. 765; Phoenix Ins. Co. v. Schwartz, 57 L. R. A. 752; and Atkinson v. Woodmansee, 64 L. R. A. 325.

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As to statutes requiring payment of full amount of insurance, see also, in this series, Seyk v. Millers' Nat. Ins. Co. 3 L. R. A. 523; Queen Ins. Co. v. Leslie, 9 L. R. A. 45; German Ins. Co. v. Eddy, 19 L. R. A. 707; Havens v. Germania F. Ins. Co. 26 L. R. A. 107; Dugger v. Mechanics' & T. Ins. Co. 28 L. R. A. 796; and Daggs v. Orient Ins. Co. 35 L. R. A. 227.

As to forfeiture of insurance by failure to furnish proofs of loss within certain time, see Steele v. German Ins. Co. 18 L. R. A. 85, and *note*; Southern Home Bldg. & L. Asso. v. Home Ins. Co. 27 L. R. A. 844; Southern F. Ins. Co. v. Knight, 52 L. R. A. 70; and Peabody v. Satterlee, 52 L. R. A. 956.

design, or procurement on the part of the insured, or in consequence of any fraud or evil practice done or suffered by the insured; and that any other information required by the company would be furnished on request,—substantially comply with a provision in the policy requiring the proofs of loss to state the knowledge and belief of the insured as to the time and origin of the fire, particularly as the company requested no further information from the insured.

12. Trial courts have power to permit parties to withdraw from written stipulations waiving a jury and submitting the cause upon an agreed statement of facts to the court. The exercise of such power rests in discretion, and it is properly exercised where the application is made before the court has decided the cause under the written submission, and the party applying has discovered other pertinent facts since the submission was entered into, which the other party declines to embrace in the agreed statement. The fact that, by the exercise of due diligence, the omitted facts might have been discovered before the submission was entered into, does not deprive the court of the power to grant the application to withdraw.

13. Under § 1050, Rev. Stat. 1892, a plaintiff may file more than one replication or subsequent pleading to any pleading of the defendant, if he so desires.

14. Where, at the time a policy of insurance is written, other insurance exists upon the same property, and the fact is known to the agent, who communicates it to the company, and the company accepts the premium, and does not deny the validity of its policy on account of such other insurance until after a loss occurs, the company is liable, though its consent for such other insurance was not indorsed upon the policy as required by its terms. Such conduct on its part amounts to a waiver of the provision requiring written consent for other insurance, and the waiver will apply, not only to the other insurance as it existed when its policy was written, but to any policy subsequently issued in lieu or renewal of such other insurance.

(June 4, 1904.)

ERROR to the Circuit Court for Jefferson County to review a judgment in favor of plaintiffs in an action brought to enforce payment of the amount alleged to be due under a fire insurance policy. *Affirmed.*

The facts are stated in the opinion.

Messrs. Cockrell & Son for plaintiff in error.

Mr. T. L. Clarke, for defendants in error:

Notice to the agent is notice to the company, especially when communicated by the agent to the company, and when received and acted on by the company.

Argall v. Old North State Ins. Co. 84 N. C. 355; *May, Ins. § 463; West Branch Ins. Co. v. Helfenstein*, 40 Pa. 289, 80 Am. Dec. 67 L. R. A.

573; *Home Ins. & Bkg. Co. v. Myer*, 93 Ill. 271.

If insured was entirely without knowledge as to how the fire occurred or the cause thereof; and if it did not originate from any act, procurement, or evil practice done or suffered by insured,—it can scarcely be presumed that insured had any belief as to the origin of the fire.

If the insurer objects to proofs of loss, he must return them promptly and point out their defects; and they are presumed to be waived if the insurer does not object to defects therein, but bases its refusal to pay on other grounds.

May, Ins. § 469, p. 1119, note; Imperial Mfg. Co. v. American Credit Indemnity Co. (La.) 26 Ins. L. J. 626; *Post v. Aetna Ins. Co.* 43 Barb. 351; *O'Conner v. Hartford F. Ins. Co.* 31 Wis. 180.

The time within which this statement shall be furnished is not made the essence of the contract.

May, Ins. § 465, pp. 1097, 1099, note a; German Ins. Co. v. Davis, 40 Neb. 700, 59 N. W. 698; *Continental Ins. Co. v. Chase*, 89 Tex. 212, 34 S. W. 93; *Sergeant v. Liverpool & L. & G. Ins. Co.* 155 N. Y. 349, 49 N. E. 935; *Carpenter v. German-American Ins. Co.* 52 Hun. 249, 4 N. Y. Supp. 925; *Taber v. Royal Ins. Co.* 124 Ala. 681, 26 So. 260; *Tubbs v. Dwelling-House Ins. Co.* 84 Mich. 646, 48 N. W. 296; *Coventry Mut. Live Stock Ins. Asso. v. Evans*, 102 Pa. 281; *Weiss v. American F. Ins. Co.* 148 Pa. 349, 23 Atl. 991.

This policy covered a building which was totally destroyed by fire, of which destruction the insurer had immediate notice; and, under our statutes fixing the measure of damages in such cases, and upon the principles of general insurance law, no further proofs of loss were necessary or could be required to perfect a right of action in the insured.

Acts 1899, chap. 4677, §§ 1, 2, p. 33; May, Ins. § 465; Pennsylvania F. Ins. Co. v. Dougherty, 102 Pa. 568.

Admitting that this policy has no indorsement permitting the additional insurance, the court, in overruling this demurrer, simply holds that the facts set out in the replication constitute a waiver and estoppel on the part of the defendant.

As waiver and estoppel cannot be abolished by contract, the clause as to written consent does not prevent the operation of the usual rules by which the subsequent waiver of that clause may be established.

Alabama State Mut. Assur. Co. v. Long Clothing & Shoe Co. 123 Ala. 667, 26 So. 655; *Grubbs v. Virginia F. & M. Ins. Co.* 110 N. C. 108, 14 S. E. 516; *Equitable F. Ins. Co. v. Alexander* (Miss.) 12 So. 25; *Thomp-*

son v. St. Louis Mut. L. Ins. Co. 52 Mo. 469; *Walsh v. Etna L. Ins. Co.* 30 Iowa. 133, 6 Am. Rep. 664; *Peck v. New London County Mut. Ins. Co.* 22 Conn. 575; *Kiernan v. Dutchess County Mut. Ins. Co.* 150 N. Y. 190, 44 N. E. 698; *Titus v. Glens Falls Ins. Co.* 81 N. Y. 410.

The silence of the company in such case should be treated as its assent to the additional insurance.

Alabama State Mut. Assur. Co. v. Long Clothing & Shoe Co. 123 Ala. 667, 26 So. 658; *Beach, Ins. § 767*; *Wood, Fire Ins. p. 807*; *Planters' Mut. Ins. Co. v. Lyons*, 38 Tex. 253; *Hayward v. National Ins. Co.* 52 Mo. 181, 14 Am. Rep. 400.

An office which issues a subsequent policy will be presumed to have notice of a prior one. And where both policies are negotiated through the same person, who is agent for both companies, his knowledge is the knowledge of each company.

May, Ins. § 370; *Richmond v. Niagara F. Ins. Co.* 79 N. Y. 230; *Barnes v. Union Mut. F. Ins. Co.* 45 N. H. 21; *Warner v. Peoria Marine & F. Ins. Co.* 14 Wis. 318; *Phœnix Ins. Co. v. Spiers*, 87 Ky. 285, 8 S. W. 453; *Planters' Mut. Ins. Co. v. Lyons*, 38 Tex. 253; *Crescent Ins. Co. v. Griffin*, 59 Tex. 509.

Leave to keep insured to a greater amount than is contained in the policy is a sufficient indorsement permitting prior and subsequent insurance.

Blake v. Exchange Mut. Ins. Co. 12 Gray, 265; *Palatine Ins. Co. v. Ewing*, 35 C. C. A. 236, 92 Fed. 111; *First Baptist Soc. v. Hillsborough Mut. F. Ins. Co.* 19 N. H. 580; *Brown v. Cattaraugus County Mut. Ins. Co.* 18 N. Y. 385; *May, Ins. § 365*, p. 804; *Pitney v. Glen's Falls Ins. Co.* 65 N. Y. 6.

Notice to insurer's agent that the insured has taken out additional insurance on the insured property is notice to the insurer.

Home F. Ins. Co. v. Wood, 50 Neb. 381, 69 N. W. 941; *Hibernia Ins. Co. v. Malevinsky*, 6 Tex. Civ. App. 81, 24 S. W. 804; *Morris v. Orient Ins. Co.* 106 Ga. 472, 33 S. E. 430; *May, Ins. § 368*, p. 823, note; *Mississippi Home Ins. Co. v. Dobbins*, 81 Miss. 623, 33 So. 504; 3 Joyce, *Ins. § 2486*; *Wood, Fire Ins. p. 838*; *Phoenix Ins. Co. v. Tomlinson*, 125 Ind. 84, 9 L. R. A. 317, 21 Am. St. Rep. 203, 25 N. E. 126; *Schreiber v. German-American Hail Ins. Co.* 43 Minn. 368, 45 N. W. 708.

Carter, P. J., delivered the opinion of the court:

This writ of error is taken from a judgment in favor of defendants in error rendered by the circuit court of Jefferson county in an action against plaintiff in error upon a fire insurance policy. The policy, in 67 L. R. A.

form, is substantially the same as that set forth in the statement of facts in the case of *Indian River State Bank v. Hartford F. Ins. Co.* (Fla.) 35 So. 228, except as hereinafter stated. It is dated October 14, 1899, and purports to insure Ida H. Redding, for the term of one year from October 15, 1899, "against all direct loss or damage by fire except as hereinafter provided to an amount not exceeding \$1,500" to the building therein specifically described. It contains an indorsement, "The insurable value of the building herein described is fixed at \$3,000," purporting to have been made "to comply with the act of the legislature of the state of Florida regulating the issue of policies by fire insurance companies, approved May 31, 1899."

The declaration, as originally drawn, alleges the making of the policy, the payment of the premium, and the ownership of the property by Ida H. Redding at the time the policy was issued and at the time of the fire. It alleges that by the policy the defendant "did insure the plaintiff Ida H. Redding for the term of one year from the said 15th day of October, A. D. 1899, at noon, to the 15th day of October, A. D. 1900, at noon, against all loss or damage by fire, except as therein provided, to an amount not exceeding the sum of \$1,500," on a certain building (describing it); that "in and by its said policy the said defendant, the Hartford Fire Insurance Company, did promise and agree to pay to the plaintiff Ida H. Redding all such loss or damage as might occur to said building by fire during the period of such insurance aforesaid, not exceeding the said sum of \$1,500, sixty days after notice and proof of such loss or damage furnished to the said defendant company;" that "on the 21st day of August, A. D. 1900, and while the said policy of insurance was in full force and effect, the aforesaid building was totally and entirely lost and destroyed by fire, of which loss and destruction the said defendant had due notice;" and that "the plaintiff Ida H. Redding has rendered to the said defendant company a particular account and proof of said loss more than sixty days prior to the commencement of this action, and has otherwise fully complied on her part with all the conditions of said contract of insurance." It further alleges that the cash value of the building was \$4,000 at the time of the loss; that Ida H. Redding actually sustained loss to said amount; that the total insurance on the building was \$3,000, consisting of the policy in suit, "and a like policy of insurance for the sum of \$1,500 issued to the plaintiff Ida H. Redding on the said building by the Home Insurance Company of New

York city, at its Monticello, Florida, agency, numbered 328, dated April 18, 1900, and expiring April 18, A. D. 1901, of all which the defendant had due notice and proof."

There are other allegations in the declaration, which need not be noticed, further than to say that attorneys' fees were claimed under the statute hereafter referred to. The policy was attached to, and made a part of, the declaration.

The defendant filed its motion to strike those allegations of the declaration claiming attorneys' fees upon the grounds:

(1) There is no law authorizing such recovery.

(2) There is no law which required defendant to pay attorneys' fees before suit brought and prosecuted.

(3) There is no law authorizing plaintiff to demand such fees before suit brought and prosecuted. Consequently there can be no failure to pay, on which to predicate a demand and refusal. This motion was overruled, and the ruling is assigned as error.

The court at the trial instructed the jury to find for the plaintiff an additional sum as attorneys' fees, to be fixed at such reasonable amount as was shown by the evidence. This instruction was excepted to, and is also assigned as error.

The recovery of attorneys' fees in cases of this character is authorized by chapter 4173, p. 101, act approved June 3, 1893. It is contended that the statute is unconstitutional, but this court held otherwise in *Tillis v. Liverpool & L. & G. Ins. Co.* (Fla.) 35 So. 171, and we adhere to that decision. The 2d section of the statute provides that "the amount to be recovered for fees and compensation for attorneys and solicitors against life and fire insurance companies as provided in the foregoing section, shall be ascertained and fixed by the court in chancery causes, or a jury in common law actions, from testimony adduced for that purpose, and shall be included in the judgment or decree rendered against such companies." This language shows very clearly that the legislature intended to authorize the plaintiff in actions upon life and fire insurance policies to recover and have included in one and the same judgment the amount due upon the policy and the attorneys' fees, and there is consequently no impropriety in claiming attorneys' fees by the declaration which seeks to recover upon the policy.

It is further contended that the statute was repealed by chapter 4677, p. 33, act approved May 31, 1899, entitled "An Act to Regulate Contracts of Insurance of Buildings and Structures in This State, to Fix a Measure of Damage in Case of Loss, and to

Prescribe a Rule of Evidence Therein," which reads as follows:

"Sec. 1. That from and after the passage of this act any individual, firm, corporation, or association insuring any building or structure in this state against loss or damage by fire or lightning, shall cause such building or structure to be examined by an agent of the insurer and full description thereof to be made, and the insurable value thereof to be fixed by such agent and written in the policy; in the absence of any change increasing the risk without the consent of the insurers, in case of total loss the whole amount mentioned in the policy upon which the insurers receive a premium shall be paid, and in case of partial loss the full amount of the partial loss shall be paid; but in no case shall the insurer be required to pay more than the amount upon which a premium is paid.

"Sec. 2. In case of the total loss of the property insured the measure of damage shall be the amount upon which the insured paid a premium, and, in case of partial loss, the measure of damage shall be such part of the amount upon which premiums are paid as the damage sustained is part of the insurable value of the building or structure as fixed by the agent of the insurer, and the insurers shall be estopped from denying that the property insured was worth at the time of insuring the amount of the insurable value as fixed by the agent.

"Sec. 3. Any person who solicits insurance and procures applications therefor shall be held to be the agent of the party issuing a policy upon such application, anything in the application or policy to the contrary notwithstanding.

"Sec. 4. That the defendant in any action brought upon a policy, or contract of insurance, hereafter made, or renewed, insuring any building or structure in this state against loss or damage by fire or lightning, shall not be permitted to defend against such action by setting up any claim, or provision of such policy, or contract of insurance, as avoiding the provisions, or any of them of this act: and it shall be the duty of the court on motion of the plaintiff, or on its own motion, to strike out any plea setting up such defense."

A question very similar to the one here presented was considered in *Florida East Coast R. Co. v. Hazel*, 43 Fla. 263, 31 So. 272, and it was held that the later statute did not repeal the former. There is no necessary inconsistency between the two statutes we are now considering and, upon the authority of the decision in that case, we hold that the act of 1893 was not repealed by the act of 1899. The motion to strike

was properly denied. The instruction complained of is correct.

In this connection we will consider the contention made that the act of 1899 is unconstitutional. It is argued that, properly construed, the statute denies the right of the insurer to plead that the fire was caused by the criminal conduct of the insured; that the insured, by fraud, procured or induced the insurer to fix the insurable value at an excessive amount; and that the property depreciated in value between the date of the policy and the loss. The contention, as we understand it, is that the statute confines the insurer's defenses to four only, *viz.*, that the contract was never, in fact, executed; that the loss set up never, in fact, occurred; that the loss was not due to fire or lightning; that the property insured was not, in fact, a building or structure in the state of Florida.

The statute requires the insurer to fix the insurable value of the building, and to specify such value in the policy; and the measure of damages in case of total loss is fixed at the amount mentioned in the policy upon which a premium is paid. The statute does not undertake to deprive the insurer of any proper defense it may have to an action upon the policy, except in respect to the measure of damages and the authority of certain agents. Its principal object and purpose are to fix the measure of damages in case of loss, total or partial, and, to this end, it requires the insurer to ascertain the insurable value at the time of writing the policy, and to write it therein. Its provisions do affect the three-fourths value and arbitration clauses, as well as other clauses contained in the policy; but there is nothing in its language that will justify us in holding that it deprives the insurer of the right to plead that the fire was caused by the criminal conduct of the assured, or that the insurable value was procured to be fixed by fraud on his part. Whether the statute, properly construed, deprives the insurer of the right to show that the property depreciated in value between the time the policy was issued and the loss, we do not find it necessary to determine in this case, as there is no claim that the property insured by this policy had so depreciated; but, if the statute does deprive the insurer of that right, it will not be unconstitutional for that reason. In fixing the insurable value, the insurer can consider depreciation as an element, and protect itself against ordinary depreciation in that way. Without further discussion of the question it is sufficient to say that the provisions of this statute are not contrary to the Constitution of this state or of the United States. *Orient Ins. Co. v. Daggs*, 172 67 L. R. A.

U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *John Hancock Mut. L. Ins. Co. v. Warren*, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. Rep. 535. See also *Farmers' & M. Ins. Co. v. Dobney*, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565.

The defendant filed its demurrer to the original declaration, and the demurrer came on for hearing during a term of the court. The order on demurrer recites that "this action having been submitted on brief of counsel for the respective parties on the demurrer of defendant to plaintiffs' declaration, and the plaintiffs having, with leave of the court, amended their said declaration by striking out the word 'otherwise,' in line 20 from top of second page of said declaration, and by inserting after the word 'proof,' in line 4 from top of third page of said declaration, the words 'and made no objection to such additional insurance,' thereupon, upon consideration of the same, it is considered and ordered that the said demurrer of the defendant to the complainants' declaration be, and the same is hereby, overruled, and the defendant is granted leave until the first Monday in January, A. D. 1902, to plead over to said declaration." Several assignments of error are based upon this order, which we will now discuss.

It is first insisted that the court erred in permitting the declaration to be amended without notice to the defendant. The rule requiring notice of applications to amend (common-law rule No. 12) has reference to amendments made in vacation, and not to those made in term. It is true that the demurrer in this case was submitted upon briefs, but it was heard and decided and the amendment was permitted in term. The mere fact that the parties chose to submit the demurrer upon briefs during the term did not deprive the court of the power to make any appropriate order in term, without requiring special notice to be given, that it could have made, had the demurrer been submitted orally, or if the case had not been before the court upon demurrer at all. There was therefore no error in permitting the amendment of the declaration without requiring special notice of the application to amend.

It is also contended that the court erred in depriving defendant of the right to demur to the amended declaration, by requiring it to "plead over," and in applying the demurrer to the amended declaration without a request on its part to that effect. This court is of opinion that such contention is correct. When the declaration was amended, the defendant should have had an opportunity to plead to the amended declaration by filing a demurrer, if it deemed the amend-

ed pleading bad, or by filing pleas, if it chose to file pleas instead of a demurrer. But the defendant was entitled to have its demurrer applied to the amended declaration, if it desired, and the court did in fact give it the benefit of the demurrer to the same extent as if application had been made to that effect. The court below gave it the same benefit of the demurrer as if it had been filed to the amended declaration, which the defendant knew at the time of filing its pleas; and, with this knowledge, it filed pleas, without offering to file a demurrer, or asking leave to do so. It now asks that the order overruling the demurrer be reviewed and reversed, because, as it insists, the declaration was bad, and therefore the demurrer should have been sustained, instead of overruled. The grounds of demurrer are broad enough to include every objection urged to the declaration as amended, and, if the declaration is valid as against these objections, the judgment should not be reversed for this technical error in a mere matter of practice, which did not and could not injure the defendant.

The principal questions sought to be presented by the objections to the declaration as amended depend upon the correct interpretation of certain provisions in the policy relating to notice of loss and proofs of loss, and upon the effect to be given other provisions requiring the defendant's consent for other insurance to be evidenced by indorsements upon or additions to the policy. These provisions are substantially the same as those contained in the policy in the case of *Indian River State Bank v. Hartford F. Ins. Co.* (Fla.) 35 So. 228, as already stated, except that the policy in that case provides that "if fire occur the insured shall give immediate notice of any loss," etc., while the policy in the present case omits the word "immediate." Probably the omission of this word is a clerical error in copying the policy in the transcript, but the omitted word is not regarded as material to this case, as without it the proper construction of the provision as it stands would probably require the notice to be given within a reasonable time. So construing it, what effect will the omission to give the notice of loss and to furnish proofs of loss have upon the rights of the insured? In the case referred to above, it was contended that the failure of the assured to make proofs of loss required by the policy within the time thereby provided wrought an absolute forfeiture thereof, and released the insurer from all liability thereon. The court said: "Unfortunately for this contention, it is founded upon a false premise. The provision of the policy sued upon herein requir-

ing the assured to make proofs of loss within sixty days after the fire does not provide that such policy shall become void, forfeited, or annulled upon a failure to furnish such proofs of loss within the prescribed time, and such is not the legal effect of said contract between the parties. Taken in connection with another provision of said contract of insurance, the only effect of a failure to furnish the prescribed proofs of loss within the required time, when such failure has not been excused or waived, is that it postpones the date when the amount of the loss becomes due and payable, and consequently postpones the time within which suit may be brought thereon; another part of the policy providing that the amount due upon the policy shall be payable sixty days after satisfactory proofs of loss have been received by the company." The effect of a failure to give the notice of loss immediately or within a definite time was not considered in that case, but we think it is governed by the same principles. The provision requiring notice of loss is of the same nature as that requiring proofs of loss; the two are used in the same connection in the policy; and, while each constitutes a condition to the right to sue, and must be performed, if not waived, before suit can be instituted, it is nowhere provided that a failure to perform them within the time specified shall release the company from liability, or render the policy void. There are many provisions in the policy requiring the performance by the insured of stipulations relating to the insurance after as well as before the loss, the nonperformance of which, it is expressly stated, will render the policy void or release the company from liability; but no such effect is stipulated for failure to give the notice and make the proofs within the required time. Many authorities can be found which require the notice of loss to be made within the time specified; but the same authorities also hold the same rule with respect to proofs of loss. We think the same principles which uphold the rule announced in *Indian River State Bank v. Hartford F. Ins. Co.* (Fla.) 35 So. 228, require a like holding with respect to the notice of loss. In *Ermentrout v. Girard F. & M. Ins. Co.* 63 Minn. 305, 30 L. R. A. 346, 56 Am. St. Rep. 481, 65 N. W. 635, and other Minnesota cases, it was held that the failure to comply with the requirement to give immediate notice was a condition precedent to the company's liability; but in *Mason v. St. Paul F. & M. Ins. Co.* 82 Minn. 336, 83 Am. St. Rep. 433, 85 N. W. 13, the previous cases are referred to, and the doctrine announced that the result stated does not apply to the Minnesota standard policy,

because that policy does not provide that a failure to give notice or make the proofs within the time stated shall invalidate the policy or work a forfeiture of the rights of the insured, and that the failure to comply with the requirement within the time stated will simply postpone the day of payment. See also *Peninsular Land Transp. & Mfg. Co. v. Franklin Ins. Co.* 35 W. Va. 666, 14 S. E. 237; *Coventry Mut. Live Stock Ins. Assn. v. Evans*, 102 Pa. 281; *Hurt v. Employers' Liability Assur. Corp.* 122 Fed. 828.

Having ascertained the proper construction of the provisions of the policy respecting notice and proofs of loss, we will consider the objections urged to the amended declaration, with respect to these matters. The declaration attempts to set out the legal effect of the policy, and it also makes the policy itself a part of its averments. It is contended that there is a variance between the alleged legal effect and the instrument itself, properly construed. The variance, it is thought, arises upon a comparison of the language of the declaration that the defendant promised to pay "sixty days after notice and proof of such loss furnished to the said defendant," and the stipulations of the policy, which, it is claimed, when properly construed, require it to pay sixty days after the notice of loss and proofs of loss, rendered in accordance with the terms of the policy; i. e., notice of loss given immediately or within a reasonable time, and proofs of loss rendered within sixty days after the fire. As we have already shown, this is not the proper construction of the contract. The suit was begun February 19, 1901. The fire is alleged to have occurred August 21, 1900. The declaration alleges that proofs of loss were rendered more than sixty days prior to the commencement of the suit, which would show that they were rendered prior to December 19, 1900, or within four months of the fire. Even if no other notice of the loss was given, except the proofs of loss so alleged to have been furnished, the declaration shows that the proofs were of such a nature as to give "notice of the loss," and, as these proofs were furnished long before the contract limitation upon the suit expired, it was sufficient to authorize recovery in this case. The alleged variance between the allegations of the declaration and the terms of the policy made a part thereof does not exist, if the construction we have placed upon the policy is correct.

Another objection to the declaration is that it appears therefrom that, after the issuance of the policy sued on, another policy was obtained from the Home Insurance Company for a like amount; that no permission

to take such additional policy was indorsed in writing upon the Hartford policy, as appears from an inspection of the latter, made a part of the declaration; and that, consequently, the policy became void, under that clause which reads: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." The declaration, as amended, alleges that the additional policy was obtained in April, and that defendant had due notice and proof of the additional insurance, and made no objection thereto. If the defendant had notice of the additional insurance, and made no objection thereto, it must be held to have given its consent thereto. By its failure to object after notice of the fact, the insured was led to rely upon the validity of its policy; and it cannot now, after a loss, when it is too late for the insured to obtain other insurance, be permitted to repudiate its liability upon the ground stated. This allegation shows a waiver of the provisions of the policy requiring that the permission for such additional insurance be indorsed on or added thereto,—a proposition which we discuss under another assignment of error: and therefore the objection to the declaration now being considered is not tenable.

The fifth ground of the demurrer complains that the declaration does not aver performance of conditions precedent generally, nor particularly the performance of each and every condition precedent, nor set up excuse for nonperformance. We have shown that the amended declaration does allege the issuance of the policy, the payment of the premium and the loss, and that it sufficiently alleges performance of the provisions requiring notice and proof of loss, and waiver of the requirement that permission for other insurance must be indorsed on the policy, if that can properly be considered a condition precedent. In addition to these special allegations, the declaration alleges generally that plaintiff "has fully complied on her part with all the conditions of said contract of insurance." If there are other conditions precedent not embraced in these averments, they do not now occur to us, and none were pointed out either in the oral argument or briefs.

The defendant, after its demurrer was overruled, filed two pleas, in substance as follows: First. That the policy sued on contains a provision that "if fire occur the insured shall give immediate notice of any loss thereby in writing to this company; and

defendant avers that the notice so required was not given in writing or otherwise."

Second. That the policy sued on provides "that the insured within sixty days after the fire, unless such time is extended in writing by the insurance company, shall render a statement to the insurance company, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the time and origin of the fire: and defendant avers that the time was not extended, and the statement so required was not rendered."

After plaintiffs' demurrer to these pleas was overruled, they filed their replication thereto, alleging, substantially, that on December 17, 1900, they sent by mail to defendant a statement in writing signed and sworn to by Ida H. Redding; the insured stating therein, among other things, "that the fire by which the insured building was destroyed occurred about 11 P. M. August 21, 1900, originating in the roof or attic of said building, but how said fire originated, or the cause thereof, was to said insured entirely unknown; that said fire did not originate by any act, design, or procurement on the part of said insured, or in consequence of any fraud or evil practice done or suffered by the insured, and that any other information required by defendant would be furnished on call;" that said written statement so signed and sworn to by insured, was received by defendant, and by it retained until the 24th day of December, A. D. 1900, and then returned to plaintiffs with the objections only that the same had not been furnished within sixty days after the fire occurred, and no other or further information was called for by the defendant. The defendant demurred to this replication, and the order overruling it is assigned as error.

It is beyond question that the written proofs of loss which the replication alleges were delivered to defendant in December after the fire in August were a sufficient "notice of loss." *Weed v. Hamburg-Bremen F. Ins. Co.* 133 N. Y. 394, text, 407, 31 N. E. 231; *Purcell v. St. Paul F. & M. Ins. Co.* 5 N. D. 100, text, 112, 64 N. W. 943. And, as we have already seen, the failure to give this notice immediately did not invalidate the policy, but merely postponed plaintiffs' right to sue. The replication was, therefore, a complete answer to the first plea.

The objection to the replication, as applied to the second plea, is that the insured did not state in the proofs of loss her belief as to the origin of the fire. It does not appear that the insured had any belief as to the origin of the fire which she could state. She does state the time of the fire, and that

it originated in the attic; but how it originated, or the cause thereof, she swears, was entirely unknown to her. She then proceeds to state her knowledge that it did not originate through her procurement, or in consequence of any fraud or evil practice done or suffered by her. There is no intimation anywhere that she had any belief upon the subject, and it affirmatively appears that she had no knowledge of any fact upon which to base a belief. We think the statement rendered substantially complies with the requirements of the policy. *McNally v. Phoenix Ins. Co.* 137 N. Y. 389, 33 N. E. 475; *Hovard Ins. Co. v. Hocking*, 115 Pa. 415, 8 Atl. 592; 13 Am. & Eng. Enc. Law. p. 336. An offer to furnish other information, if desired, was made; and, as the company did not avail itself of that offer by asking other information, according to the allegations of the replication, it seems evident that it did not regard the absence of the statement of belief as material at that time.

It is contended that the replication is a departure from the declaration, but we think otherwise. The declaration alleges performance with respect to the notice of loss and proofs of loss, the pleas deny the allegations of performance, and the replication merely reiterates performance, setting forth the facts at length. The replication does not set up waiver, but performance, in accordance with the interpretation we put upon the provisions of the policy.

Nearly a year after the pleas above considered were filed, the defendant filed its third plea, alleging that "it is provided in the contract sued on, 'This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy:' and defendant avers that after said policy was issued, to wit, on the 18th day of April, A. D. 1900, the insured, Ida H. Redding, procured another contract of insurance on the property covered by the policy sued on, issued by the Home Insurance Company, which other insurance was not provided for by agreement indorsed on or added to said policy sued on." The plaintiffs filed their replication to this plea, and defendant its demurrer to the replication; and thereupon, by agreement of parties, a jury was waived, and the cause was submitted to the judge upon an agreed statement of facts, to be decided in vacation. This agreement was made November 20, 1902. On December 2d following, plaintiffs moved the court for leave to withdraw their replication to the third plea, and for leave to with-

draw from the written submission and stipulation entered into November 20, 1902; basing the latter application upon the fact that other material testimony on behalf of plaintiffs had been discovered since the making of the agreement for submission, and because the pleadings, evidence, and stipulations then on file did not fully and fairly present to the court the facts as they really existed. At the hearing it was shown that, within five days after the written agreement was entered into, plaintiffs notified defendant that they had discovered the existence of material facts not embraced in the written agreement, and requested that the additional matter be embraced in the agreed statement of facts. Counsel declined to accede to the request, and thereupon the motion to withdraw from the submission was made. The motion was resisted principally because the additional matters could have been known to plaintiffs' counsel before the submission if he had exercised due diligence to ascertain them. The court granted the motion to withdraw plaintiffs' replication to the third plea, and also permitted plaintiffs to withdraw from the written submission, and to file new replications to the third plea, and these rulings are assigned as error.

Under our very liberal statute of amendments the court had ample power to permit plaintiffs to withdraw their replication and to file others. The matter rested very largely in the discretion of the court, and no abuse of discretion is shown.

Nor do we perceive any impropriety in the ruling permitting plaintiffs to withdraw from the written stipulation. As defendant would not consent to amend the agreed statement of facts so as to embrace the additional matters which plaintiffs desired to incorporate therein, and as the court had not rendered its decision in pursuance of the stipulation, it was proper to permit plaintiffs to withdraw from the stipulation, in order that the case might take its regular course before a jury, and the parties thereby have an opportunity to present all pertinent facts. The defendant was not deprived of any substantial right by the order. It had not been misled to its disadvantage, nor put to any trouble or inconvenience, between the date of the submission and the plaintiffs' motion to withdraw. The mere fact that plaintiffs might have discovered the new matter, by the exercise of proper diligence, before they agreed to the submission, does not, as a matter of law, deprive them of the privilege of withdrawing from the submission, for the case had not been decided by the court, and therefore the strict rule of diligence applicable to new trials for newly discovered evidence does not ap-

ply. The court had power to make the order, the matter rested in its discretion, and no abuse of discretion is shown. 20 Enc. Pl. & Pr. p. 670.

The replication to the third plea filed by plaintiffs in pursuance of leave granted alleges, among other things, that on October 15, 1889, plaintiff Ida H. Redding applied to the local agent of the defendant, who was also the local agent of the Etna Fire Insurance Company, for insurance on the building; that the agent had authority, on behalf of the companies, to examine the building, fix its insurable value, write, countersign, and issue policies thereon, and to collect and receive the premium; that he examined the building, fixed the insurable value at \$3,000, issued to plaintiff the policy sued on, and a like policy in the Etna Insurance Company, and thereupon, in discharge of his duty, gave defendant immediate notice in writing of the \$1,500 additional insurance; that defendant, with full knowledge and notice of the existence of the additional insurance, consented to and accepted the risk, with the purpose and intent that same should be concurrent with additional insurance of \$1,500, and not avoided thereby, and with purpose and intent to waive and forego any and all benefit of said provisions and conditions; that, in faith thereof, and with the sole purpose of procuring such insurance to be concurrent with additional insurance on said building to the amount of \$1,500, and not otherwise, the plaintiff paid and defendant received the premium, amounting to the sum of \$60; that afterwards, on April 18, 1900, the Etna Insurance Company canceled its policy, and, in lieu and place thereof, the same agent, who was also the agent of the Home Insurance Company, wrote, countersigned, issued, and delivered to plaintiff Ida H. Redding the policy of the last-named company, for \$1,500, mentioned in defendant's plea; that afterwards, on December 24, 1900, plaintiff Ida H. Redding, in her sworn proofs of loss then furnished defendant, notified and fully advised it of the policy for \$1,500 in the Home Insurance Company, and the defendant then and there made no claim that said additional insurance was not provided for by agreement indorsed on its policy, and set up no want of knowledge or consent on its part to the existence of said additional insurance, and claimed no forfeiture of its said policy by reason of said additional insurance, or by reason of any failure to comply with the provisions and conditions set up in its said plea; and that defendant has made no tender of, or offer to return, the premium of \$60 so as aforesaid paid by plaintiffs to defendant for its said policy, but still retains the same. The

defendant demurred to this replication, but the court overruled it, and this ruling is assigned as error.

It is contended that the replication is a departure from the declaration. The declaration alleges that defendant had notice of the additional insurance, and facts showing a waiver with respect to the provisions relating to indorsement on the policy of permission for such additional insurance. The plea does not traverse this allegation of waiver, nor deny that defendant had notice, but asserts merely that the permission for other insurance was not indorsed upon the policy. The replication reiterates waiver, and alleges specifically the facts which it is claimed constitute such waiver. The plea is not directly responsive to the material allegations of the declaration, and for that reason might, perhaps, have been held bad upon demurrer; but the replication constitutes no departure from the declaration, as both allege waiver.

It is also contended that plaintiffs, having already filed one replication taking issue upon this plea, could not be permitted to file another, the argument being that, while the statute (Rev. Stat. 1892, § 1063) permits more than one plea to be filed to the declaration, the same indulgence was not, and could not with safety be, extended to replications. Rev. Stat. 1892, § 1059, provides that a plaintiff "may file as many replications or subsequent pleadings to any pleading of the defendant as he may desire," and this language fully answers defendant's contention, without further comment.

The principal contention, however, relates to the sufficiency of the allegations of the plea to show a waiver of the provision of the policy requiring the company's permission for additional insurance to be indorsed on or added thereto; and it is strenuously insisted that the decision of the Supreme Court of the United States in *Northern Assur. Co. v. Grand View Bldg. Assn.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, conclusively decides that question in favor of defendant. The provisions of the policy construed in that case, so far as the question now being considered is concerned, are very similar to the provisions invoked by defendant, contained in the policy sued on in this case. In that case the jury found that, when the policy was issued, other insurance upon the property was in existence; that the agent who issued the policy was recording agent of the company, having authority to countersign and issue policies, to accept fire insurance risks in its behalf, and to collect and receive premiums therefor; that the agent knew of the other insurance when he issued the policy; and that no consent for such additional insurance was indorsed

on the policy. It further appeared that knowledge of the additional insurance was never communicated to the company until proofs of loss were made, and that the company, immediately upon receipt of such information, denied any liability on that ground, and tendered the insured the premium paid by him. The court held that the agent's authority in matters of waiver of conditions was limited to the method designated,—that is, by indorsements on, or written additions to, the policy,—and that, as knowledge of the additional insurance was never acquired by the company until the loss occurred, when it immediately denied liability because of such additional insurance, and tendered the insured the premium, the company was not liable for the loss. This decision is directly in conflict with the opinions of many other courts and text writers, and several courts, since it was rendered, have refused to follow it. *Thompson v. Traders' Ins. Co.* 169 Mo. 12, 68 S. W. 889; *Orient Ins. Co. v. McKnight*, 197 Ill. 190, 64 N. E. 339. See also Clement, *Fire Insurance as a Valid Contract*, p. 413.

We do not think the decision in that case, even if it is correct, controls the present one. Here we have not simply the knowledge of the local agent that the additional insurance existed, but the knowledge of the company itself, which, with such knowledge, accepted the premium, and thereby gave its consent to the additional insurance. Knowing that the additional insurance existed, and that its consent thereto was required by the terms of its policy to be indorsed thereon in order to render its contract valid, it was its duty to so indorse it, or decline to accept the premium which it knew was being paid for a supposed valid policy. The insured had no authority to indorse such consent on the policy; and, if the company intended to act fairly and honestly, and not to perpetrate a deliberate fraud, by accepting the consideration for its contract, known to be void, good faith required it either to indorse the policy, or to waive the provision requiring such indorsement. We cannot suppose that a fraud was intended by the company, and the only reasonable conclusion is that, by accepting and retaining the premium with knowledge of the additional insurance, it intended to waive the provision referred to. Clement, *Fire Insurance as a Valid Contract*, pp. 418, 428. In *Tillis v. Liverpool & L. & G. Ins. Co.* (Fla.) 35 So. 171, we held that provisions of this nature might be waived, and the decision of the Supreme Court of the United States, above referred to, admits that this is so, provided the waiver is made by an officer having authority. See also, to the same effect, *Etna L. Ins. Co. v. Frierson*, 51 C. C. A. 424, 114 Fed. 56; *Gwaltney v. Prov-*

ident Sav. Life Assur. Soc. 132 N. C. 925, 44 S. E. 659; note to *Wheaton v. North British & M. Ins. Co.* 9 Am. St. Rep. 235; Kerr, Ins. p. 238. It is insisted, however, that the replication does not allege that the company knew that the agent had failed to indorse its consent to the additional insurance on the policy when it accepted the premium. We do not regard such knowledge material to the question in hand. Knowledge of the additional insurance was the important thing, and, with such knowledge, the company's plain duty required it to see that the proper indorsement was made on the policy if it elected to retain the premium, and, making no effort to perform that duty, it must be held to have waived the matter of indorsement. This is the reasonable view, and the only one consistent with fair dealing.

We have thus far treated the matter as if the policy mentioned in the plea constituted the additional insurance which existed at the time the policy in suit was issued; but the fact is not precisely that. The insurance in force when the policy was issued consisted of a policy in the *Etna*, which was afterwards canceled, and another issued in lieu thereof in the *Home*. The latter policy, however, was merely a substitute for the former, being issued for the same amount. We are of opinion that this substitution of one policy for the other does not constitute a breach of the condition against other insurance, for the defendant, by accepting the premium for the policy in suit with knowledge of the additional insurance then existing, thereby gave its consent for additional insurance to the amount then in existence for the full period of its own policy. The mere substitution of one policy for another of the same amount was permissible under that consent. See *Stage v. Home Ins. Co.* 76 App. Div. 509, 78 N. Y. Supp. 555. Evidently the defendant did not regard the *Home* policy as having been taken without its consent, for, according to the allegations of the replication, it made no objection to the proofs of loss on that account, and in its plea there is no denial that it had due notice of the additional insurance.

Several objections to testimony offered at the trial were interposed by defendant, which we will now consider. The proofs of loss were objected to on several grounds which have been disposed of in what has been said in considering other assignments of error.

For the purpose of proving defendant's knowledge of the additional insurance, the 67 L. R. A.

daily report sent by its agent to the defendant on the day the policy in suit was issued was introduced in evidence by the plaintiffs, over certain objections interposed by defendant. This daily report was made up in pursuance of instructions to the agent to "give full copy of the policy," as well as other information; and it gives the written portions of the policy issued, with the indorsement slips. In answer to questions propounded, the agent stated that the company had no other policies in or on the same building; but in another place he stated there was \$1,500 additional insurance on the property; and, being required to name companies, amounts, and rates, he stated, "*Hartford*," which was evidently a clerical error, in view of his other statement already referred to. It is contended that this report did not advise the company that there was any additional insurance upon the property; and, even if it did, the additional insurance was stated to exist in the same company, which was not the truth. We think the report clearly advises the company that there was \$1,500 additional insurance. Besides, the plea does not deny the fact of knowledge. The conflicting statements in the daily report about its being in the same company put the defendant upon notice that some mistake had been made as to this matter, and it could easily ascertain by reference to its own records which statement was true. There was no uncertainty as to the fact that other insurance existed, which was the important matter for the company to know. The name of the company carrying the additional insurance was not required by the policy to be stated in the written consent. There was no error in admitting in evidence the daily report.

The court gave the general charge to find for the plaintiffs, to which an exception was taken. The defendant introduced no testimony, and, without encumbering this opinion with a further statement of the facts, we think it sufficient to say there was no error in giving the charge.

The judgment is affirmed.

Shackleford and Whitfield, JJ., concur.

Taylor, Ch. J., and Hocker, J., concur in the opinion.

Cockrell, J., being disqualified, took no part in the decision of this case.

KENTUCKY COURT OF APPEALS.

William MORRISON, *Appt.*,
v.
COMMONWEALTH of Kentucky.

(.....Ky.....)

1. Upon prosecution of one for killing the brother of a woman, with whom he was maintaining improper relations, in an altercation about her, evidence is admissible to show such relation for the purpose of explaining the circumstances of the parties, illustrating their motives, and showing interest on the part of the woman, who has testified on behalf of defendant.
2. The aggressor who kills his opponent in an altercation cannot show that decedent was a violent and dangerous man, and

had made threats to kill him, which had been communicated to him.

3. A man is not entitled to champion the cause of a woman with whom he is maintaining improper relations, and defend her against the simple assaults of her brother, so as to give him the benefit of the rule of self-defense in case he kills the brother during the altercation.

(Nunn, J., *dissents.*)

(May 19, 1903.)

A PPEAL by defendant from a judgment of the Circuit Court for Franklin County convicting him of manslaughter. *Affirmed.*

The facts are stated in the opinion.

NOTE.—Homicide to prevent criminal or unlawful acts.

- I. Scope and nature, 529.
- II. Forcible felonies and crimes.
 - a. General rules as to, 529.
 - b. Justification limited to necessity, 530.
 - c. Apparent, as distinguished from real, danger as necessity, 531.
- III. Application of rules to particular acts.
 - a. Attempts to kill or seriously injure.
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I. Scope and nature.

The scope and nature of this note are plainly indicated by its name. The questions for consideration are, Was the homicide committed to prevent a criminal or unlawful act? and, If so, was the criminal or unlawful act such as to justify the commission of a homicide to prevent it, and was it necessary, or apparently necessary, in order to prevent it? and it is only necessary to distinguish between these questions and questions with relation to homicide to revenge a past criminal or unlawful act, and with relation to extenuation of homicide by provocation furnished by criminal or unlawful acts.

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II. Forcible felonies and crimes.

a. General rules as to.

At common law, as well as under the statutes of most of the states, it is regarded as the duty of everyone seeing any felony attempted by force to prevent it, and, if need be, to extinguish the felon's existence for that purpose. *Carpenter v. State*, 62 Ark. 286, 36 S. W. 900; *Dill v. State*, 25 Ala. 15; *Pond v. People*, 8 Mich. 150.

The rule is that a man may repel force by force in defense of his person, habitation, or property, against one who manifestly endeavors by violence or surprise to commit a known felony such as rape, robbery, arson, burglary, or the like; and in these cases he is not obliged to retreat, but may pursue his adversary until he has freed himself from all danger. *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282; *Storey v. State*, 71 Ala. 329; *Carpenter v. State*, 62 Ark. 286, 36 S. W. 900; *Mitchell v. State*, 43 Fla. 188, 30 So. 808; *Richard v. State*, 42 Fla. 528, 29 So. 413; *State v. Thompson*, 9 Iowa, 188, 74 Am. Dec. 342; *State v. Kennedy*, 20 Iowa, 569; *Burton v. Com.* 23 Ky. L. Rep. 1915, 66 S. W. 516; *State v. Conally*, 3 Or. 69; *Stoneham v. Com.* 86 Va. 523, 10 S. E. 238; *United States v. Outerbridge*, 5 Sawy. 620, Fed. Cas. No. 15,978; *United States v. Wiltberger*, 3 Wash. C. C. 515, Fed. Cas. No. 16,738.

And in such case a homicide committed by a person in defense of his person, habitation, or property, where the person killed manifestly intended and endeavored by violence or surprise to commit a forcible or atrocious felony upon either, is justifiable. *Parrish v. Com.* 81 Va. 1; *State v. Dugan*, *Houst. Crim. Rep.* (Del.) 563; *State v. Thompson*, 9 Iowa, 188, 74 Am. Dec. 342; *State v. Kennedy*, 20 Iowa, 569; *State v. Rutherford*, 8 N. C. (1 Hawks) 457, 9 Am. Dec. 658.

And it is likewise justifiable when committed for the prevention of any forcible or atrocious crime. *Mitchell v. State*, 22 Ga. 211, 68 Am. Dec. 493.

And all reference as to whether or not there was a peace officer on the ground at the time should be omitted from the instructions, in a prosecution against a person who killed another whom he had reasonable grounds to believe was about to commit a felony, in an effort to disarm

Messrs. James Andrew Scott and B. G. Williams for appellant.

Messrs. C. J. Pratt and M. R. Todd for the Commonwealth.

Hobson, J., delivered the opinion of the court:

Appellant, William Morrison, was indicted for the murder of Alex Dean, and was convicted of manslaughter, and his punishment fixed at confinement in the penitentiary for eleven years. The proof shows that Ida Dean, a sister of the deceased, had borrowed an umbrella on the afternoon of the day of the homicide, she promising to return it that evening. About half past 8 o'clock she came up the street with the umbrella, and, meeting George

Turner, asked him if he had seen Morrison. They went on together, and soon met Alex Dean, who took hold of his sister and told her to go home, upbraiding her for being out looking for Morrison. There is a conflict of evidence as to what followed. The proof for the commonwealth is that Alex Dean went along the street with his sister, pushing her along about 90 feet, when she stopped, declining to go any further, and about this time Morrison, seeing them, ran down to where they were on his tiptoes, and stabbed Dean in the back; that he immediately fell to the ground, uttering no sound except a groan, and died in a few minutes. The proof for the defendant is that Morrison heard someone say that Alex Dean was beating his sister, and ran out to

him and prevent its commission. *Burton v. Com.* 23 Ky. L. Rep. 1915, 66 S. W. 516.

The rule of law justifying homicide to prevent felony extends to statutory felonies as well as to felonies at common law. *Storey v. State*, 71 Ala. 329; *Pond v. People*, 8 Mich. 150; *State v. Taylor*, 143 Mo. 150, 44 S. W. 785.

But it does not extend to secret felonies not accompanied by force or violence. See *infra*, IV. a, b.

b. Justification limited to necessity.

The common-law doctrine is that to justify homicide for the prevention of any forcible and atrocious crime there must have been absolute necessity for the act. *Mitchell v. State*, 22 Ga. 211, 68 Am. Dec. 493; *Reg. v. Bull*, 9 Car. & P. 22.

That killing a man is justifiable homicide only where there was an intention upon his part to rob or murder, or do some serious bodily injury to, the slayer, rendering it necessary to do the act in self-defense. *Reg. v. Bull*, 9 Car. & P. 22.

And, under the general statutes existing in most of the states, to excuse one person for taking the life of another there must exist a necessity to prevent the commission of a felony, or the infliction of great bodily harm, or a reasonable belief in the mind of the slayer that such necessity exists. *Noles v. State*, 26 Ala. 31, 62 Am. Dec. 711; *Lovett v. State*, 30 Fla. 142, 17 L. R. A. 705, 11 So. 550. And see *infra*, II. c.

And it is at least manslaughter where one unnecessarily kills another while resisting an attempt by such other to commit any felony or do any other unlawful act, or where the killing is after such attempt has failed. *Perugi v. State*, 104 Wis. 230, 76 Am. St. Rep. 865, 80 N. W. 593.

Within these rules, killing a person to prevent the commission of a felony by him is not justified, when by arresting him, or disabling him, or otherwise, the felony can be prevented. *Carpenter v. State*, 62 Ark. 286, 36 S. W. 900.

And a person committing a homicide to prevent a felony would not be excusable if he used more force than reasonably appeared to be necessary to so restrain the person killed. *Burton v. Com.* 23 Ky. L. Rep. 1915, 66 S. W. 516; *Blesot v. State*, 53 Ind. 408.

So, to justify homicide to prevent the perpetration of any other felony, the danger or

felony intended and the necessity of killing must not be problematical or remote, but evident and immediate. *Weaver v. State*, 19 Tex. App. 547, 53 Am. Rep. 389; *Carpenter v. State*, 62 Ark. 286, 36 S. W. 900.

The necessity must be great and the situation imminently perilous. *State v. Thompson*, 9 Iowa, 188, 74 Am. Dec. 342; *State v. Kennedy*, 20 Iowa, 569.

And the fact that a man had used, and was likely to use, fraudulent means for the purpose of seducing a woman by administering drugs to excite her or overcome her resistance does not justify the woman's brother in killing the man for the purpose of preventing the seduction, since the evil threatened could have been prevented by other means within his reach. *People v. Cook*, 39 Mich. 236, 33 Am. Rep. 380.

And one who surprises another in the act of placing an obstruction upon the track of a railroad with intent to wreck a train expected to pass a short time later, and thereby endanger the lives of the persons upon said train, and who shoots him, is not justified in the act as one done to prevent a felony, where he has no ground to fear that his own life will be taken, or that he will suffer great bodily harm; since other means may be taken to prevent the derailing of the train, and the endangering of life is too problematical and remote so long as the train is not immediately approaching. *Weaver v. State*, 19 Tex. App. 547, 53 Am. Rep. 389.

Whether or not killing a person was necessary to prevent the commission of a felony or great bodily harm to the person doing the killing or another is a question for the jury in a prosecution for the homicide, to be determined upon a preponderance of the evidence, the accused being entitled to the benefit of a reasonable doubt. *State v. Conally*, 3 Or. 69.

And the known character of a person for violence, and his acts and threats personally made, are a proper subject for consideration on the question as to whether or not killing him was necessary to prevent the commission of a felony, or great bodily harm to another. *Ibid.*

But threats of personal violence, made by one person against another, are not admissible in evidence in a prosecution against the latter for killing the former, alleged to be in prevention of a felony, where such threats were not communicated to the accused. *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282.

where they were, putting his hand on Alex Dean's shoulder, and saying, "You can't beat her where I am;" that Dean immediately drew a pistol, and said with an oath, "I will kill you both;" that Morrison caught the pistol, and they clinched, and, as they fell, he stabbed Dean in the back with his knife. This proof is made by Morrison himself; and also by Ida Dean, who testified in his behalf, and by Turner. No pistol was found on Dean's person, or on the ground where he fell, nor is it shown by any other proof that he had a pistol. The proof shows that Dean was smoking a pipe, and that when he and his sister stopped at the place where the homicide took place, and she declined to go any further, she struck him with the umbrella and

knocked the fire out of his pipe. This pipe was found on the ground after the homicide, and it may be that this is what Dean had in his hand when Morrison came up. The point at which the difficulty occurred was near the center of the square, and not well lighted by the street lamps.

The court allowed the commonwealth to prove by both Morrison and Ida Dean, on cross-examination, in effect, that Morrison was, and had been for some time past, living in improper relations with Ida Dean. This evidence was objected to, but was properly admitted, for it explained the circumstances of the parties and illustrated their motives. The evidence also went to the interest of the witness Ida Dean, and to show bias.

The rule that a person killing another, in order to justify himself, must show the necessity for doing so in order to protect himself or his property from a felony, is not rendered inapplicable by the fact that the shot he fired did not result in loss of life, and that the prosecution was for an assault with intent to kill, instead of for homicide. *Newman v. State*, 60 Ga. 609.

See also *Mitchell v. State*, 43 Fla. 188, 30 So. 803; *Richard v. State*, 42 Fla. 528, 29 So. 413, —*infra*, III. b.

c. Apparent, as distinguished from real, danger as necessity.

At common law the necessity to prevent the commission of a felony, or the danger of great bodily harm which would justify a homicide, must have been real; that it was apparent only was not sufficient. *People v. Cole*, 4 Park. Crim. Rep. 35; *Dyson v. State*, 26 Miss. 362.

And if one person kills another to keep the peace and prevent him from killing a third person whom he has attacked, to render the killing justifiable under the New York statute, it must appear that it is actually necessary for him to do it, and not merely that he has reasonable grounds for believing it necessary; and it must appear that there is no other way to prevent the commission of the felony. *People v. Cole*, 4 Park. Crim. Rep. 35.

Under the general form of statute on this subject, however, the peril which will warrant a person in killing another to prevent the commission of a felony, or the infliction of great bodily harm, need not be real, but it must appear to be so; and this appearance must be the real aspect of affairs presented to the slayer at the time. *Harris v. State*, 96 Ala. 24, 11 So. 255; *Carroll v. State*, 23 Ala. 20, 58 Am. Dec. 282; *Oliver v. State*, 17 Ala. 587; *People v. Angeles*, 61 Cal. 188; *Lovett v. State*, 30 Fla. 142, 17 L. R. A. 705, 11 So. 550; *Stanley v. Com.* 86 Ky. 440, 9 Am. St. Rep. 305, 6 S. W. 155; *Weaver v. State*, 19 Tex. App. 547, 53 Am. Rep. 389.

The appearance must be such as would excite a reasonable apprehension of such danger. *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282; *Noles v. State*, 26 Ala. 31, 62 Am. Dec. 711.

And there must have been an actual belief upon the part of the accused that the necessity was real, and not merely apparent. *Lovett v.* 67 L. R. A.

State, 30 Fla. 142, 17 L. R. A. 705, 11 So. 550; *Oliver v. State*, 17 Ala. 587.

A bare fear upon the part of one person that another is about to commit a felony will not justify killing him; it must appear that the circumstances are such as to excite the fears of a reasonable man, and that the slayer acts in good faith under the influence of such fears, and not in a spirit of revenge. *State v. Conally*, 3 Or. 69; *Thompson v. State*, 55 Ga. 47; *Stoneman v. Com.* 25 Gratt. 887.

And there must be some overt act indicating imminent danger at the time. *Stoneman v. Com.* 25 Gratt. 887.

But a reasonable ground to believe that a person intends to destroy the life of, or rob, another, or commit a felony, justifies the latter in killing him for the purpose of arresting such design, though he may be mistaken in the intent. *State v. Harris*, 46 N. C. (1 Jones, L.) 190; *State v. Conally*, 3 Or. 69; *People v. Walworth*, 4 N. Y. Crim. Rep. 355.

And where an officer, interfering in a difficulty between two other persons, drew his pistol, and a third person, believing that the officer was not acting officially to preserve the peace, but was taking part in the fight, shot and killed him to save the life of the person against whom he appeared about to use his pistol, the killing would be excusable, though the officer was in fact attempting to prevent the fight and preserve the peace. *Glover v. State*, 33 Tex. Crim. Rep. 224, 26 S. W. 204.

So, the right of one person to defend another under Tenn. Code, § 2930, providing that any person in aid or defense of a person about to be injured may make resistance sufficient to prevent the offense, is not confined to the defense of a person in actual danger of injury, but authorizes action upon well-grounded apprehensions of injury, as in case of self-defense. *Fisher v. State*, 10 Lea, 151.

And Hutch. (Miss.) Code, 957, providing that homicide is justifiable when committed in lawful defense of a person, or his or her husband, wife, parent, child, master, mistress, or servant, when there shall be reasonable ground to apprehend a design to commit a felony, or do some great bodily injury, and there shall be imminent danger of such design being accomplished, does not require actual danger, but distinctly recognizes a just apprehension of immediate danger of the commission of a felony, or of some great

Morrison offered to prove by a number of witnesses that the deceased was by character a violent and dangerous man, who usually carried deadly weapons. He also offered to show by several witnesses that the deceased had threatened to kill him, and that these threats had been communicated to him. This evidence was excluded by the court. In *Roberson on Criminal Law*, § 240, it is said: "If the deceased was a man of violent and dangerous character, more prompt and decisive measures of defense would be justifiable than if he were of a peaceable disposition. Hence, in cases of homicide, evidence that the deceased was a violent, quarrelsome, turbulent, dangerous, or vindictive man, or was in the habit of carrying concealed weapons, is admissi-

ble to show, or as tending to show, that defendant acted in self-defense, or under such circumstances as would have naturally caused a man of ordinary reason to believe that he was, at the time of the killing, in imminent danger of losing his life or of suffering great bodily harm at the hands of deceased. . . . But evidence of the character here spoken of is not admissible where the defendant was the aggressor, nor until a proper foundation is laid by showing an overt act or hostile demonstration toward defendant by deceased before he was killed." See also, to same effect, *Payne v. Com.* 1 Met. 379; *Riley v. Com.* 94 Ky. 266, 22 S. W. 222; *Com. v. Hoskins*, 18 Ky. L. Rep. 59, 35 S. W. 284. In *Roberson on Criminal Law*, § 223, it is also said:

personal injury, as a justification. *Staten v. State*, 30 Miss. 619.

But this act modifies the common law only by making the homicide justifiable where there shall be reasonable ground to apprehend a design to commit a felony, or some great bodily injury, as distinguished from actual danger at the time; and does not dispense with the necessity of showing some overt act indicating a present intent to kill or do some great personal injury, and that the danger was imminent at the time. *Dyson v. State*, 26 Miss. 362.

Where, in a prosecution for homicide, however, the jury is instructed as to the right of the accused to resist a felony actually attempted, failure of the court to charge as to the right of the accused to resist when the facts and circumstances were such as would have induced a reasonable person of ordinary prudence and judgment to believe that the felony was about to be committed is not error, where no request for such charge was made. *People v. Angeles*, 61 Cal. 188.

And whether the circumstances are such as to create a reasonable belief in the mind of the slayer to prevent a felony that the necessity exists for taking life is a question for the jury in a prosecution for the killing, and not one for the slayer; and in its solution they may consider the condition of both parties. *Oliver v. State*, 17 Ala. 587; *State v. Harris*, 46 N. C. (1 Jones, L.) 190; *People v. Walworth*, 4 N. Y. Crim. Rep. 355.

And an assault made by one person upon another, and threats to kill the latter, are admissible in evidence in a prosecution against the latter for shooting the former about five months afterward to prevent him from entering the latter's house, from which he attempted to keep him with a deadly weapon, as tending to show that he had reasonable grounds to believe that it was necessary for him to go as far as he did in order to protect his own life, or his person from great bodily harm. *DeForest v. State*, 21 Ind. 23.

Likewise, any fact tending to prove that at the time of the killing the slayer knew that the deceased and his companions did not intend to commit any felony, or do him any great bodily harm, is admissible in evidence in a prosecution for the killing, where the defense is that it was done to prevent the commission of a felony. *Noles v. State*, 26 Ala. 31, 62 Am. Dec. 711.

See also *Richard v. State*, 42 Fla. 528, 20 67 L. R. A.

So. 413, infra, III. c; *Hurd v. People*, 25 Mich. 405, *infra*, V. a; *Stoneman v. Com.* 25 Gratt. 887; *Richardson v. State*, 7 Tex. App. 486,—*infra*, V. b; *Parrish v. Com.* 81 Va. 1, *infra*, VI.

III. Application of rules to particular acts.

a. Attempts to kill or seriously injure.

1. Upon the slayer.

The application of rules with reference to justification of homicide to prevent a felony to acts of violence toward the slayer involves and includes the whole subject of homicide committed in self-defense, which, owing to its extent and its distinct character, has been reserved for future consideration.

2. Upon others.

Where a person is unlawfully, wilfully, and feloniously engaged in an attempt to kill another, or do him great bodily harm with a deadly weapon, and not in his own necessary self-defense, another person may lawfully interfere to prevent the injury, and may even take the life of the person seeking to do the injury in order to prevent it, providing such action is apparently necessary for that purpose. *Stanley v. Com.* 86 Ky. 440, 9 Am. St. Rep. 305, 6 S. W. 155; *Mitchell v. State*, 22 Ga. 211, 68 Am. Dec. 493; *People v. Cole*, 4 Park. Crim. Rep. 35; *Weaver v. State*, 19 Tex. App. 547, 53 Am. Rep. 389; *Glover v. State*, 33 Tex. Crim. Rep. 224, 26 S. W. 204; *Garcia v. State* (Tex. Crim. App.) 57 S. W. 650.

This is the rule of *MORRISON v. COM.*

Thus, where it appears to a person in the exercise of a reasonable judgment that others intend to use an ax in committing a felonious assault upon persons present, he has the right to interpose to prevent such assault, and to do for the persons against whom it is attempted what such persons might do for themselves, even to the killing of the assailant if necessary. *Fletcher v. Com.* 26 Ky. L. Rep. 1157, 83 S. W. 588.

And the killing of a person sought to be arrested by an assistant of the officer seeking to make the arrest is justified where the circumstances are such as to excite the fears of a reasonable man that it is the purpose of the person sought to be arrested to perpetrate a felony upon the officer, and his assistant acts under the

"Upon the issue of self-defense, or where there is a doubt concerning the defendant's motive in committing the homicide,—whether he was actuated by malice or believed that he was in danger from deceased,—he may prove that deceased had made threats against his person or life, as tending to show that he was in peril at the time of the homicide, or that he had reasonable grounds upon which to believe that he was in such peril, provided such threats were communicated to defendant before the killing. . . . But where there is no evidence of an overt act or hostile demonstration on the part of the deceased, evincing a present purpose to carry the threats into execution, nor any doubt that defendant was the aggressor, evidence of previous

influence of such fears, and not in a spirit of revenge. *Adams v. State*, 72 Ga. 85.

And a deputy marshal of the United States, charged with the duty of protecting and guarding a judge of the United States court while in the discharge of his official duties against assault, being present at the critical moment when prompt action is necessary, is justified in killing the person making the assault if necessary, to protect the life of the judge; and in so doing he is acting under the laws of the United States, and is not answerable for the act in the courts of the state. *Re Neagle* (*Cunningham v. Neagle*) 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658, Affirming 5 L. R. A. 78, 14 Sawy. 232, 39 Fed. 833.

So, it is the right of the father of a married daughter to go to the premises of her husband to rescue the daughter from, and prevent infliction upon her by her husband of, cruel, inhuman blows; and where he does so he has the right to defend his own person against the husband, even to the extent of killing him if necessary. *Campbell v. Com.* 88 Ky. 402, 21 Am. St. Rep. 348, 11 S. W. 290.

And where a woman is assaulted in her own house with a rock, by another woman, and her husband believes, or has reasonable grounds to believe, that she is in imminent danger of losing her life or suffering great bodily harm, he has the right to interfere to protect his wife; and, if the husband of the other woman attempts to prevent his interference, he is justified in taking whatever means are necessary, or appear to him to be necessary, to rescue and defend his wife, even to taking the life of his assailant. *Estep v. Com.* 86 Ky. 39, 9 Am. St. Rep. 260, 4 S. W. 820.

And a person is using a pistol, within the meaning of Tex. Penal Code, art. 571, providing that, when a homicide takes place, to prevent murder, maiming, etc., if the weapon used by the party attempting to commit such crime is such as would have been calculated to produce death, it shall be presumed that the person using such weapon designed to kill, where he says to another, "I have got you now," and at the same time throws his hand to his breast, thrusts it into his pocket, and seizes his pistol and draws it partially out of his pocket, and is only prevented by bystanders from further use of it. *Ward v. State*, 30 Tex. App. 687, 18 S. W. 793.

So, where one person throws rocks at another, 67 L. R. A.

threats by deceased against the defendant, although they were communicated to defendant, is not admissible." See also, to same effect, 3 Rice, Ev. 362; Wharton, Crim. Ev. § 757; 9 Am. & Eng. Enc. Law, p. 673.

It will thus be seen that the admissibility of the evidence in question depends upon whether the defendant was the aggressor in the difficulty; for if he knew that deceased had threatened his life, and was a violent and dangerous man, so much the more reason would there be that the defendant should not be the aggressor in the difficulty. The court, after giving the usual instructions on murder, manslaughter, and reasonable doubt, instructed the jury as follows on self-defense: "If the jury believe

and then flees, and the other follows him with a knife, the person fleeing is reinstated to his right of self-defense; and another person, in his behalf, would have the same right to kill the pursuer to prevent his killing the pursued as the pursued himself would have. *Stanton v. State* (Tex. Crim. App.) 29 S. W. 476.

And where, in a prosecution for homicide, it appears that four persons were chasing some insolent boys with threats of chastising them, and that the boys took refuge in a house, and that one of the men demanded of the occupant that the boys be turned over to them, and in the altercation which followed the occupant and one of the attacking party struggled for the possession of an ax, and that the occupant killed the person struggling to gain possession of the ax, an instruction should be given as to his right to interpose to prevent a felonious assault, and to do for the person against whom the assault was attempted what such person might do for himself. *Fletcher v. Com.* 26 Ky. L. Rep. 1157, 83 S. W. 588.

And where one person interposed in a fight between two others, and shot one of them, it is for the jury, in a prosecution for homicide, to say whether or not in shooting he intended to interfere to prevent the murder of the other combatant, and nothing else. *People v. Cole*, 4 Park. Crim. Rep. 35.

The right to slay in defense of another, however, where the person slaying is not himself assaulted, depends, both at common law and under the statutes, upon necessity; and the homicide is justifiable only when necessarily committed. *Richard v. State*, 42 Fla. 528, 29 So. 413.

The slayer must act in good faith, and use all reasonable means in his power otherwise to prevent the perpetration of the crime. *Mitchell v. State*, 22 Ga. 211, 68 Am. Dec. 493.

And the homicide must be in necessary resistance to aggression apparently violent, immediate, and imminent toward the person about to be injured. *Weaver v. State*, 19 Tex. App. 547, 53 Am. Rep. 389. And see *MORRISON v. Com.*

The provisions in 3 N. Y. Rev. Stat. 7th ed. § 3, subsecs. 1, 2, with reference to homicide justifiable because committed in defense of another, relate to transactions occurring in respect to parties present at the time and place of its occurrence, and have no application to a case in which the danger is to an absent

from the evidence that the defendant, at the time he cut and killed the said Alex Dean, if he did cut and kill him, believed, and had reasonable grounds to believe, that the said Alex Dean was then and there about to take his life or inflict on him great bodily harm, and there appeared to him, in the exercise of a reasonable judgment, no other safe means to avert the real, or to him apparent, danger, if any, but to cut the said Dean, then he had the right to do so, and they ought to acquit him on the ground of self-defense." The commonwealth complains of this instruction as too favorable to the accused, in that it allows him to rely on self-defense, although he was the aggressor in the difficulty. He, however, insists that the instruction was

not as favorable to him as it should have been, and that the court erred in refusing the following instruction which he asked: "The court instructs the jury that if they shall believe from the evidence that, just before he was cut and killed, the deceased, Alexander Dean, was, without any fault on her part, engaged in an assault upon Ida Dean, within the sight and hearing of the defendant, William Morrison, and that said Morrison had a right to believe, and did in good faith believe, that said Dean was then and there about to inflict upon said Ida Dean either loss of life or great bodily harm, then said Morrison had a right to interfere for her protection and stop said assault by all such reasonable means as appeared to him to be necessary to that end,

person. *People v. Walworth*, 4 N. Y. Crim. Rep. 355.

And where a person does not stand in the relation of husband or wife, parent or child, or master or servant of another, he cannot justify an interference on his behalf, or the killing of a third person for his protection, upon the ground that he came into the difficulty for the purpose of taking the place of the person assailed. He can justify, if at all, merely as an indifferent person seeking to preserve the peace. *Morrison v. Com.*

Nor is a person who sees another about, to attack a third person justified in killing him to prevent the attack, where his acts and conduct are such as to render it uncertain whether he intends to kill the other under circumstances which would amount to murder, until he has resorted to all other means to prevent the injury; and the killing must be done while the other is in the very act of making an unlawful and violent attack. *Glover v. State*, 33 Tex. Crim. Rep. 224, 26 S. W. 204.

And a burglar, who, with others, was discovered in the act of robbing a store, who killed one of the discoverers, cannot claim that the killing was necessary in order to prevent the person killed from unnecessarily killing one of his companions, where the two discoverers had left the companion before he returned to the rescue, and neither of them was then harming, or attempting to harm, him. *Ruloff v. People*, 45 N. Y. 213.

And, in determining whether persons catching robbers in the act of robbery inflicted unnecessary or wanton violence upon them so as to become wrongdoers, the courts will not be astute in searching for such a line of demarcation as will take an innocent citizen, whose property and person are in danger, from the protection of the law, and place his life at the mercy and discretion of an admitted felon. *Ibid.*

So, it has been held that, where a man interposes when another is attacked, it must be to keep the peace, and the protection of the other must be incidental to that purpose. *People v. Cole*, 4 Park. Crim. Rep. 35.

And no matter how heinous an offense committed against a person, or against another whom he desires to defend, he is not justified in taking vengeance in his own hands, and deliberately slaying the wrongdoer. *Perry v. State*, 102 Ga. 365, 30 S. E. 903.

And if the person defended is in fault, the 67 L. R. A.

person killing another, in his defense, acts at his peril. *Stanley v. Com.* 86 Ky. 440, 9 Am. St. Rep. 305, 6 S. W. 155.

b. Robbery or burglary.

Robbery is a forcible felony, and a person has a legal right to prevent the attempted commission of a robbery to the extent of inflicting death upon the person attempting it. *People v. Grimes*, 132 Cal. 30, 64 Pac. 101; *Smith v. State*, 31 Tex. Crim. Rep. 14, 19 S. W. 252.

And where one person wrongfully takes money belonging to another from his possession, whether forcibly or through fraud, the right to protect one's possession is regarded as an extension of the right to protect one's person, and goes to the same extent. *Com. v. Donahue*, 148 Mass. 529, 2 L. R. A. 623, 12 Am. St. Rep. 591, 20 N. E. 171.

And where a strong man threatened to take by force from the person of a weaker one a watch, falsely claiming it to be his, pressing upon him while he retreated until the larger man neared him, and raised his hand to seize or strike him, when he fired his pistol and killed the former, an instruction with reference to the right to repel force by force in defense of one's person or property is proper and necessary in a prosecution for the killing. *Stoneham v. Com.* 86 Va. 523, 10 S. E. 238.

And where one person raises a crop upon the land of another under a contract by which he is entitled to a share of the crop for his services, they are not joint tenants or tenants in common in the crop produced; it is exclusively the property of the landowner, so that a forcible taking of the crop by the tenant would be robbery which might justify killing him to prevent it. *Parrish v. Com.* 81 Va. 1.

So, if a man intending to kill a thief or a house breaker in his own house happens, by mistake, to kill one of his own family, it cannot be imputed to him as a criminal action. *Levett's Case*, Cro. Car. 538.

And where a burglar seizes the gun of the owner of the premises he is attempting to burglarize to prevent himself from being shot, and in the struggle for the gun it goes off and kills a third person, the owner, having a right to kill the burglar to prevent the burglary, would not be guilty of murder or manslaughter in the commission of an unlawful act in killing the third person. *McPherson v. State*, 22 Ga. 478.

and if, in doing so, it became necessary, or apparently necessary, for him to take the life of said Dean, he had the right to do so, and the jury should acquit him; for what a man may do for himself, he may do for another."

The defendant Morrison's testimony as to how the difficulty came up is in these words: "I ran down that way. I did not go very fast, and I went down. Why, he had her up against the house beating her, and I caught him on one shoulder and shoved them apart, and told him, 'You can't beat her where I am,' and he drew a pistol, and said, 'I will kill both of you.' . . . My intention was to keep him from hitting her. . . . He was striking her in the face with his fist when I got to him.

These rules apply to prevention of the consummation of a robbery by getting away with the proceeds, as well as to the robbery itself.

Thus, where a robbery has been committed, and an attempt to escape with the proceeds is made, another has the legal right to prevent such escape by any means within his power, even to that of inflicting death. *People v. Grimes*, 132 Cal. 30, 64 Pac. 101.

And one whose money is fraudulently taken from him by another may thereupon retake it from him; but in retaking he should use only such force as is necessary for retaking, the amount of force which may be used being a question of fact for the jury. *Com. v. Donahue*, 148 Mass. 529, 2 L. R. A. 623, 12 Am. St. Rep. 591, 20 N. E. 171.

And a person discovering others in the commission of a robbery may, under 2 N. Y. Rev. Stat. 661, § 11, providing that every person who shall unnecessarily kill another while resisting an attempt of such other person to commit any felony, or do any other unlawful act, shall be deemed guilty of manslaughter in the second degree, use all the force necessary to oppose and prevent the consummation of the robbery, and properly resist all attempts to inflict bodily injury upon himself, and may lawfully detain the robbers and hand them over to the officers of the law; and it would only be by the use of unnecessary or wanton violence, or the infliction of unnecessary or wanton injury to the criminals, that the person discovering them could become a wrongdoer. *Ruloff v. People*, 45 N. Y. 213.

If goods are taken either by violence or by putting the owner in fear, the taking is robbery within the rule justifying homicide to prevent a felony, *McDaniel v. State*, 8 Smedes & M. 401, 47 Am. Dec. 93.

And to constitute robbery, to prevent which a killing may be justified, it is not necessary that the taking of the property shall be directly from one's person; it is sufficient if it is taken while in his possession and immediate presence. *Crawford v. State*, 90 Ga. 701, 35 Am. St. Rep. 242, 17 S. E. 628.

And where violence is used to obtain possession of property with a felonious intent, it is none the less robbery, which may justify a homicide to prevent it, because the thief has recourse to some colorable or specious claim of right to effect his purpose. *Parrish v. Com.* 81 Va. 1.

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. . . It seemed to very near knock her to the ground. The last one knocked her up against the house. She would have fallen if it had not been for the house. . . . He drew his pistol, and I grabbed his hand, and he struggled. . . . We both went to the ground. . . . I cut him while I was in the fall." Turner and Ida Dean make in substance the same statement. On the other hand, the commonwealth's witnesses all say that Dean was simply pushing his sister along the side of the street. They all agree that Morrison ran at least 90 feet on tiptoe before he came up to them. We do not see anything in the evidence to warrant the belief that Alex Dean was about to kill his sister or do her some great bodily harm. It is true, he wanted her to go

But to constitute robbery, to prevent which a killing may be justified, there must have been force or intimidation, asportation without the consent of the owner, and the intent to steal; the act of a person taking property from another under a bona fide claim of right, with the purpose of applying it to a claim of debt from another to himself, is not such robbery. *Crawford v. State*, 90 Ga. 701, 35 Am. St. Rep. 242, 17 S. E. 628.

And a killing to prevent a taking of slight moment and importance cannot be justified, though it technically amounted to a robbery; and the fact that one person took from another by violence a nickle with intent to appropriate it does not justify the latter in killing him while retreating with the money. *Bowman v. State* (Tex. Crim. App.) 21 S. W. 48.

c. Breaches of the peace.

It is as much every man's duty to interfere to prevent a breach of the peace as it is to prevent a felony, for a breach of the peace, whether in itself felonious or not, is liable to lead to felony; and the general common-law rule seems to be that felonious rioters, resisting the lawful authorities, may be slain with impunity when necessary for the purpose of maintaining or restoring the public peace. *Re Riots of 1844*, 2 Clark (Pa.) 275, *dictum*.

And when engaged in the suppression of dangerous riots a sheriff and his assistant are authorized to resort to every necessary means to restore peace and prevent criminal outrages against person or property, and they may arrest the rioters and detain and imprison them; and, if they resist and continue their riotous actions, killing them becomes justifiable. *Com. v. Daley*, 2 Clark (Pa.) 361.

So, private persons may forcibly interfere to suppress a riot or resist rioters, although a riot is not necessarily a felony in itself; and, where they cannot otherwise suppress them or defend themselves, they are justified in killing them, as it is their right and duty to aid in preserving the peace. *Pond v. People*, 8 Mich. 150.

And a person who sees another in a drunken condition attempting to shoot into a house where a large number of persons are assembled has a right to disarm him, and, if need be, restrain him, in order to prevent the commission of the act, and may use such force as is neces-

home, and she declined to go. She struck him with the umbrella, and, whether he then struck her or pushed her against the house, it is reasonably clear that no harm would have come of the quarrel between brother and sister if Morrison had not intervened. The proof shows that she was a small, frail woman, and that Alex Dean only wanted her to get off the street.

So, the case comes to this: Did Morrison, when he saw Alex Dean committing an assault on his sister, and pushing or striking her against the house, have a right to intervene between the brother and sister for her protection from a simple battery? In 1 Bishop on Criminal Law, § 877, it is said: "The doctrine here is that whatever one may do for himself he may do for another.

The common case, indeed, is where a father, son, brother, husband, servant, or the like, protects by the stronger arm the feeble. But a guest in a house may defend the house, or the neighbors of the occupant may assemble for its defense; and, on the whole, though distinctions have been taken and doubts expressed, the better view plainly is that one may do for another whatever the other may do for himself." The statement of the law, as applied to simple batteries and breaches of the peace, is broader than it is usually put in the authorities. Thus, in 3 Bl. Com. 3, it is said: "The defense of one's self or the mutual and reciprocal defense of such as stand in relations of husband and wife, parent and child, master and servant. In

sary; but he would not be excusable in killing him if he should use more force than reasonably appeared to be necessary to restrain him. *Burton v. Com.* 23 Ky. L. Rep. 1915, 66 S. W. 516.

And an attack upon the net house of a fisherman for the purpose of destroying it is a violent, forcible felony, justifying him in killing one of the persons attacking when necessary to prevent the destruction, without reference to whether or not it is a part of his dwelling. *Pond v. People*, 8 Mich. 150.

And one who peaceably goes to the house of another solely to stop a disturbance there, and to require an apology for previous insults to his wife, and who is attacked by the other with a deadly weapon, upon which he kills his assailant, is not guilty of murder. *Watson v. Com.* 87 Va. 608, 13 S. E. 22.

So, the various statutes on the subject seem, substantially at least, to be a re-enactment of the common-law rule.

Thus, homicide is justifiable under the New York statutes when committed necessarily in the lawful keeping and preserving of the peace. *People v. Cole*, 4 Park. Crim. Rep. 35.

And one who interposes in a fight between two others, whose design is to prevent the commission of a crime by one upon the other, and unnecessarily kills the one he seeks to restrain, is guilty of manslaughter in the second degree only. *Ibid.*

And Fla. Rev. Stat. § 2398, div. 2, subdv. 3, making homicide justifiable when committed in lawfully suppressing any riot, or lawfully keeping and preserving the peace, authorizes the killing, by a brother, of two or more persons assaulting and attempting to kill his brother or sister; such killing being one to prevent a violent breach of the peace. *Mitchell v. State*, 48 Fla. 188, 30 So. 803; *Richard v. State*, 42 Fla. 528, 29 So. 413.

But the justification of a homicide under that statute depends upon actual necessity, and not upon reasonable belief arising from appearance. *Richard v. State*, 42 Fla. 528, 29 So. 413.

So, where two or more persons manifestly intended and endeavored in a riotous and tumultuous manner to enter the habitation of another for the purpose of assaulting or offering personal violence to anyone being therein, and one of them, to prevent such injury, was killed by the occupant of the house, if the circumstances were sufficient to excite the fears of a 67 L. R. A.

reasonable man that such entry was intended, and the killing was done under the influence of such fears, such homicide is justifiable under Ga. Penal Code, § 90, though the assault or personal violence intended was less than a felony. *Smith v. State*, 106 Ga. 673, 71 Am. St. Rep. 286, 82 S. E. 851.

The rule that a person has the right to kill to prevent the commission of an atrocious crime, where he acted in good faith and such a killing was necessary for the purpose, however, does not apply where the slayer acted in concert with another in bringing about a difficulty with the person slain, and made himself a party to it, and aided and assisted in bringing about the fatal encounter. *Mitchell v. State*, 22 Ga. 211, 68 Am. Dec. 493.

And an unlawful, or even a riotous, assembly of persons cannot be shot down without any previous effort being made to suppress it by other means. *Com. v. Daley*, 2 Clark (Pa.) 361.

And it cannot be said that to keep the peace in a mere fist fight it can be necessary to resort to firearms, or to take life in any case. *People v. Cole*, 4 Park. Crim. Rep. 35; *Johnston's Case*, 5 Gratt. 660.

And one who finds two men fighting, one of whom is a friend, and inflicts a dangerous stab upon the other without provocation, is no more excusable than he would have been for the same act committed on one who was fighting with a stranger, or who was not fighting at all. *Conner v. State*, 4 Yerg. 137, 26 Am. Dec. 217.

IV. *Misdemeanors, crimes without force, and trespasses.*

a. *General rules as to misdemeanors and secret crimes.*

One can only kill to save life or limb, or prevent a great crime, or to accomplish a necessary public duty. *State v. Morgan*, 25 N. C. (3 Ired. L.) 186, 38 Am. Dec. 714.

And a homicide committed in endeavoring to restrain the commission of a mere misdemeanor is not justifiable. *People v. Grimes*, 132 Cal. 64, 64 Pac. 101; *Crawford v. State*, 90 Ga. 701, 35 Am. St. Rep. 242, 17 S. E. 628; *Carmouche v. Bouis*, 6 La. Ann. 95, 54 Am. Dec. 558.

And the general rule justifying homicide to prevent felony does not authorize the killing of persons attempting secret felonies not accompanied by force, such as a mere larceny or pick-

these cases, if the party himself, or any of these, his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace which happens is chargeable upon him only who began the affray." In a note to this it is added: "When a person does not stand in either of these relations, he cannot justify an interference on behalf of the party injured, but merely as an indifferent person to preserve the peace." See, to the same effect, 2 Am. & Eng. Enc. Law, p. 981; 2 Roberson, Criminal Law, § 543.

When a felony is apparently about to be committed, as where there is apparent danger of loss of life by the person assailed or of great bodily harm to him, a different rule prevails, and there any third person

may lawfully intervene for his protection, using such means for his defense as the person assailed himself may lawfully use. But where the assault is not felonious, and the person intervening does not stand in any of the relations to the one assailed excepted out of the common-law rule, then he who intervenes can only act for the preservation of the peace. He cannot come into the difficulty for the purpose of taking the place of the person assailed, and continuing the fight. This is the common-law rule, as we understand the authorities, and we cannot depart from it or extend it.

It is conceded on all hands that Morrison ran down on tiptoe to where Alex Dean and his sister were, some 90 feet away. If, when he got there, he at once stabbed Dean

ing pockets. *Storey v. State*, 71 Ala. 329; *Carmouche v. Bouls*, 6 La. Ann. 95, 54 Am. Dec. 558; *Weaver v. State*, 19 Tex. App. 547, 53 Am. Rep. 389.

So, where a felonious act is not of a violent or forcible character, as in the case of crime partaking of fraud rather than force, there is no necessity to prevent it, and, therefore, no justification for homicide. *Pond v. People*, 8 Mich. 150.

b. Larceny.

Larceny is a secret crime not attended with force, and, especially when the goods taken are of small value, furnishes no warrant to one person for killing another to prevent its consummation.

Thus the killing of one person by another to prevent the crime of petit larceny is not justified. *Bloom v. State*, 155 Ind. 292, 58 N. E. 81.

And feloniously carrying away fallen timber from the premises of another does not warrant the owner in shooting the thief, though the shooting is done to prevent the act, since that would amount to punishing with death an offense for which the law has provided a milder penalty. *Reg. v. Murphy*, 2 Craw. & D. (Ir.) 20.

So, one person has no right to shoot and kill another to prevent him from taking a dog, which both claim, away from his premises. *Trusty v. Com.* 19 Ky. L. Rep. 706, 41 S. W. 766.

And, while boys have no right to enter the melon patch of another and help themselves to the melons without his consent, he would not be justified in shooting them for so doing. *State v. Vance*, 17 Iowa, 138.

And an instruction, in a prosecution for manslaughter, that boys have no right to enter a melon patch of another and help themselves to his melons without his consent, but it would be a reproach to the laws to hold that for such an act the owner has a right, without notice or warning, to shoot them, tends to show a proper comprehension of the sacredness of human life, and is not objectionable as tending unjustly to prejudice the minds of the jury. *Ibid.*

So, one who killed a slave while in the act of committing a larceny within his inclosure is liable therefor, where the act was not necessary for the defense of his person, his family, or his property. *Bibb v. Hebert*, 3 La. Ann. 132; *Priester v. Augley*, 5 Rich. L. 44. 67 L. R. A.

And the act of a band of negroes in going upon the premises of a planter and taking a small quantity of sugar cane, without attempting to put the owner in fear, is a mere misdemeanor, and not a crime, and does not justify shooting one of the number. *Carmouche v. Bouls*, 6 La. Ann. 95, 54 Am. Dec. 558.

Nor may an owner of poultry protect his property from larceny by shooting and killing the thief in the absence of any effort to arrest the thief, or of any showing that he could not have been arrested, or that the poultry could not have been protected by other means. *Marks v. Borum*, 1 Baxt. 87, 25 Am. Rep. 764; *Gardiner v. Thibodeau*, 14 La. Ann. 742.

And a person set to watch a yard or garden is not justified in shooting anyone who comes into it, though in the night, and though the person coming into it goes into the master's henroost, unless from the conduct of such person he has fair grounds for believing his own life to be in actual and immediate danger. *Rex v. Scully*, 1 Car. & P. 819.

Nor does a mere larceny justify an intentional killing under a statute justifying a homicide when committed by a person in resisting an attempt to commit a felony on him. *McDaniel v. State*, 8 Smedes & M. 401, 47 Am. Dec. 93.

When the owner of stolen property tries to prevent the theft, or recover the property, however, and is resisted, he may repel force with force and not retreat; and, if the thief is unavoidably killed, the homicide is justifiable. *Storey v. State*, 71 Ala. 329.

And where a person attempts to take hogs in legal possession of another, and, while attempting to do so, the latter strikes him with a board, not being able to prevent him from doing so otherwise, and having resorted to all other means at hand to prevent the taking of the hogs, and such person retreats and afterwards advances upon him with deadly weapons, he is not bound to retreat; and, if it reasonably appears to him that his life is in imminent danger, or that he is in danger of serious bodily harm, he is justified in striking the other in his own self-defense. *Lilly v. State*, 20 Tex. App. 1.

And if a slave, though the property of another, be found in the nighttime engaged in stealing the property of a citizen upon his premises under such circumstances that he cannot be identified or apprehended with safety, the citizen may lawfully shoot at him with a de-

in the back, as stated by the witnesses for the commonwealth, he was the aggressor. The instruction of the court, which submitted to the jury the question whether Morrison believed, or had reasonable grounds to believe, himself in danger of death or great bodily harm at the hands of Dean, when he stabbed him, was more favorable to Morrison than the law warranted, as the court did not submit to the jury the question whether Morrison was the aggressor. Morrison knew that the illicit relations between him and Ida Dean were the foundation of the animosity of Alex Dean to him. He also knew that this was the cause of the quarrel between the brother and sister. With this knowledge

he ran on tiptoe down to where they were, armed with a dirk, and if, as he says, he caught Alex Dean by the shoulder and shoved them apart, saying to him, "You can't beat her where I am," his interference was not as an indifferent person to preserve the peace, for his first act was to commit a battery on Alex Dean by taking him by the shoulder, and this was followed up by a declaration which he could but know, under all the circumstances, would make Alex Dean regard him as an assailant. To hold that he intervened, under the evidence, as an indifferent person to preserve the peace, would be to give no real effect to the common-law rule allowing greater rights to parent and child, husband and wife, master

and slave to wound him, but without intent to produce death, without incurring criminal responsibility, even though death ensues. *McClelland v. Kay*, 14 B. Mon. 103.

Under the Texas statute making homicide justifiable when inflicted for the purpose of preventing certain offenses therein enumerated, including theft at night and burglary, and providing that, in case of burglary and theft by night, the homicide is justifiable at any time while the offender is in the building, or at the place where the theft is committed, or within reach of a gun shot from such place or building, it makes no difference whether the party has abandoned the property stolen or taken and is fleeing from the place of the theft, or whether he still retains it; if he is still within the reach of a gun shot from the place, the homicide is justifiable. *Whitten v. State*, 29 Tex. App. 504, 16 S. W. 206.

And a theft by night within the meaning of that act means, in analogy with statutes with reference to burglary, a theft committed at any time between thirty minutes after sunset and thirty minutes before sunrise. *Laws v. State*, 26 Tex. App. 643, 10 S. W. 220.

The taking of partnership property by a partner is neither a larceny nor a trespass against the other partner, within the meaning of rules of law with reference to the use of force to prevent a trespass or a felony. *Jones v. State*, 76 Ala. 8.

c. Trespass on property.

1. General rules.

The law justifies the taking of life when necessary to prevent the commission of a felony, but not to prevent the commission of a mere trespass on the property of another. *Oliver v. State*, 17 Ala. 587; *Storey v. State*, 71 Ala. 329; *State v. Becker*, 6 Houst. (Del.) 411, 33 Atl. 17; *Davison v. People*, 90 Ill. 221.

A person should not in defense of his property, as distinguished from the defense of his person, resort to means reasonably calculated to endanger life. *State v. Dooley*, 121 Mo. 591, 28 S. W. 558; *State v. Forsythe*, 89 Mo. 607, 1 S. W. 834; *Meade's Case*, 1 Lewin, C. C. 184.

And if one man deliberately kills another to prevent a mere trespass upon property, whether such trespass can or cannot otherwise be prevented, it is murder. *Harrison v. State*, 24 Ala. 67, 60 Am. Dec. 450; *State v. Morgan*, 25 N. C. (3 Ired. L.) 186, 38 Am. Dec. 714; *State v. 67 L. R. A.*

Brandon, 53 N. C. (8 Jones, L.) 463; *State v. McDonald*, 19 N. C. (4 Jones, L.) 19.

And Minn. Gen. Stat. § 13, p. 598, providing that whoever unnecessarily kills another, except by accident or misfortune, and in certain other designated cases, either while resisting an attempt by such other person to commit any felony, or to do any other unlawful act, or after such attempt has failed, shall be guilty of manslaughter in the second degree, has no application to a case of a killing with an ax by inflicting blows therewith upon the head and neck of the deceased, claimed to be in resistance of a civil trespass upon lands or cattle, or both, of the person using the ax, there being no pretense of the absence of design to effect death. *State v. Hoyt*, 13 Minn. 132, Gil. 125.

Where property is attacked, but not in such a way as to endanger the life of the owner or person in charge, or to render him liable to serious bodily harm, every effort must be made to repel the aggression before resorting to homicide in order to prevent it. *Ledbetter v. State*, 26 Tex. App. 22, 9 S. W. 60.

A man may use force to defend his real or personal property in his actual possession against one who endeavors to dispossess him without right, taking care that the force used does not exceed what reasonably appears to be necessary for the purpose of defense and prevention; but, in the absence of an attempt to commit a felony, he cannot defend his property, except his habitation, to the extent of killing the aggressor for the purpose of preventing the trespass; rather than slay an aggressor to prevent a mere trespass, he should yield, and appeal to the courts for redress. *Carpenter v. State*, 62 Ark. 286, 36 S. W. 900; *Davison v. People*, 90 Ill. 221.

So, Ga. Code, § 4332, providing that if, after persuasion, remonstrance, or other gentle measures, a forcible attack or invasion of the property or habitation of another cannot be prevented, it shall be justifiable homicide to kill the person so forcibly attacking and invading, has no application where the property attacked or invaded is so inconsiderable that the injury intended is slight and trifling, and not in fact a felony. *Crawford v. State*, 90 Ga. 701, 35 Am. St. Rep. 242, 17 S. E. 628.

If a trespass on the person or property of another amounts to a felony, however, the killing of the trespasser is justified, if necessary, to prevent it. *Ibid.*

And a man may lawfully defend his property

and servant, or the like, than to other persons in cases of simple batteries or breaches of the peace. According to his own testimony, the manner of his approach, his conduct on reaching Alex Dean, and his declaration to him, under the circumstances, were not those of one bent on peace, but of one proposing to champion the woman and fight her battles for her. He was therefore the aggressor, and the court did not err in refusing to admit the proof as to the bad character of Alex Dean or his previous threats; and this evidence, if admitted, could not have been of material service to the defendant under the view of the law which we have indicated, for the jury might

have inferred that when he interfered with knowledge of the previous threats and the character of Dean he anticipated the result that ensued. The verdict of the jury finding him guilty of manslaughter, and fixing his punishment at eleven years in the penitentiary, seems to have been due to their accepting the version of the transaction as given by the witnesses for the commonwealth, and their believing that Morrison acted in sudden heat on seeing the woman assailed by her brother.

Judgment affirmed.

Nunn, J., dissents.

in his possession by any degree of force short of taking life necessary to make the defense effectual. *State v. Forsythe*, 89 Mo. 667, 1 S. W. 834; *Richardson v. State*, 7 Tex. App. 486.

And if any forcible attempt is made with a felonious intent against the person or property, the owner is not obliged to retreat, but may pursue his adversary, if necessary, till he find himself out of danger; and, while life may not properly be taken when the evil may be prevented by other means within reach, reasonable apprehension of danger is sufficient to justify the taking of life. *Pond v. People*, 8 Mich. 150; *Ledbetter v. State*, 26 Tex. App. 22, 9 S. W. 60.

And, in case of a reasonable apprehension or fear of death or serious bodily harm, he may act at once to defend himself by taking the life of the other without resorting to other means to prevent the attack or protect the property. *Ledbetter v. State*, 26 Tex. App. 22, 9 S. W. 60.

So, Tex. Penal Code, arts. 572, 575, providing that homicide is only justifiable in the protection of property after all other means have been resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making an unlawful attack; and such homicide, to be justifiable, must be committed to protect the possession of corporeal property, and not of a mere right; and the possession must be actual, and not merely constructive; and the possession must be legal though the right of property may not be in the possessor; and every other effort must be made by the possessor before he will be justified in killing,—gives one who has property lawfully in his possession which is sought to be carried away by another the right to take the life of the other in defense against a forcible taking. *Lilly v. State*, 20 Tex. App. 1.

And under that act one's right to defend property is not dependent upon the fact that the injury to it is not accompanied by violence to himself; it is only where a third person interferes in behalf of one whose person or property is assailed that the killing of the aggressor by such third person will not be justifiable under art. 752 thereof, unless the life or person of the injured party is in peril by reason of the attack upon his property. *Ibid.*

2. Personality.

The above general rules are particularly applicable to the appropriation by one person of 67 L. R. A.

another's personal property; and, where one person attempts to remove personal property belonging to another from his possession and appropriate it to his own use, and the other kills him, the killing is not justified if the person removing the property is not armed, and simply attempts the trespass without force of arms, neither intending nor endeavoring to commit a felony against the other. *People v. Payne*, 8 Cal. 341.

And an open taking of property in the presence of the owner, or of other persons, is only a trespass, and not a felony, to prevent which the taking of life may be justified. *McDaniel v. State*, 8 Smedes & M. 401, 47 Am. Dec. 93.

Where property was merely converted or taken possession of in such a manner as to constitute a civil trespass without any criminal intent, it would not be lawful to recapture it by any exercise of force which would amount even to a breach of the peace, much less felonious homicide. *Storey v. State*, 71 Ala. 329.

No trespass upon personal property of another will authorize the killing of the trespasser, and any such killing is murder if committed with a deadly weapon, the kind of weapon used in such case determining the intent. *McDaniel v. State*, 8 Smedes & M. 401, 47 Am. Dec. 93; *Hayes v. State*, 58 Ga. 35.

And evidence that one person informed another that he was going to take property upon which the latter had a claim and which was in his possession, but that he had not proceeded to take it when he was shot, does not raise an issue as to the right of the other to kill in defense of the property, and does not require a charge as to that issue. *Dean v. State* (Tex. Crim. App.) 83 S. W. 816.

And where a person claiming that another owed him met him on the road having a large piece of meat in his possession, and proceeded with his pocket knife to cut off enough of the meat to pay the debt, whereupon a difficulty arose and the owner of the meat killed him, the killing is not justifiable if the claim of debt was made in good faith and there was no intent to steal, but would be manslaughter. *Crawford v. State*, 90 Ga. 701, 35 Am. St. Rep. 242, 17 S. E. 628.

In the above case it was said that what was said in *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 209, to the effect that a trespass amounting to a misdemeanor will reduce a killing to manslaughter, refers to trespass affecting the person, and not to trespass affecting the goods

only; and the same comment was made in *Hayes v. State*, 58 Ga. 35, *supra*.

And in *Crawford v. State*, 90 Ga. 701, 35 Am. St. Rep. 242, 17 S. E. 628, *supra*, it was said that the ruling in *Pound v. State*, 43 Ga. 88, *infra*, V. b, that Ga. Code, § 4332, does not apply to the defense of property which is not at the habitation, is *dictum* only.

So, where a person borrowed money and deposited a gun as security, and then carried away the gun, and the lender seized the gun and attempted to dispossess him, and in the struggle which ensued the gun went off and accidentally killed the borrower, the act of the lender, though he had a right to the possession of the gun, in attempting to take it away by force, was unlawful, and the killing, being the result of an unlawful act, is manslaughter. *Reg. v. Archer*, 1 Fost. & F. 351.

And the killing of a constable who comes to make an unlawful distress is manslaughter though his act is illegal. *United States v. Williams*, 2 Cranch, C. C. 439, Fed. Cas. No. 16,710.

But a constable in levying a distress warrant for rent is not acting in the discharge of his official duty within the rule of law which makes killing an officer murder when it would not have been murder if he had not been an officer, since he can only justify his acts when those of the owner or landlord would have been justified had he personally distrained. *Ibid*.

And where a broker had made a distress for rent of goods of a lodger in a room, and left a man in charge, who was turned out by the lodger, and upon the broker and his assistants breaking open the outer door to re-enter the lodger struck one of the assistants with an ax on the forehead, he is guilty of an assault at least, and he might be found guilty of wounding with intent to murder or do grievous bodily harm. *Reg. v. Sullivan*, Car. & M. 209.

So, when there is a fair, bona fide claim of property, or right, or title in the taker, the taking amounts to a trespass only, and not to a felony, to prevent which the taking of life might be justifiable; but it is not enough to do away with the criminal intent that there is a mere false claim of property in the article taken. *McDaniel v. State*, 8 Smedes & M. 401, 47 Am. Dec. 93.

And the act of a person engaged in gambling with another, of reaching over and appropriating the stakes, which have apparently been won by another, on a claim that the other holds an improper number of cards, is not robbery, and therefore a felony to prevent which a killing would be justified. *People v. Grimes*, 132 Cal. 30, 64 Pac. 101.

And where two persons engage in playing a game of craps, and one of them wins \$10, or a part thereof, from the other, and the latter retains possession and refuses to deliver it, and an altercation ensues, and the winner arms himself with a club to make the loser surrender the \$10, and a difficulty ensues, and the loser assaults the winner with his fists, or with an unopened knife, and the winner kills the loser, his passion having been aroused by the attack upon him, an issue of manslaughter is presented. *Greer v. State* (Tex. Crim. App.) 45 S. W. 12.

Where one person, without right, attempts to remove and appropriate personal property belonging to another, however, and the latter kills him, the killing is justifiable if the person removing the property intends to kill the

owner if necessary to effect the removal. *People v. Payne*, 8 Cal. 341.

And a man has a right, on his own premises near his own dwelling, to go to the aid of his wife, who is in dispute with others as to a cow claimed by him, and which one of the others has threatened to take away from the premises, or kill him, and use such force as is necessary to prevent their driving the cow away. *Beard v. United States*, 158 U. S. 550, 39 L. ed. 1086, 15 Sup. Ct. Rep. 962.

And where premises are held under a verbal lease by which each party is to have half of the potatoes raised upon them, and the right to use and dig therefrom for family use during the season, the owner and landlord has the right to go upon the premises and request a division of the crop, to the end that each may not encroach upon the other's rights; and, in case he does so, and the tenant attempts to drive him away by an assault, he may use such force as is necessary to protect himself. *State v. Forsythe*, 89 Mo. 667, 1 S. W. 834.

So, in the recapture of property taken from the owner he is authorized to use such force as is reasonably necessary to effect his purpose, provided it does not extend to the use of deadly weapons, or an assault likely to produce death, or great bodily harm. *State v. Dooley*, 121 Mo. 591, 26 S. W. 558.

And the right of an owner to use force in recapturing his property which has been taken from him is not confined to the immediate time and place of the taking, but continues though the property is taken temporarily out of his sight where the pursuit is immediate. *Ibid*.

But persons whose horses have been taken, who go after the persons taking them with a settled and determined purpose to shoot them unless they comply with their demands for the return of the horses, and who, upon overtaking them, assume a position for shooting before demand is made, and omit to shoot only because the demand is complied with, use force in procuring a return of their property in excess of that authorized by law, and the fact that the original taking of the horses was unlawful is no justification for such force. *Ibid*.

3. Realty.

A bare trespass against the real property of another, not his dwelling, does not warrant the owner in using a deadly weapon in its defense; and if he kills the trespasser, it is murder, though the killing is actually necessary to prevent the trespass. *State v. Vance*, 17 Iowa, 138; *Carpenter v. State*, 62 Ark. 286, 36 S. W. 900; *Com. v. Drew*, 4 Mass. 391; *State v. Shippey*, 10 Minn. 223, 88 Am. Dec. 70, Gil. 178; *State v. Zellers*, 7 N. J. L. 220; *Hull v. State*, 6 Lea, 250.

And that the person killed was going to commit a trespass upon land of the slayer at the time of the killing is not competent to justify or excuse the homicide. *State v. Zellers*, 7 N. J. L. 220.

While an owner or tenant of land is justified in using all necessary force to eject a trespasser thereon, his purpose must be to put the trespasser off, and not do him great bodily harm; and he can only use such force as is necessary under the circumstances to effect that purpose, and cannot take his life, except to save his own, or to escape great bodily harm. *State v. Warren*, 1 Marv. (Del.) 487, 41 Atl. 190; *Tiffany v.*

Com. 121 Pa. 165, 6 Am. St. Rep. 775, 15 Atl. 462.

To kill in defense of one's own property or the property of another, except in case of habitation or castle, is never justifiable until every other means has been resorted to to prevent the injury or felony attempted. *Weaver v. State*, 19 Tex. App. 547, 53 Am. Rep. 389.

Thus, a homicide committed with a deadly weapon in order to prevent a trespass in the removal of a line fence in dispute is murder in the absence of proof that would tend to rebut the presumption of malice arising from the use of a deadly weapon, the guilt or innocence of the accused being in no degree dependent upon the title to the land or fence in dispute. *Lambeth v. State*, 23 Miss. 322.

And a person occupying land as a lessee, over which another has no right, is not justified in killing him to prevent him from traveling over it. *People v. Conkling*, 111 Cal. 616, 44 Pac. 314.

And where a person in possession of land as a lessee obstructs a road crossing it, and another person claiming the right to travel over such road kills the other to prevent such obstruction, there is no question of defense of property or habitation which would justify the killing. *Ibid.*

So, where evidence in a prosecution for homicide tends to show that the killing was effected with an ax, a deadly weapon, by inflicting blows therewith upon the head and neck of the deceased, claimed to have been given in resistance of a civil trespass upon land or other property, Minn. Gen. Stat. § 13, p. 598, providing that whoever unnecessarily kills another, except in certain named cases, either when resisting an attempt by such other person to commit any felony or to do any other unlawful act, or after such attempt has failed, shall be guilty of manslaughter in the second degree, has no application, and instructions based thereon are properly refused. *State v. Hoyt*, 13 Minn. 132, Gil. 125.

A person assaulted on his own premises, however, though outside of his own dwelling house, is not obliged to retreat, nor consider whether he can retreat, but may stand his ground, and meet any unprovoked attack made upon him with a deadly weapon in such a way and with such force as to lead him honestly to believe, and give him grounds to believe, it necessary to kill his assailant to protect himself from death or great bodily injury; and in such case the killing would be justifiable. *Beard v. United States*, 158 U. S. 550, 39 L. ed. 1086, 15 Sup. Ct. Rep. 902.

And he is justified in using all necessary force to defend his possession. *Corey v. People*, 45 Barb. 262.

And where two adjoining owners differ as to the ownership of a tract of land, the one rightfully in possession of the disputed tract is not obliged, when the other seeks to move the fence so as to include the disputed tract with his property, to permit him to do it and proceed against him by injunction, in order to comply with a statutory provision requiring him, in order to justify homicide, first to resort to every other means of protecting himself. *Sims v. State*, 36 Tex. Crim. Rep. 154, 36 S. W. 256.

And in such case, where the one not in possession threatens to remove the fence, and refuses to appeal to the law, and proceeds in his purpose, taking the matter into his own hands, 67 L. R. A.

and sends men to dig holes on the line to which he proposes to remove the fence, and, upon the men being driven away, goes himself with a shot gun, manifesting in unmistakable terms his determination to remove the fence, having with him four assistants, and being better armed than the other, the latter is not required to leave the field and seek re-enforcement to prevent the removal of the fence, but is justified, where the other attacks him, or keeps his arms within easy reach, in shooting him to prevent such removal. *Sims v. State*, 36 Tex. Crim. Rep. 637, 44 S. W. 522, 36 Tex. Crim. Rep. 154, 36 S. W. 256.

Nor will the court inquire into the title where a homicide results from a dispute over the ownership of land. *State v. Zellers*, 7 N. J. L. 220.

And surveys, maps, and testimony with reference to the claim and title of a claimant of a disputed strip of land are not admissible in a prosecution against another claimant in lawful possession for killing the former in an alleged effort to prevent him from removing the line fence. *Sims v. State*, 36 Tex. Crim. Rep. 637, 44 S. W. 522.

And a letter written by a former owner of land of which the title was in dispute, to one of the claimants, recognizing his right to the disputed strip, is inadmissible in evidence in such case, where the slayer was not aware of such letter, the question of possession, and not of ownership, being the one at issue; and an argument by counsel, based thereon, that the possession of the accused, not being a legal possession, did not warrant him in defending an encroachment, is improper. *Ibid.*

So, where a person entitled to the joint use and occupation of a well went there to draw water for his family, and there killed the other joint owner in consequence of a sudden violent attack upon him by the latter, the question at issue with reference to the justification of the act is whether it was necessary to save his own life from such a serious assault as would create a reasonable apprehension that his life was in imminent peril, and he did the act to avert the threatened danger, and not whether the act was done to protect his property in the well. *Haynes v. State*, 17 Ga. 465.

And the professional license to practise law of a joint owner of property, who had been expelled therefrom, is not admissible in a prosecution against him for killing the other joint owner in an effort to regain possession, for the purpose of raising a presumption of good character, where it bore date long prior to the killing; but it is admissible for the purpose of showing that he intended to manage his own case in reoccupying the premises in dispute. *Ibid.*

And a charge as to rightful possession is improper in a prosecution for homicide committed by a person in the legal possession of land to prevent another from fencing such land with his own, under Tex. Penal Code, art. 680, sub-div. 2, with reference to self-defense predicated upon the possession of property, providing that the possession must be legal, though the right of property may not be in the possessor. *Sims v. State*, 36 Tex. Crim. Rep. 154, 36 S. W. 256.

V. *Attack in, or trespass or assault on, dwelling.*

a. *Personal attack in.*

When a person is attacked in his own house he is not required to retreat, but may stand

at bay and turn on and kill his assailant if this is apparently necessary to save his own life. *Jones v. State*, 76 Ala. 8; *Storey v. State*, 71 Ala. 329; *Brinkley v. State*, 89 Ala. 34, 18 Am. St. Rep. 87, 8 So. 22; *People v. Newcomer*, 118 Cal. 263, 50 Pac. 405; *Haynes v. State*, 17 Ga. 465; *State v. Middleham*, 62 Iowa, 150, 17 N. W. 446; *Bledsoe v. Com.* 9 Ky. L. Rep. 1002, 7 S. W. 884; *Tingle v. Com.* 11 Ky. L. Rep. 224, 11 S. W. 812; *Wright v. Com.* 85 Ky. 123, 2 S. W. 904; *Pond v. People*, 8 Mich. 150; *State v. Taylor*, 143 Mo. 150, 44 S. W. 785; *Willis v. State*, 43 Neb. 102, 61 N. W. 254; *State v. Harman*, 78 N. C. 515.

And this is so even though a retreat could be safely made. *Brinkley v. State*, 89 Ala. 34, 18 Am. St. Rep. 87, 8 So. 22.

And an instruction in a prosecution for killing his assailant, making his justification depend upon the existence of no other safe, or apparently safe, means of avoiding the danger, is improper. *Bledsoe v. Com.* 9 Ky. L. Rep. 1002, 7 S. W. 884; *Tingle v. Com.* 11 Ky. L. Rep. 224, 11 S. W. 812; *Wright v. Com.* 85 Ky. 123, 2 S. W. 904.

And the right of a person to defend himself when assaulted in his own dwelling house does not depend upon the assailant having sought him out for the purpose and with the intent to kill him or inflict great bodily harm upon him. *Estep v. Com.* 86 Ky. 39, 9 Am. St. Rep. 260, 4 S. W. 820.

And to justify a person assaulted in his own dwelling in shooting his assailant, it is immaterial whether the assailant intended to make a forcible attack upon him or not, where he was following him up in such a manner as to frighten him, and lead him to believe that a violent attack was imminent. *Hurd v. People*, 25 Mich. 405.

Thus, a person against whom another had made threats, who is attacked by the latter at night at his own door with the apparent purpose of executing such threats, is not bound to fly from his habitation, where his wife and children are, to escape danger, instead of resisting the aggressor; and, if he kills the other, his act is excusable if he has reason to believe, and does believe, from the other's previous and present language and actions, that it is necessary to do so to save his own life, or protect himself from danger or great bodily harm. *People v. Lilly*, 38 Mich. 270.

And one who was attacked by another, a larger and stronger man than himself, and sought to shut himself in a house for protection, but who, upon being followed by the larger man, inflicted wounds upon the other believing that his life was in danger, or that he was in danger of receiving great bodily harm, and that such danger was so urgent and pressing that to save his own life or prevent such harm it was absolutely necessary for him to inflict such wounds, is entitled, in a prosecution for the wounding and resulting death, to an instruction as to justifiable homicide in defense of habitation, property, or person against one who manifestly intends, or endeavors, by violence or surprise to commit a known felony. *Reins v. People*, 30 Ill. 256.

So, if several armed men go to a dwelling house in the nighttime for the purpose of seizing the owner without lawful authority, and one of them is killed by him to prevent the execution of their purpose, the killing is not murder;

at most it is but manslaughter. *State v. Medlin*, 60 N. C. (2 Winst. L.) 99.

And in *DeForest v. State*, 21 Ind. 23, it was said that where a man, upon going home, found the door locked and himself locked out of his own house, those within refusing to open it, and he got an ax and beat the door down, upon which he encountered a man inside armed with an ax handle, who attacked him, and whom he killed, it cannot be said that the homicide was not committed under circumstances excusable as a matter of self-defense; but the case was decided upon other grounds.

And *Rex v. Longden, Russ. & R. C. C.* 228, holds that where a person stands with an offensive weapon in the doorway of a room to prevent a person from leaving it, and others from entering it, and a person entitled to enter attempts to get his weapon away from him, upon which his comrade stabs such person causing his death, it is murder on the part of the comrade.

A person, though attacked in his own house, however, has no right to kill, unless it becomes necessary to save his own life, or prevent a felonious destruction of his property, or the commission of a felony therein; he is not justified in killing to prevent a mere trespass upon the property, even in his own dwelling. *State v. Taylor*, 143 Mo. 150, 44 S. W. 785.

He must not take life if he can otherwise arrest or repel the assailant; he is not justified in killing unless the killing is to all reasonable appearances necessary to preserve his own life, or prevent great bodily harm. *State v. Middleham*, 62 Iowa, 150, 17 N. W. 446.

And where one went to the house of another rightfully to get his property which he had left there, and demeaned himself properly while there, and left peaceably, and, irritated by a remark of the owner, returned on his invitation, upon which the owner seized a deadly weapon and killed him, his return under the circumstances did not render him a trespasser so as to furnish any justification for the assault upon him; and a sufficient showing of malice appears to warrant a conviction of murder in the first degree. *Greschia v. People*, 53 Ill. 295.

So, while one in his own domicile may defend himself without retreating therefrom, if he has retreated from his domicile and enclosure, and attempts afterward to defend himself, the principle which excuses one from retreating from his own domicile is no longer applicable, and he may not then strike with a deadly weapon unless it reasonably appears to be necessary to save himself from grievous bodily harm. *Martin v. State*, 90 Ala. 602, 24 Am. St. Rep. 844, 8 So. 358.

But evidence that after a conflict between two persons one of them entered his own house and procured a revolver and returned to the door, and that the other was then in a position from which he might have left the premises by another way, but that he came to the door and attempted to open it, when he was shot by the owner, does not warrant an instruction as to the law in case the person shot attacked the owner, and afterwards abandoned the attack and retreated, when the owner became the aggressor, and pursued and killed him. *Hayner v. People*, 213 Ill. 142, 72 N. E. 792.

b. Defense against entrance.

A man's house is his castle, and he has the right to resort to any means to prevent another

entering it, even to the extreme means of taking life, if the entrance cannot otherwise be prevented. *State v. Dugan*, *Houst. Crim. Rep.* (Del.) 563; *Davison v. People*, 90 Ill. 221; *Pond v. People*, 8 Mich. 150; *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200; *Semayne's Case*, 5 Coke, 91a.

And an inmate of a dwelling which is attacked need not flee therefrom to escape being injured, but may meet the assailant at the threshold, and prevent him from breaking in by any means rendered necessary by the exigency. *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200; *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282; *State v. Conally*, 3 Or. 60.

The law regards an attack on a person's dwelling in the night as equivalent to an assault on the man's person on the question of the amount of force which may be used to repel the attack. *Meade's Case*, 1 Lewin, C. C. 184; *Richardson v. State*, 7 Tex. App. 486; *Weaver v. State*, 19 Tex. App. 547, 53 Am. Rep. 389.

And where the purpose of an assailant of a dwelling is to take life or inflict great bodily harm, and the object of the attack is to gain access to the inmates, the same means may lawfully be used to prevent him as might have been used to prevent him from making a harmful assault upon the person in case the parties had met at another place. *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200.

And where an assault on a house is made with the intent, either of taking the life of the owner, or of doing him great bodily harm, the owner is justified in using a deadly weapon if it is necessary to prevent the perpetration of the crime, or if he believes and is warranted in believing that it is so necessary. *Ibid.*

Nor does the law require that there shall be actual danger to one's habitation to justify killing in defense of it; but it does require that there shall be reasonable ground for apprehending a design to commit a felony upon such habitation, and that there shall also be reasonable ground for believing the danger imminent that such design will be accomplished. *Stoneman v. Com.* 25 Gratt. 887.

And where an assault is made upon the house of a person under circumstances which would create a just and reasonable apprehension in the mind of a reasonable man of a design to commit a felony with force, or to inflict a personal injury which might result in the loss of life or some great bodily harm, the danger of the design being carried into execution being imminent and present, the person in whose mind such an apprehension is induced, or over whose person or property the danger is pending, may lawfully act upon the apprehension and kill the assailant. *Richardson v. State*, 7 Tex. App. 486.

Thus, where a large and strong man attacked a smaller and weaker one, first outside his dwelling, and then followed him up with apparent intention of attacking him again inside his dwelling, where he had retired or fled, he was justified in shooting his assailant if the acts of the other were such, and the circumstances as they appeared to him such, as to render it necessary. In his opinion, for the protection of his life, or to avoid grievous or dangerous bodily harm, to kill the other. *Hurd v. People*, 25 Mich. 405.

And where several persons go to the house of another for the purpose of arresting the latter without authority, and depriving him of his

liberty, and carrying him away in the nighttime, the attempt constitutes an assault which he and the inmates of his house have a right to resist with such force as may be necessary to protect themselves, even to the taking the life of those present aiding and assisting, as well as those breaking and entering. *Wright v. Com.* 85 Ky. 123, 2 S. W. 904.

And where in such case they break in, and, upon being resisted, retreat a short distance and prepare to shoot into the house, the owner is not required to retreat from his house, or to remain in it, but has the right, outside or inside, to use such force as may be, or reasonably appears to him to be, necessary to protect himself, even after the other party has fallen back, to prevent any further assault upon his person or dwelling; and is not rendered more responsible for the killing of one of the attacking party because he comes out of his dwelling to do the shooting. *Ibid.*

So, where a wife, having reasonable grounds to apprehend personal violence at the hands of her husband, seeks a temporary refuge in the house of another person, and the husband attempts to enter, and, after being induced by force or artifice to leave, goes away and procures a pistol with the apparent intention or design of effecting an entrance by force, or by intimidating the owner or his family, the owner has the right to shoot him in order to prevent the felony, if he has reasonable cause to apprehend that it is necessary in order to prevent him from doing great bodily harm to him or a member of his family. *State v. Conally*, 3 Or. 69.

The idea embodied in the expression that a man's house is his castle, however, is not that it is his property, and as such he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office, or his barn; the sense in which the house has a special immunity is that it is sacred for the protection of his person and of his family. *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200.

And an assault on one's house can be regarded as an assault on the person, within the meaning of a law with reference to self-defense, only where the purpose of the assault is an injury to the person of the occupant or members of his family, to accomplish which the assailant attacks the castle in order to reach the inmates. *Ibid.*

And to justify a homicide in protection of a dwelling the means used must have been necessary to the effectual protection of the occupant or his family. *Ibid.*; *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282; *Pond v. People*, 8 Mich. 150; *State v. Conally*, 3 Or. 69.

A man is not authorized to fire a pistol at one who forcibly breaks his close or invades his dwelling, unless less violent means will not avert the danger. *Meade's Case*, 1 Lewin, C. C. 184.

And a person who, in defending his house against an unlawful entry for the purpose of executing a lawful warrant, and thus securing his unlawful arrest, though having the right to resist, would be guilty of manslaughter if he made an unreasonable defense and killed the officer, though unintentionally. *State v. Scheele*, 57 Conn. 307, 14 Am. St. Rep. 106, 18 Atl. 256.

A man in his own habitation may resist force with force, however, and oppose an unlawful entry against his will by one who, in a violent

manner, attempts to enter with the purpose of assaulting or offering violence to him, even to the extent of taking life, under Ill. Crim. Code, § 148, div. 1, declaring homicide justifiable in defense of habitation, person, or property against any person who manifestly intends or endeavors in a violent, riotous, or tumultuous manner to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein, though the circumstances may not be such as to justify a belief that there is actual peril of life, or great bodily harm, or that the act is necessary to prevent the commission of a felony. *Hayner v. People*, 213 Ill. 142, 72 N. E. 792.

But a mere demonstration toward, or even an effort to break into, a dwelling house will not excuse a homicide by the owner or an inmate to prevent the breaking in. *Wright v. Com.* 85 Ky. 123, 2 S. W. 904.

And entering a house after warning has been given not to enter is an aggravated trespass; but, if done without force, it is not a breach of the peace, so that a killing to prevent such entry would be justifiable; and the fact that threats were made does not convert the trespass into one with force. *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282.

And a mere civil trespass upon a man's house, unaccompanied with such force as to make it a breach of the peace, will not reduce the killing of the trespasser to manslaughter if it was done under circumstances from which the law would imply malice, as with a deadly weapon. *Ibid.*

And while the assembling of rioters before a person's house for the purpose of annoying him and his family by blowing horns, ringing bells, firing guns loaded only with powder and wads, and by other noises, without any actual attack on the house, or forcible attempt to enter it, justifies the owner in attempting to drive them off even with blows, not calculated to endanger life, it would not justify or excuse him in attacking any of the rioters with an ax or other dangerous weapon for the purpose of compelling them to desist or leave, and would not relieve him from criminal liability if in so doing he killed one of them. *Patten v. People*, 18 Mich. 314, 100 Am. Dec. 173.

And the fact that the mother of the owner was in feeble health, and that fear and excitement caused by such conduct produced upon her alarming effects from which he might have apprehended her speedy death, is not available as an excuse for his attack upon them with a deadly weapon, and the killing of one of them, unless the rioters were informed of the mother's condition, and the effect produced by their conduct, or unless every reasonable and practical effort had been made to inform them of the facts. *Ibid.*

So, Ga. Code, § 4266, providing that if, after persuasion, remonstrance, or other gentle measures used to prevent a forcible attack and invasion on the property and habitation of another, it cannot be prevented, the party attacked may kill the person so forcibly attacking, if it appears that the killing is absolutely necessary to prevent such attack and invasion, and that a serious injury is intended or might accrue to the person, property, or family of the slayer,—contemplates an attack upon the property or habitation of another, or upon his person or his family, by an invasion of his rights of property, and applies only to the right of defense given to a citizen in protecting his habitation, or 67 L. R. A.

property, or family, or himself, while in such place, from forcible attack. *Pound v. State*, 43 Ga. 88.

But it is not qualified in its application by § 4267 thereof, so as to make it necessary to the justification that the danger was so urgent and pressing that, in order to save his own life, the killing of the other was absolutely necessary, and that the person killed should have been the assailant, or that the slayer had in good faith declined any further struggle before the mortal blow was given. *Ibid.*

And Ga. Penal Code, § 12, div. 4, providing that homicide is justifiable in self-defense against any persons who manifestly intend and endeavor in a riotous and tumultuous manner to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein, contemplates the joint action of two or more persons, and does not apply to a single individual. *Hudgins v. State*, 2 Ga. 173.

c. Expulsion.

A man's house is regarded as his castle, affording him and his family a city of refuge with reference to expulsion of intruders, as well as with reference to the prevention of intrusion; and, if a person unlawfully intrudes, the house holder, after having warned him to depart, and after his refusal to obey within a reasonable time, may employ sufficient force to expel him. *State v. Battmess*, 33 Or. 110, 54 Pac. 167; *State v. Dugan*, *Houst. Crim. Rep.* (Del.) 563; *Pennsylvania v. Robertson*, *Addison* (Pa.) 246.

And where one person indulges in profanity and indecent behavior in the house of another, the latter is justified in ordering or expelling him from his premises, and upon doing so, and upon refusal to go, he is under no legal necessity to avoid the altercation by yielding the right in question as a mode of avoiding apprehended violence. *Brinkley v. State*, 89 Ala. 34, 18 Am. St. Rep. 87, 8 So. 22.

And an instruction in a prosecution against the owner of a dwelling house for the killing of a person who had entered in a lawless manner and with what was equivalent to a threat of violence to the inmates, making his justification depend upon there being no other safe, or apparently safe, means of escape from impending danger, is improper and misleading, since he had a right to stand his ground and defend himself as well as the inmates of his house. *Estep v. Com.* 86 Ky. 39, 9 Am. St. Rep. 260, 4 S. W. 820.

So, evidence in a criminal prosecution that a man was seen at the door of the house of another, cutting or reaching into the door with a razor, when the owner came out striking at him with a whip staff while the trespasser was cutting at him, and that the trespasser walked backward cutting with his razor some 12 or 15 feet, while the owner continued to advance, warrants and requires an instruction to the jury as to the amount of force which might lawfully be used by the owner to expel the intruder. *State v. Taylor*, 82 N. C. 554.

But, while a man has the right to order another to leave his house, and to lay his hands upon him softly, and, if he then resists, use force, he has no right to put him out by force until all other means have failed, or to use violence at the outset. *McCoy v. State*, 8 Ark. 451; *State v. Dugan*, *Houst. Crim. Rep.* (Del.) 563.

Homicide in defense of one's possession, to be justifiable, must have been committed in defense of one's dwelling house after all means of expulsion of the intruder had failed. *State v. Becker*, 9 Houst. (Del.) 411, 33 Atl. 17.

And while it is the duty, as well as the right, of every householder to prevent breaches of the peace in his dwelling; and, for the accomplishment of such purpose, such householder has the clear and legal right to expel from his house any person guilty of an attempt to commit a breach of the peace therein, and may use all the force necessary to such expulsion,—it is not his right or duty to kill such person to prevent a breach of the peace or a simple assault on himself or another. *State v. Conally*, 3 Or. 69.

When a trespasser or unwelcome visitor invades the premises of another, the latter has the right to remove him; but the law requires that he shall first request him to leave, and, if he does not do so, that he shall lay hands gently upon him, and if he then resists, he may use sufficient force to remove him, taking care to use no more force than is necessary to accomplish that object; but, if the intruder defiantly stands his ground, armed with a deadly weapon, the owner may at once resort to force; and it is a question for the jury to decide whether or not he uses more than is necessary. *State v. Taylor*, 82 N. C. 554.

And though a man who killed another in the former's house had reason to believe that the latter was there for the purpose of debauching the former's wife, he is not entitled to an instruction, in a prosecution for the killing, as to his right to eject the latter, where he was not asked to leave until after the blow was struck. *Pence v. Com.* 21 Ky. L. Rep. 500, 51 S. W. 801.

d. Who may defend, and against whom.

Either a master of, or lodger or sojourner in, a house, who necessarily kills a person breaking into it with intent to commit burglary or homicide therein, is exempt from criminal responsibility. *Cooper's Case*, Cro. Car. 544.

And one who rents a house of the owner, who is entitled to possession, and enters under him, has the same right to use force in keeping the possession that the owner had. *Corey v. People*, 45 Barb. 262.

So, a person in his own house has the same right of defense, and the same right to stand his ground and to kill in self-defense when assaulted by a partner or cotenant, as when assaulted by a stranger. *Jones v. State*, 76 Ala. 8.

And the moral character of a person, or of her doings or transactions in her domicile, does not affect her right to take life, if necessary, in its defense against an armed and deliberate intruder; and evidence as to her business, in a prosecution for a homicide committed in such defense, is inadmissible. *State v. Kennade*, 121 Mo. 405, 26 S. W. 347.

e. What constitutes dwelling or castle.

A house cannot be said to be the owner's castle, within the meaning of rules of law with reference to the right to use force in defense of one's castle, where it is not used as a dwelling, but merely as a storehouse. *Corey v. People*, 45 Barb. 262.

And the right to employ force in defense of one's habitation does not extend beyond the 67 L. R. A.

limits of the dwelling and the customary out-buildings. *State v. Bartmess*, 33 Or. 110, 54 Pac. 167.

But a tobacco house which is in the owner's curtilage is entitled to all the privileges and protection, with reference to felonious acts committed against it, of the capital or dwelling house. *Parrish v. Com.* 81 Va. 1.

And a net house belonging to a fisherman, which is near his dwelling, and is used, not only for preserving his nets, which are the tools of his ordinary occupation, but also as a permanent dormitory for his servants, is a part of his dwelling, within the meaning of the rule authorizing a person to kill if necessary in defense of his dwelling. *Pond v. People*, 8 Mich. 150.

And one who shot and killed one of a number of persons who had followed and threatened him, and who had attempted to forcibly enter his dwelling, and who was in the act of seizing and choking his servants, and had commenced to tear down boards from a building in which the servants were found, is entitled to defend on the ground that the act was done in defense of his property. *Ibid.*

So, a man's place of business may be regarded as his dwelling, under rules of law authorizing him, in case of necessity, to take life in defense of his dwelling. *Jones v. State*, 76 Ala. 8; *Willis v. State*, 43 Neb. 102, 61 N. W. 254.

And a man's office, for the transaction of business, is as much his dwelling as the house in which he resides; and he has an equal right to act in defense of his office as he has in defense of his dwelling, and may use like force against a person attacking it. *Morgan v. Duffee*, 69 Mo. 469, 33 Am. Rep. 508.

And a lawyer in his office, who is abused by a person therein, who is his physical superior, and who refuses to go when told to do so, and who threatens his life and attacks him, has the right to defend his office from ruthless intrusion and his person against a battery, as well as to defend himself against threatened death, and may employ all the means within his reach and all the energies under his control apparently necessary for such defense; and his act in defending himself from such attack, while the other has him by the throat, of striking him upon the head with a notarial seal and killing him, is justifiable. *Ibid.*

So, a man in the home of his mother has the right to protect it and himself and everyone in it against all intruders; and, if he should slay a person standing outside, firing a pistol into the midst of the assembled family, his act would be justifiable. *State v. Pollard*, 139 Mo. 220, 40 S. W. 949.

And killing in defense of one's room in a tavern is justifiable where the intruders attempt forcibly to put the lawful occupant out. *Ford's Case*, J. Kelyng, 51.

And a room rented by a person and occupied as a bedroom is his castle, from which no duty to retreat rests on him, and, in case of an attack therein, he has the right to stand his ground and defend himself, even to the death of his assailant, who is, or reasonably appears to be, about to kill or inflict grievous bodily harm on him. *Harris v. State*, 96 Ala. 24, 11 So. 255.

And he should not be convicted of murder on evidence that he fired the first shot, after the door was opened, which killed the person at-

tacking him, if the jury from all the evidence entertain a reasonable doubt on the question whether or not he acted upon a well-grounded and reasonable belief that it was necessary to shoot the trespasser to save himself from death or great bodily harm. *Ibid.*

VI. Defense of family and relations.

A person is always justified in acting for the defense of his family according to the circumstances as they appear to him. *Richardson v. State*, 7 Tex. App. 486. And see *MORRISON v. Com.*

Persons connected by the relation of the family, guardian and child, or master and servant, may defend each other against an assailant, even to the necessity of taking life. *Waybright v. State*, 56 Ind. 122; *Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370.

And a man who finds another violating, or attempting to violate, his wife, and kills him, is justified in the act, as the woman herself would be. *State v. Neville*, 51 N. C. (6 Jones, L.) 432.

And evidence in a prosecution for homicide that the deceased entered the bedchamber in which the wife and sister of the accused were asleep after midnight, and that he aroused the sister by putting his hand upon her, and that, upon being told to go away, he went under the wife's bed in the same room, and that the sister awoke the accused and told him the circumstances, and that he immediately went in and the killing followed, warrants and requires an instruction to the jury with reference to the rule justifying homicide when committed in the just apprehension of immediate danger of the commission of a felony, or of great personal injury or bodily harm. *Staten v. State*, 30 Miss. 619.

So, a husband has the right to use force, if necessary, to enable him to regain possession of his wife from one in whose society he finds her, where he has reason to believe that they have committed, or are about to commit, a criminal act. *State v. Craton*, 28 N. C. (6 Ired. L.) 164.

And if a man takes the life of another who attempts the seduction of his wife under circumstances of gross and direct aggravation, it is for the jury, in a prosecution for the killing, to find whether the case stands upon the same footing of reason and justice as other instances of justifiable homicide enumerated in the Georgia Penal Code, within the meaning of a provision of law making cases of homicide so standing also justifiable. *Biggs v. State*, 29 Ga. 723, 76 Am. Dec. 630.

And where the character of a wife for chastity is impeached in a prosecution against her husband for making a violent assault upon one who attempted her seduction, it is competent for the husband to give evidence in support of his wife's general character for chastity, since, if her character was bad, he would be less justifiable in resorting to violent means to rescue and protect her. *Ibid.*

And one who shoots at another in defense of his wife, whom the latter had attempted to seduce, and who would be justified in his act had he killed the other, cannot be held criminally liable for shooting where death does not result, under a statute imposing a penalty upon any person who should be guilty of the offense of shooting at another. *Ibid.*

Also, one who sees his brother assaulted by 67 L. R. A.

another has the same right to resist the assault, and is entitled to the same defenses, or partial defenses, reducing the grade of the crime, as the person assaulted. *Palmer v. State* (Tex. Crim. App.) 83 S. W. 202; *Snell v. State*, 29 Tex. App. 236, 25 Am. St. Rep. 723, 15 S. W. 722.

And shooting and killing a person who is about to shoot the slayer's brother, for the purpose of saving his life, is justifiable, when such action appears to be reasonably necessary for that purpose, though it fails to save the brother's life. *Guffee v. State*, 8 Tex. App. 187.

And the brother of a man, who has been taken by force in the nighttime, under threats against his life, from his place of business, by a father and mother for the purpose of compelling him to marry their daughter, has the right to pursue the carriage in which they went in order to rescue his brother, and use such force as is reasonably necessary for that purpose; but he has no right to commence firing into the carriage, or to make hostile demonstration before demanding his brother's release, and, in case he does so and causes the death of one of the party, he is guilty of manslaughter. *Dalaney v. Com.* 18 Ky. L. Rep. 212, 35 S. W. 1037.

So, the question in a prosecution against a father who killed a person to prevent an attempt to take away his children is whether the circumstances were such as to produce a reasonable belief in his mind of a pressing necessity to take the life of the assailant; and it is wholly immaterial to inquire whether the father was in a state of fear or alarm, or whether he was a man of firmness and character, or of a weak and cowardly disposition. *Oliver v. State*, 17 Ala. 587.

And whether or not the taking or decoying a child away from its parents would be a felony, to prevent which the taking of life would be justifiable, under a statutory provision punishing by imprisonment in the penitentiary every person who shall maliciously, forcibly, or fraudulently lead or take away, or decoy, or entice away, any child under a designated age with intent to detain or conceal such child from its parents, guardian, or other person having lawful charge, and making all offenses punishable by imprisonment in the penitentiary, depends upon the intent with which the child is taken; to render the offense a felony the criminal intent and the act must both concur. *Ibid.*

Likewise, if one person shot another under a reasonable apprehension that his own life or that of some other member of his family was in imminent danger, or under a reasonable apprehension that the person intended to burn the dwelling house of his mother, or commit some other known felony, and that there was imminent danger of such design being carried into effect, his act is justifiable; and this is the rule though the danger was unreal. *Parrish v. Com.* 81 Va. 1.

And a person who is called in to protect the family of his uncle from the assaults of another, and to prevent the other from committing a rape upon the little daughter of the uncle, who believes, and has reasonable grounds to believe, that such other is about to commit a rape upon the child, has the right to use such means as are necessary to prevent the felony, or the infliction of great bodily harm, and is justified in killing such person if he acts in good

faith for the purpose of preventing the injury. *Roe v. Com.* 6 Ky. L. Rep. 364.

And an uncle, who is justified by the facts in striking a person in defense of his nephew, has the right to use such force as is apparently necessary to avert the impending peril to the nephew in the exercise of a reasonable judgment, and is not required to measure the exact force necessary to avert such danger. *Carroll v. Com.* 26 Ky. L. Rep. 1083, 83 S. W. 552.

One who kills another in the assumed right to act in defense of relatives, and is prosecuted therefor, may give in evidence any facts tending to show the character of the attack which he resisted, the intention with which it was made, and that he had reasonable grounds to believe that it was necessary, as a measure of prevention, to go to the extent he did in resisting it. *Dukes v. State*, 11 Ind. 557, 71 Am. Dec. 370.

And a decree in a divorce case rendered in favor of a wife against her husband is admissible in evidence in a prosecution against the wife's brother for killing the husband, alleged to have been done in defense of his family, for the purpose of showing that the person killed was no longer the husband of the accused's sister, but was a mere intruder upon the premises of the family of accused having no pretense of right to go there, and properly subject to be regarded as a trespasser. *Stoneman v. Com.* 25 Gratt. 887.

An agent of a husband for the purpose of hunting out the adultery of his wife, however, is not justified or excused in shooting her paramour, though he catches the parties in the very act. *People v. Horton*, 4 Mich. 67.

And whether a husband or his wife was in possession of the premises constituting their residence, and whether or not a trespasser entered the house with or without permission of the wife, is immaterial in a prosecution against an agent of the husband employed to hunt out the adultery of his wife for killing a trespasser on such premises, since in any event the killing is not justified. *Ibid.*

And a brother or other person assisting another in resisting a trespass or other wrongful act directed against the latter can use no more force than the person he assists would be entitled to use. *Carpenter v. State*, 62 Ark. 286, 36 S. W. 000.

Nor has a son, against whose mother threats of death are made, a right to shoot the person making the threats because he thinks they may at some future day be executed, the mother not being present at the time they are made. *People v. Walworth*, 4 N. Y. Crim. Rep. 355.

And where a prosecution for homicide is defended upon the theory that a difficulty occurred between the accused and the deceased, in which the deceased was using a poker and had made an assault upon the accused with it at the time accused stabbed and killed her, a charge upon the theory that the accused was defending against an attack made by deceased upon her sisters is not called for, though her two sisters were present at the time. *Johnson v. State* (Tex. Crim. App.) 84 S. W. 824.

So, Fla. Rev. Stat. § 2378, div. 2, subdiv. 2, providing that a homicide is justifiable when committed in defense of the slayer's husband, wife, parent, child, master, mistress, or servant, when there shall be reasonable grounds to apprehend a design to commit a felony, or do some great personal injury, and there shall be 67 L. R. A.

imminent danger of such design being accomplished, includes neither a brother nor sister of the person doing the killing. *Mitchell v. State*, 43 Fla. 188, 30 So. 803; *Richard v. State*, 42 Fla. 528, 29 So. 413.

And the principle of relationship has no application on the question of the right of a man to take life in defense of a woman where the two were co-slaves and lived together while such, and subsequently occupied the same bed in a room with other freed people. *Parker v. State*, 31 Tex. 132.

The amenability to the law of one who, finding another engaged in an affray, goes to his aid and takes part in the conflict, depends upon his own acts and intent, and not upon the intent which actuates the person to whose aid he goes, he having no knowledge thereof. *Guffee v. State*, 8 Tex. App. 187; *Snell v. State*, 29 Tex. App. 236, 25 Am. St. Rep. 723, 15 S. W. 722.

See also *Mitchell v. State*, 43 Fla. 188, 30 So. 803; *Richard v. State*, 42 Fla. 528, 29 So. 413, —*supra*, III. c; *State v. Pollard*, 139 Mo. 220, 40 S. W. 949, *supra*, V. c. And see generally on this subject *infra*, VII.

VII. Prevention as distinguished from punishment.

Homicide is justified when committed for the purpose of preventing felony, but not when committed as a punishment for one already committed. *State v. Roane*, 13 N. C. (2 Dev. L.) 58.

The act of deliberately seeking another and slaying him for past wrongs, however heinous they may be, is broadly separated on the question of justification from slaying another to prevent his doing a present or future wrong immediately pending. Whatever is done to avenge a past wrong is not justifiable. *Hill v. State*, 64 Ga. 453.

A well-grounded belief that a felony is about to be committed will extenuate a homicide committed to prevent the commission of a felony; but a homicide committed by an individual of his own accord after the commission of a felony, on pursuit of the person committing it, is not so extenuated. *State v. Rutherford*, 8 N. C. (1 Hawks) 457, 9 Am. Dec. 658.

Thus, to justify the killing by a husband of his wife's paramour, it must have been done to prevent him from attempting or consummating an impending adultery, and not to avenge a past one. *Hill v. State*, 64 Ga. 453; *Farmer v. State*, 91 Ga. 720, 18 S. E. 987; *Cloud v. State*, 81 Ga. 444, 7 S. E. 641.

And a husband is not justified in going into a field where a man is at work and killing him because he had committed adultery with the slayer's wife, upon the theory that it was done in the reasonable fear that the offense would be again committed. *Jackson v. State*, 91 Ga. 271, 44 Am. St. Rep. 22, 18 S. E. 298.

Nor can a killing be justified on the theory that it was done by the slayer to protect the virtue of his affianced wife, where she was in a place of safety at the time of the killing, and was in no danger at that time from being interfered with by deceased; to be justified the killing must have been necessary to protect her. *Futch v. State*, 90 Ga. 472, 16 S. E. 102.

And evidence in a prosecution for homicide that on the night of the killing the deceased had visited the slayer's daughter, and the slayer threatened to kill him, and procured a pistol,

and, after deceased had left his house and proceeded some distance therefrom, shot and killed him, does not show a killing of deceased to prevent his having further illicit relations with the daughter; and a charge as to homicide to prevent the commission of crime is properly refused. *Bone v. State*, 86 Ga. 108, 12 S. E. 205.

And to justify a defense against homicide that the killing was done in protection of the slayer's property, or property in his possession, it must appear that he killed while the other was in the very act of making a violent attack on his property, and that he resorted to all other means to prevent the injury. *Woodring v. State*, 33 Tex. Crim. Rep. 26, 24 S. W. 293.

Nor does the right of self-defense, or defense of one's family or habitation, justify pursuing and killing an intruder or aggressor after he has retreated. *State v. Conally*, 3 Or. 69.

Where a supposed felon flees and thereby abandons his supposed design a killing in pursuit is not extenuated however well grounded the belief may be that he intended to commit a felony. *State v. Rutherford*, 8 N. C. (1 Hawks) 457, 9 Am. Lec. 658.

And where a woman, having reasonable grounds to apprehend personal violence at the hands of her husband, seeks a temporary refuge in the house of another, and the husband seeks to enter against the command of the owner, either the owner or the wife has the right to use all necessary force to prevent him from entering; but they have no right to pursue and shoot at him after he has given up his attempt to enter, the attempt in such case furnishing no justification for the shooting. *State v. Conally*, 3 Or. 69.

And the occupant of a house has no right to shoot a person trespassing in his dooryard in the night when he is not approaching the house or disturbing anything, but going toward the gate and about to pass through it to the street at the time of the shooting. *State v. Roane*, 18 N. C. (2 Dev. L.) 58.

So, though an attack upon an unlawful assembly by a body of men by which it was dispersed, was unjustifiable and unlawful, a killing of one of the attacking party by one of the assembly is not justifiable where it occurred after the friends of the assembled party had rallied and commenced returning the assault, though the assailants were guilty of the first illegal assault, since the law permits no man to be his own avenger. *Com. v. Daley*, 2 Clark (Pa.) 361.

But a husband who looked through a crack of his house and saw a man whom he had suspected with his arm around his wife's neck, and saw acts which satisfied him that a criminal act was about to be committed, and ran into the house, when the man inside attacked him with a knife, upon which he killed the intruder, is clearly not guilty of murder, but manslaughter. *State v. Harman*, 78 N. C. 515.

And evidence, in a prosecution for homicide, of criminal intimacy between the person killed and the slayer's wife, and that the slayer had frequently appealed to the deceased to let his wife alone, and that he had persistently followed her up, and that on the occasion of the shooting he was seen a short time before he was killed with the wife of the slayer on his arm going up a dark alley, is sufficient to go to the jury, under a statute providing that homicide

shall be justifiable to prevent a felony, and in defense of one's family under certain circumstances, and in all other instances standing on a like footing of reason and justice; and a charge as to justifiable homicide in such case is properly given. *Cloud v. State*, 81 Ga. 444, 7 S. E. 641.

And whether or not homicide to protect the affianced wife of a man is within statutory provisions making homicide in self-defense, or in defense of habitation, person, or property against one who manifestly intends or endeavors by surprise to commit a felony on either, or against any person who manifestly intends and endeavors in a riotous and tumultuous manner to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein, and also in all other instances that stand on the same footing of reason and justice as those enumerated,—a charge in a prosecution for homicide, authorizing the jury to acquit if the deceased did the killing to protect the virtue of a woman who had engaged to marry him, is not subject to objection on his part, since, if erroneous, it is favorable to him. *Futch v. State*, 90 Ga. 472, 16 S. E. 102.

VIII. *The question of degree.*

A killing with malice is murder, usually in the first degree, irrespective of any question of defense, property, home, or family.

Thus, one who kills another with malice, express or implied, is guilty of murder, though there is reasonable ground for apprehension of imminent danger to his property or person. *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282.

And one who is about to be arrested for a misdemeanor, who has a desire to kill the officer, cannot fortify himself in his dwelling house, and on the approach of the officer shoot him without notice or warning, without being criminally responsible for murder. *State v. Scheele*, 57 Conn. 607, 14 Am. St. Rep. 106, 18 Atl. 256.

And one who kills another with actual malice cannot shelter himself, on a charge of murder, behind Miss. Rev. Code, § 2638, providing that every person who unnecessarily kills another, either while resisting an attempt by such other to commit a felony, or to do any other unlawful act, or after such attempt shall have failed, shall be guilty of manslaughter. *Long v. State*, 52 Miss. 23.

So, when one kills a trespasser knowing that a trespass only is intended is guilty of murder. *State v. Medlin*, 80 N. C. (2 Winst. L.) 99; *Hull v. State*, 6 Lea, 250.

And a bare trespass against the property of another, consisting of stealing melons from a melon patch, is not a sufficient provocation to warrant the owner in using a deadly weapon in its defense; and, if he uses such weapon, though without intent to kill anyone, it is an unlawful act, and if he kills the trespasser it is at least manslaughter; though if the injury is inflicted with a weapon and in a manner not likely to produce death, and the trespasser happens to be killed, it can be no more. *State v. Vance*, 17 Iowa, 138.

One who kills in defense of his property, however, when there is reasonable ground for apprehension of imminent danger to his property or his person, is guilty of manslaughter only, if it is done without malice. *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282.

And to reduce a homicide from murder to manslaughter the slayer is not obliged, before the mortal wound is given, to retreat from his domicile or his family. *Haynes v. State*, 17 Ga. 465.

Though the mere fact that the element of defense of property or person is involved in an act of homicide does not make it, as matter of law, nothing more than manslaughter, it is for the jury to say in all such cases whether or not there was malice which would make it murder. *State v. Scheele*, 57 Conn. 307, 14 Am. St. Rep. 106, 18 Atl. 256.

So, where a person unlawfully breaks into a house for the purpose of executing civil process, and the owner kills him, it is manslaughter only and not murder, since every man has the right to defend his own house. *Cook Case*, Cro. Car. 537.

But where an officer is about to enter a house unlawfully and in the day time for the purpose of arresting the occupant for a misdemeanor, and the occupant or owner kills him with express malice, the crime is not, as matter of law, manslaughter only because of the unlawful act of the officer. *State v. Scheele*, 57 Conn. 307, 14 Am. St. Rep. 106, 18 Atl. 256.

So, a father of a married daughter who learns that she had been assaulted and beaten by her husband so as to endanger her life, and believes that the assault and beating will be renewed, and goes to the premises of her husband to prevent it, and finds his daughter and her children expelled from their home by the husband, and in the street, and in sudden heat caused by the beating and ill-treatment shoots and kills him, is guilty of manslaughter only. *Campbell v. Com.* 88 Ky. 402, 21 Am. St. Rep. 348, 11 S. W. 290.

The rule of the preceding cases would seem to be that the act of killing is manslaughter, and not murder, when there was no malice and the act was done to prevent a felony, or in defense of home, property, or another, but was unnecessary, or done with improper force, or for some other reason was not justifiable; and this rule has been substantially adopted by statute in some of the states.

Thus, under Miss. Rev. Code, § 2638, providing that every person who unnecessarily kills another, either while resisting an attempt by such other to commit a felony, or do any other unlawful act, or after such attempt shall have failed, shall be guilty of manslaughter, one who sees another engaged in the commission of an offense against the criminal laws, and resists the accomplishment of such purpose, and in such resistance slays the person so engaged, is guilty of manslaughter and not murder, though the act of killing is not necessary to the defeat of the criminal act, and though the killing ensues directly after the abandonment of the attempt. *Long v. State*, 52 Miss. 23.

See also, on this subject, *State v. Hoyt*, 13 Minn. 132, Gil. 125, *supra*, IV. c. 3; *Long v. State*, 52 Miss. 23, *supra*.

And see also, generally, *McDaniel v. State*, 8 Smedes & M. 401, 47 Am. Dec. 93; *Crawford v. State*, 90 Ga. 701, 35 Am. St. Rep. 242, 17 S. E. 628; *Reg. v. Archer*, 1 Fost. & F. 351; *United States v. Williams*, 2 Cranch, C. C. 439, Fed. Cas. No. 16,710; *Greer v. State* (Tex. Crim. App.) 45 S. W. 12, *supra*, IV. c. 2; *Lambeth v. State*, 23 Miss. 322, *supra*, IV. c. 3; *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282, *supra*, V. b. 67 L. R. A.

IX. Summary.

It is the duty of each and every person to support government by preventing breaches of law so far as he is able. So strenuous is this duty as to justify a man even in the commission of a homicide when necessary to prevent the commission of a forcible felony, or a breach of the peace from which a homicide or other felony is liable to result. The felonies falling within this rule are such as murder, rape, robbery, arson, burglary, assaults with deadly weapons, etc., and the breaches of the peace falling within it are such as riots, mobs, etc., as distinguished from such as brawling or fighting without weapons. The right to kill, however, even to prevent such crimes, is limited to absolute, or apparently absolute, necessity for the purpose of accomplishing such prevention. If the commission of the crime can be prevented in any other way, then homicide is not justifiable; and the necessity must have been evident and immediate, and not problematical or remote, and at common law and under some of the statutes, it must have been actual and real; though the prevailing rule under most systems of jurisprudence now is, that it need be apparent only, the appearance being such as to excite a reasonable apprehension of danger that the act in question will be committed.

With reference to misdemeanors, crimes without force, and trespass on ordinary property, death or serious bodily harm is not liable to result, and they are usually punished by penalties far less severe than death. It is not regarded as justifiable, therefore, to take life to prevent such acts, though they cannot be otherwise prevented. But the owner of property may try to prevent a theft or other taking of his property, or to recover it after it is taken, and, if he is resisted he may repel force by force, and if the taker is unavoidably killed, the homicide is justifiable. And a man may lawfully defend property in his possession, whether real or personal, by any degree of force, short of taking life, necessary to the defense; and he may stand his ground and resist his adversary until he is out of danger, and, in case of reasonable apprehension of death or great bodily harm, he may defend himself, if necessary, by taking the life of his assailant.

An attack in or upon one's dwelling, however, stands upon somewhat different grounds. A man's dwelling is his castle, and when attacked in it he has all the rights of self-defense which he would have if attacked elsewhere, without being obliged to flee to the wall before slaying his opponent in order to justify himself; and if his dwelling is attacked he has the right to resort to any means to prevent the assailant from entering it, even to taking life, and that without retreating or fleeing from his adversary. And a man may, likewise, employ such force as may be necessary to expel one who has unlawfully intruded into his dwelling, or behaved improperly in it and refused to go. But in each case the rule of necessity applies, and to justify a homicide either in the protection of a dwelling, or in expelling a wrongdoer from a dwelling, or in self-defense within one's dwelling, it must have been necessary to the effectual protection of the occupant or his family, and killing to prevent a slight breach of the peace, even in one's dwelling, would not be justified.

One is also justified in acting in defense of

his family and relations according to the circumstances as they appear to him, having the right to use such force, and such force only, as the person defended would have if acting in self-defense, without perhaps being under the same necessity to flee to the wall, unless the person defended was in a situation to flee; and this rule would appear to apply to force by a husband to prevent criminal acts directed against his wife, though she was a consenting party, though an agent of a husband would not be justified in shooting the paramour of his principal's wife though employed to discover or prevent the criminal act.

In all the above-considered cases, however, there is no justification unless the homicidal act

was preventive as distinguished from punitive; punishment for criminal acts must be left to the law; though when the act is a continuing one like robbery, involving a taking and asportation, a forcible interference after the taking, to prevent the consummated act, is justifiable. And the act, if not justifiable, is either murder or manslaughter according to the circumstances of the case; it is murder if done with malice irrespective of any question as to preventing crime, and it is manslaughter if done without malice and in a proper case for the use of force in resistance of aggression, but without necessity, or with improper or unnecessary force.

F. H. B.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Howard W. GORDON, Adm^r., etc., of
Melissa Gordon, Deceased, *Plff. in Err.*,
c.

WARE NATIONAL BANK.

(132 Fed. 444.)

- *1. **The issue of a policy of life insurance to one who has no interest as a relative, dependent, creditor, or otherwise, in the life of the insured, and who pays the premiums for the chance of recovering upon the policy, is against public policy, and the contract is void, because the interest of the holder is to shorten, rather than to lengthen, the life of the insured, and his maintenance of the policy is of the nature of a wager.**
2. **A creditor has an insurable interest in the life of his debtor, and the issue or pledge of a policy upon his life as collateral security for the payment of his debt is valid.**
3. **The question whether or not an insurable interest in an assignee is requisite to the validity of the assignment of a policy of life insurance, which was originally issued to one who had an insurable interest, is a question of general law, upon which the decisions of the courts of the state in which the assignment was made are not controlling in the Federal courts.**
4. **An insurable interest in the assignee is not requisite to the validity of the assignment of a policy of life insurance which was lawfully issued to one who had such an interest, unless the assignment was made in bad faith as a cover for the issue of a wager policy. But the use of an assignment immediately upon the issue**

*Headnotes by SANBORN, Circuit Judge.

NOTE.—As to insurable interest of creditor in life of debtor, see also, in this series, *Rittler v. Smith*, 2 L. R. A. 844, and *note*; *Ulrich v. Reimoehl*, 13 L. R. A. 433, and *note*; *Hays v. Lapeyre*, 35 L. R. A. 647; *Exchange Bank v. Loh*, 44 L. R. A. 372; and *Tate v. Commercial Bldg. Asso.* 45 L. R. A. 243.

For other cases in this series as to validity of assignment of policy of insurance to one having no insurable interest, see *Rittler v. Smith*, 2 L. 67 L. R. A.

of a policy to evade the rule that the issue of a policy to one without an insurable interest renders it void avoids the assignment.

5. **The pledgee of a policy of life insurance has the right and power to sell the policy to the highest bidder for the purpose of realizing money to pay the debt which it secures, and both immediate and remote assignees under such a sale take good title to the policy and to its proceeds, although they have no insurable interest in the life insured by the policy.**
6. **In an action between the same parties or between those in privity with them, a prior judgment on the merits upon the same claim or demand by a court which had jurisdiction, is conclusive, whether right or wrong, not only of every matter offered, but of every admissible matter which might have been offered to sustain or defeat the claim or demand.**

(August 22, 1904.)

ERROR to the Circuit Court of the United States for the District of Kansas to review a judgment in favor of defendant in an action brought to establish title to the proceeds of a life-insurance policy. *Affirmed.*

Statement by **Sanborn**, Circuit Judge:

This action involves a controversy over the ownership of the proceeds of a policy of insurance between the administrator of the estate of Melissa A. Gordon, the plaintiff, and the Ware National Bank, the defendant. The insurance company admitted its liability, and paid into the court below the amount owing upon the policy, which in-

R. A. 844; *Milner v. Bowman*, 5 L. R. A. 95; *Roller v. Beam*, 6 L. R. A. 136; *Johnson v. Alexander*, 9 L. R. A. 860, and *note*; *Hewlett v. Home for Incurables*, 17 L. R. A. 447; *Mutual Reserve Fund Life Asso. v. Hurst*, 20 L. R. A. 761; *Clement v. New York L. Ins. Co.* 42 L. R. A. 247; *Steinback v. Diepenbrock*, 44 L. R. A. 417; *Chamberlain v. Butler*, 54 L. R. A. 338; and *Hinton v. Mutual Reserve Fund Life Asso.* 65 L. R. A. 161.

sured the life of William Gordon for \$5,000. All the premiums required to be paid by this policy had been paid by Gordon before the year 1879. The amount promised by the policy was payable upon the death of William Gordon to his wife, Melissa A. Gordon, if living; otherwise to the children of William Gordon. Gordon died on March 6, 1902, leaving his wife and two children surviving. Melissa A. Gordon died on March 14, 1902, so that, if Melissa Gordon was not deprived of all interest in the policy by the facts which are about to be stated, her administrator, the plaintiff, is entitled to recover its proceeds. On June 11, 1879, William Gordon and Melissa A. Gordon, his wife, assigned the policy to the German Bank of Leavenworth, Kansas, as collateral security for the payment of loans made by it to William Gordon. On May 8, 1882, the German Bank brought an action in the district court of Leavenworth county, in the state of Kansas, against William Gordon and Melissa A. Gordon to foreclose the pledge of the policy by a sale of it and the application of the proceeds to the payment of a debt of \$8,217.01, which was then owing by William Gordon to the bank. The Gordons appeared in that action, admitted that the indebtedness of William Gordon to the bank was \$8,217.01, and that they had pledged the policy to secure the payment of this debt, and they consented to an immediate trial of the action without making any farther defense. Thereupon the court tried the case, and rendered a decree that the bank should recover of William Gordon \$8,217.01; that the policy of insurance should be advertised and sold; that the proceeds of the sale should be applied to the payment of the debt of William Gordon to the bank; and that the defendants William Gordon and Melissa A. Gordon were "forever barred of and from having or claiming any lien upon or interest in or to" the policy after its sale. Under an execution issued upon this judgment the policy was sold by the sheriff to the German Bank for \$150, and it was subsequently assigned for value by the German Bank, through several mesne conveyances, to the defendant, the Ware National Bank. Neither the Ware National Bank nor any of the assignees through whom the policy passed from the German Bank to it was a creditor of William Gordon, or had any interest in his life. The Ware National Bank claimed the proceeds of the policy as the remote assignee of the German Bank. The plaintiff, the administrator of the estate of Melissa A. Gordon, demanded these proceeds upon the ground that the assignees of the German Bank had no insurable interest in the life of Gordon, and that for this reason the

assignments to them were void, and the policy remained the property of Melissa A. Gordon when she died. The court below sustained the claim of the Ware National Bank, and rendered a judgment in its favor.

Argued before *Sunborn* and *Van Devanter*, Circuit Judges, and *Amidon*, District Judge.

Messrs. Atwood & Hooper, for plaintiff in error:

The assignment of the policy to the German Bank was made in Kansas and therefore, since nothing appears to the contrary, should be governed by the laws of that state.

19 Am. & Eng. Enc. Law, p. 90; *Connecticut Mut. L. Ins. Co. v. Westervelt*, 52 Conn. 586; *Union Cent. L. Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205; *Mutual L. Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Mutual Ben. L. Ins. Co. v. Wayne County Sav. Bank*, 68 Mich. 116, 35 N. W. 853; *Cannon v. Northwestern Mut. L. Ins. Co.* 29 Hun, 470; *Barry v. Equitable Life Assur. Soc.* 59 N. Y. 587; *Miller v. Campbell*, 140 N. Y. 457, 35 N. E. 651; *Pratt v. Globe Mut. L. Ins. Co.* (Tenn.) 17 S. W. 352.

Under the law of Kansas the absolute sale of a policy of insurance cannot be made to a stranger.

Missouri Valley L. Ins. Co. v. Sturges, 18 Kan. 93, 26 Am. Rep. 761; *Price v. First Nat. Bank*, 62 Kan. 749, 64 Pac. 639.

An assignment of a policy of insurance on the life of a person cannot be made to a party who is not a dependent, relative, or creditor of such insured.

Missouri Valley L. Ins. Co. v. Sturges, 18 Kan. 93, 26 Am. Rep. 761; *Price v. First Nat. Bank*, 62 Kan. 749, 64 Pac. 639; *Ruth v. Katterman*, 112 Pa. 251, 3 Atl. 833; *Mutual Ben. Asso. v. Hoyt*, 46 Mich. 473, 9 N. W. 497; *Holmes v. Gilman*, 138 N. Y. 369, 20 L. R. A. 566, 34 Am. St. Rep. 463, 34 N. E. 205.

The test of the existence of such an interest in another's life is whether there is a reasonable expectation of benefit or advantage from the continuance of the insured life.

Guardian Mut. L. Ins. Co. v. Hogan, 80 Ill. 35, 22 Am. Rep. 180; *Keystone Mut. Ben. Asso. v. Norris*, 115 Pa. 446, 2 Am. St. Rep. 572, 8 Atl. 638; *United Brethren Mut. Aid Soc. v. McDonald*, 122 Pa. 324, 1 L. R. A. 238, 9 Am. St. Rep. 111, 15 Atl. 439.

The Ware bank, or its immediate grantors, is not within the rule.

Price v. Supreme Lodge K. of H. 68 Tex. 361, 4 S. W. 633; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *Crotty v. Union*

Mut. L. Ins. Co. 144 U. S. 621, 36 L. ed. 566, 12 Sup. Ct. Rep. 749.

The absolute sale and disposition of said policy under and by virtue of an order of the district court of Leavenworth county, Kansas, is of no effect and the purchaser acquired no title except, possibly, a lien on the policy for the purchase money so paid.

People v. Hawkins, 157 N. Y. 12, 42 L. R. A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; *The Siren (The Siren v. United States)* 7 Wall. 152, 19 L. ed. 129.

Under policies of the kind and character under consideration, a beneficiary named therein has a vested interest which cannot be divested without his consent.

3 Am. & Eng. Enc. Law, pp. 980, 981 *et seq.*; *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41; *Brown's Appeal*, 125 Pa. 303, 17 Atl. 419.

Messrs. Baker & Baker and James H. Cravens, for defendant in error:

Every wager is a bilateral affair. In a wager policy the one paying the premiums risks them in the hope of a handsome recovery by the early death of the insured. But ours was entirely a unilateral affair. All the elements of wager were wanting. Mr. Gordon was certain to die and the insurance company was bound to pay. The whole transaction amounted to an equitable assignment of a fixed fund.

There is a distinction between paid-up policies and those still demanding premiums.

Bursinger v. Bank of Watertown, 67 Wis. 75, 58 Am. Rep. 848, 30 N. W. 290; 2 Beach, Ins. § 1176; *Nye v. Grand Lodge, A. O. U. W.* 9 Ind. App. 131, 36 N. E. 435. *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251; 2 Am. & Eng. Enc. Law, 2d ed. p. 28, note 9.

When pledgeor and pledgee agree what shall be done with the pledge, no one can complain.

Hunter v. Hamilton, 52 Kan. 195, 34 Pac. 782.

The holder paid no premiums, and cared not how long Mr. Gordon should live, because the policy was accumulating dividends at a rate that made it a good investment. The Ware bank would not have more motive to kill than any remainder-man would have to kill the holder of the antecedent estate; and remainders are not against public policy.

19 Am. & Eng. Enc. Law, p. 96; *Connecticut Mut. L. Ins. Co. v. Fisher*, 30 Fed. 662; *Robinson v. Hurst (Mutual Reserve Fund Life Asso. v. Hurst)* 78 Md. 59, 20 L. R. A. 761, 44 Am. St. Rep. 266, 26 Atl. 956; *New York L. Ins. Co. v. Rosenheim*, 56 Mo. App. 27.
67 L. R. A.

The beneficiary is not obliged to have insurable interest, if he or his assignor once acquired insurable interest in good faith, as part of a legitimate business transaction, and not as a wager; and even the subsequent entire extinguishment of insurable interests does not forbid the beneficiary to recover.

May, Ins. § 117; Bliss, Life Ins. § 30; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251; *Dixon v. National L. Ins. Co.* 168 Mass. 48, 46 N. E. 430; *Connecticut Mut. L. Ins. Co. v. Fisher*, 30 Fed. 662; 16 Am. & Eng. Enc. Law, p. 846, § b; *Chamberlain v. Butler*, 61 Neb. 730, 54 L. R. A. 338, 87 Am. St. Rep. 478, 86 N. W. 481; May, Ins. 4th ed. 1900, § 398a; Colebrooke, Collateral Securities, pp. 189-191, note e; Denis, Contract of Pledge, p. 267.

Sanborn, Circuit Judge, delivered the opinion of the court:

The issue of a policy of insurance to one who has no interest as a relative, dependent, creditor, or otherwise, in the life insured, and who pays the premiums for the chance of recovering upon the policy, is against the public policy of this nation, and void, because the interest of the holder of the policy is to shorten, rather than to lengthen, the life insured, and his maintenance of the policy is of the nature of a wager. Evasions of this rule by the issue of a policy to one who has an insurable interest, and its immediate assignment, pursuant to a pre-conceived intent, to one without such an interest, who undertakes to pay the premiums for his chance of profit upon his investment, are equally ineffective, and such assignments are void. *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 461, 24 L. ed. 251, 253; *Cammack v. Lewis*, 15 Wall. 643, 21 L. ed. 244; *Warnock v. Davis*, 104 U. S. 775, 782, 26 L. ed. 924, 927. A creditor has an insurable interest in the life of his debtor, and a policy on the latter's life issued to him, or issued to one who has an insurable interest in the life of the debtor and subsequently assigned to him, is valid and enforceable in his hands. *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 461, 24 L. ed. 251, 253; *Warnock v. Davis*, 104 U. S. 775, 778, 26 L. ed. 924, 926.

Counsel for the plaintiff insist that the supreme court of the state of Kansas has determined that every assignment of an insurance policy is void unless the assignee has an insurable interest in the life protected, and that this decision is controlling in the Federal courts, because the assignments here in question were executed in the state of Kansas. But the question whether or not an insurable interest in an assignee

of a policy issued to one who had such an interest is indispensable to the validity of the assignment of it is a question of general law, which it would be a dereliction of duty for a Federal court to decline to consider and determine for itself. The opinion of the court of the state in which the assignment is executed upon this question is not controlling in a national court. *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* 30 L. R. A. 193, 17 C. C. A. 62, 65, 36 U. S. App. 152, 70 Fed. 201, 203; *Speer v. Kearney County*, 32 C. C. A. 101, 114, 60 U. S. App. 38, 88 Fed. 749, 762; *Clapp v. Otoe County*, 45 C. C. A. 579, 582, 104 Fed. 473, 477.

There is some conflict of authority among the courts of the states upon the question whether or not the assignment of a policy for value in good faith by one who has an insurable interest to one who has not such an interest is valid. The supreme court of Indiana, in the case of *Franklin L. Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313, declared that such an assignment was as obnoxious to the rule against wager policies as the issue of a policy to one without interest, and that it was void. The courts of the states of Alabama, Kansas, Kentucky, Missouri, North Carolina, Pennsylvania, Texas, and Virginia have followed this declaration. *Alabama Gold L. Ins. Co. v. Mobile Mut. Ins. Co.* 81 Ala. 329, 1 So. 561; *Helmetag v. Miller*, 76 Ala. 183, 52 Am. Rep. 316; *Missouri Valley L. Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761; *Missouri Valley L. Ins. Co. v. McCrum*, 36 Kan. 146, 59 Am. Rep. 537, 12 Pac. 517; *Price v. First Nat. Bank*, 62 Kan. 743, 64 Pac. 639; *Schlamp v. Berner*, 21 Ky. L. Rep. 324, 51 S. W. 312; *Burnam v. White*, 16 Ky. L. Rep. 241, 22 S. W. 555; *Heusner v. Mutual L. Ins. Co.* 47 Mo. App. 336; *Powell v. Dewey*, 123 N. C. 103, 68 Am. St. Rep. 818, 31 S. E. 381; *Downey v. Hoffer*, 110 Pa. 109, 20 Atl. 655; *Gilbert v. Moose*, 104 Pa. 74, 40 Am. Rep. 570; *Oheeves v. Anders*, 87 Tex. 287, 47 Am. St. Rep. 107, 28 S. W. 274; *Schonfield v. Turner*, 75 Tex. 324, 7 L. R. A. 189, 12 S. W. 626; *Long v. Meriden Britannia Co.* 94 Va. 594, 27 S. E. 499. The reason for this view that the assignee who pays the premium practically wagers it upon the early close of the life insured has much less force where, as in the case at bar, the premiums have been paid before the assignment is made. *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 462, 24 L. ed. 251, 254; *Bursinger v. Bank of Watertown*, 67 Wis. 75, 83, 58 Am. Rep. 848, 30 N. W. 290. The rule adopted by these states greatly detracts from the value of life insurance policies, and restricts their commercial value; for, if their possible pur-

chasers are limited to those who have insurable interests in the lives they insure, it is obvious that buyers will be few, and their commercial value and the traffic in them must be much less than if all men may become their lawful purchasers. In view of this fact the Supreme Court of the United States and the courts of the great commercial communities of this country—of New York, Ohio, Massachusetts, Illinois, Michigan, New Jersey, California, Minnesota, Connecticut, Louisiana, Rhode Island, Wisconsin, Nebraska, Tennessee, South Carolina, Mississippi, and Maryland—have repudiated the old declaration of the supreme court of Indiana, and have adopted the more modern and rational rule that "any person has a right to procure an insurance on his own life, and to assign it to another, provided it be not done by way of cover for a wager policy." *Ætna L. Ins. Co. v. France*, 94 U. S. 561, 564, 24 L. ed. 287, 289; *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 597, 29 L. ed. 997, 999, 6 Sup. Ct. Rep. 877; *Chamberlain v. Butler*, 61 Neb. 730, 738, 54 L. R. A. 338, 87 Am. St. Rep. 478, 86 N. W. 481; *Croswell v. Connecticut Indemnity Asso.* 51 S. C. 103, 28 S. E. 200, 203; *Bursinger v. Bank of Watertown*, 67 Wis. 75, 83, 85, 58 Am. Rep. 848, 30 N. W. 290; *St. John v. American Mut. L. Ins. Co.* 13 N. Y. 31, 40, 64 Am. Dec. 529; *Valton v. National Fund Life Assur. Co.* 20 N. Y. 32, 38; *Olmsted v. Keyes*, 85 N. Y. 593, 598; *Steinback v. Diepenbrock*, 1 App. Div. 417, 37 N. Y. Supp. 279, 280; *Eckel v. Renner*, 41 Ohio St. 232, 233; *Mutual L. Ins. Co. v. Allen*, 138 Mass. 24, 31, 52 Am. Rep. 245; *Dixon v. National L. Ins. Co.* 168 Mass. 48, 49, 46 N. E. 430; *Brown v. Greenfield Life Asso.* 172 Mass. 498, 502, 53 N. E. 129; *Martin v. Stubbings*, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657, 660; *Prudential Ins. Co. v. Liersch*, 122 Mich. 436, 81 N. W. 258; *Trenton Mut. Life & F. Ins. Co. v. Johnson*, 24 N. J. L. 576, 585; *Vivar v. Supreme Lodge, K. of P.* 52 N. J. L. 455, 469, 20 Atl. 36, 41; *Curtiss v. Ætna L. Ins. Co.* 90 Cal. 245, 25 Am. St. Rep. 114, 27 Pac. 211; *Widaman v. Hubbard*, 88 Fed. 806, 814; *Hogue v. Minnesota Packing & Provision Co.* 59 Minn. 39, 43, 60 N. W. 812; *Brown v. Equitable Life Assur. Soc.* 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968, 1126; *Fitzpatrick v. Hartford Life & Annuity Ins. Co.* 56 Conn. 116, 7 Am. St. Rep. 288, 13 Atl. 673, 677, 678, 17 Atl. 411; *Hearing's Succession*, 26 La. Ann. 326, 327; *Clark v. Allen*, 11 R. I. 439, 443, 23 Am. Rep. 496; *Strike v. Wisconsin Odd Fellows Mut. L. Ins. Co.* 95 Wis. 583, 70 N. W. 819, 820; *Clement v. New York L. Ins. Co.* 101 Tenn. 22, 42 L. R. A. 247, 70 Am. St. Rep. 650, 46 S. W. 561, 564; *Murphy v. Red*, 64

Miss. 614, 60 Am. Rep. 68, 1 So. 761-763; *Rittler v. Smith*, 70 Md. 261, 2 L. R. A. 844, 16 Atl. 890, 892, 893; *Souder v. Home Friendly Soc.* 72 Md. 511, 20 Atl. 137, 138.

The provision of the bankruptcy law of 1898 that an insurance policy held by a bankrupt shall pass to his trustee as assets of his estate unless he pays to the trustee the surrender value of the policy demonstrates the fact that the national Congress deemed the rule adopted by the Supreme Court and by the courts of these states the established law of the nation. Act July 1, 1898, chap. 541. § 70, 30 Stat. at L. 565. U. S. Comp. Stat. 1901, p. 3451. The courts of Indiana themselves, the courts in which the opposite rule seems to have taken its rise, have lately repudiated it, have followed the trend of the more modern decisions, have adopted the more liberal rule, and have declared that, "when the person himself in good faith makes the contract, procures the insurance on his own life, and pays the premiums, it is immaterial whether the beneficiary designated by him, or the assignee of the policy, has any insurable interest in the life of the insured or not. This doctrine is settled by this court, and is in accordance with the decided weight of authority." *Milner v. Bowman*, 119 Ind. 448, 454, 5 L. R. A. 95, 21 N. E. 1094. This is a great commercial nation. The policy of the nation, the business habits and acts of its citizens and the tendency of the decisions of its courts are to depart more and more from the old rule that choses in action are not assignable, to make them more and more the subjects of traffic and of commerce, and to sustain their transfers in the ordinary course of business. The stronger reasons, the decided trend of the decisions of the courts, and the great weight of authority, concur to establish the rule that an insurable interest in the assignee of a policy of life insurance is not essential to the validity of the assignment if the party to whom it was originally issued had such an interest, and the assignment is not made as a cover for the issue of a wager policy.

In the case at bar, however, there are still other reasons why the plaintiff in this action cannot recover the proceeds of the policy which lies at the basis of this controversy against the title of the Ware National Bank or of any of the immediate or remote assignees of the German Bank upon the ground that these assignees had no insurable interest in the life of Gordon. In the first place, the administrator of the estate of Melissa Gordon is conclusively estopped from enforcing any such claim by the judgment of foreclosure and sale of the pledge in the action of the German Bank against Melissa A. Gordon and William

Gordon. After all the premiums upon this policy had been paid, the Gordons pledged it to the German Bank to secure the payment of the indebtedness of William Gordon to that bank. That indebtedness has never been paid. The German Bank brought an action against Melissa A. Gordon and her husband in a court of general jurisdiction to foreclose the pledge, sell the policy, and apply the proceeds of the sale to the payment of the debt. Melissa A. Gordon and her husband appeared in that action, admitted the indebtedness and the pledge, and consented to the trial of the case. The court adjudged the amount due upon the debt, that the policy should be advertised and sold, that the proceeds of the sale should be applied to the payment of the indebtedness, and that "said defendants and each of them be and they are forever barred of and from having or claiming any lien upon or interest in or to said policies of insurance from and after such sale." On May 29, 1882, the sheriff of the county sold this policy at public vendue under an execution issued upon this judgment, pursuant to an advertisement which he had published, to the highest bidder at the sale, the German Bank; and that judgment and the sale under it stand unassailed and without modification to the present day. Now, the claim of the plaintiff is not that the sale and the assignment to the German Bank were not valid and lawful, but that the subsequent assignments were void because the immediate and remote assignees of the bank had no insurable interest in the life secured by the policy. The answer is that Melissa A. Gordon was conclusively estopped by the judgment from claiming any interest in the policy or in its proceeds, and the plaintiff, the administrator of her estate, stands in her shoes. He is estopped from presenting or litigating this question.

It is not material to this estoppel that the judgment which works it may have been erroneous; that the court may have been mistaken in the facts, may have misconceived the law, or may have disregarded the public policy of the nation when it rendered it. It is sufficient that it had jurisdiction of the subject-matter of the action and of the parties to it, and in this state of the case the established rule of law is that its judgment upon the merits in an action between the same parties, or between those in privity with them, upon the same claim or demand, is conclusive, whether right or wrong, not only as to every matter offered, but as to every admissible matter which might have been offered, to sustain or defeat the claim presented. *Cromwell v. Sac County*, 94 U. S. 351, 352, 24

L. ed. 195, 197; *Lake County v. Platt*, 25 C. C. A. 87, 91, 49 U. S. App. 216, 79 Fed. 567, 571. The plaintiff stands in privity with Melissa A. Gordon. He is the administrator of her estate, and has no rights which he did not possess at her death. The Ware National Bank is in privity with the German Bank, and the judgment in the case of the German Bank against Melissa A. Gordon and her husband conclusively estops the administrator of her estate from claiming any interest in or lien upon the policy, or the proceeds of the policy, which was the subject of that litigation.

In the second place, the German Bank was a creditor of Gordon, and therefore had an insurable interest in his life. The assignment by Gordon and his wife of the policy on his life to the bank as collateral security for the payment of his debt to it was a lawful pledge of the policy. One of the inherent and indispensable elements of a pledge is the right and the power to sell the subject of it to the highest bidder for cash, in order to realize the moneys to pay the debt. The restriction of this power to sell policies of life insurance to those purchasers who may have insurable interests in the lives insured thereby would greatly diminish, if it would not practically destroy, the value of such policies as security for loans or debts. They are now articles of commerce, the frequent subjects of purchase and of sale, and ready and valuable means of obtaining loans and securing obligations. The policy of the nation is to enlarge, not to restrict, commerce in choses in action. The conceded proposition that a pledge of a

policy of life insurance to a creditor as security for a debt is lawful and valid carries with it the inevitable corollary that such a pledge vests in the pledgee the right and the power to sell and to assign the policy to the highest bidder to obtain money to satisfy the debt, whether that bidder has an insurable interest in the life secured by the policy or not. Our conclusion is that the lawful pledgee of a policy of life insurance has the right and the power to sell the policy to the highest bidder for the purpose of realizing money to satisfy the debt, and that the immediate and remote assignees under such a sale take good title to the policy and to its proceeds, although they may have no insurable interest in the life protected by the policy.

Because the assignments in this case were not made as covers for wager policies, but in good faith in the ordinary course of business, and no insurable interest in the assignees was essential to their validity; because the administrator of the estate of Melissa A. Gordon was conclusively estopped by the judgment in the case of the German Bank against her from claiming any interest in or lien upon the policy or its proceeds; and because the lawful pledgee of the policy had the right and the power to sell and to assign it to one who had no insurable interest in the life protected by it for the purpose of raising money to satisfy the debt it secured,—the Ware National Bank was entitled to the proceeds of the policy in controversy, and the judgment below is affirmed.

ARKANSAS SUPREME COURT.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, *App't.*,

v.

Henry E. COOLIDGE.

(.....Ark.....)

1. Delay by the initial carrier in the transportation of goods at a season when weather conditions would naturally produce deterioration in their quality, which may have aided in causing the damaged condition in which they were delivered to the consignee, will render it lia-

ble for the loss, unless it shows that its delay did not produce the injury in whole or in part, although delay by a connecting carrier is also shown, which might have caused or contributed to the injury.

2. A clause inserted without consideration in a carriage contract, fixing the damage, in case of loss of the goods, at their value at the place of shipment rather than of destination, is invalid.

(November 19, 1904.)

A PPEAL by defendant from a judgment of the Circuit Court for Phillips

NOTE.—As to liability of connecting carrier beyond its own line, see cases in notes to *Fox v. Boston & M. R. Co.* 1 L. R. A. 708; *Crossan v. New York & N. E. R. Co.* 3 L. R. A. 766; and *Richmond & D. R. Co. v. Payne*, 6 L. R. A. 849; also the later cases in this series of *McCann v. International & G. N. R. Co.* 16 L. R. A. 39; *McCann v. Eddy*, 35 L. R. A. 110; *Illinois C. R.* 67 L. R. A.

Co. v. Carter, 36 L. R. A. 527; *Colfax Mountain Fruit Co. v. Southern P. Co.* 40 L. R. A. 78; *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.* 41 L. R. A. 511; *Illinois C. R. Co. v. Southern Seating & Cabinet Co.* 50 L. R. A. 729; *Courteen v. Kanawha Despatch*, 55 L. R. A. 182; *Taffe v. Oregon R. & Nav. Co.* 58 L. R. A. 187.

County in plaintiff's favor in an action brought to recover damages for injuries to property while in defendant's possession for transportation. *Affirmed.*

The facts are stated in the opinion.

Messrs. Dodge & Johnson, for appellant:

At common law the carrier could not be held for such loss as the result of nature, vice, or defect inherent in the goods carried, and in no sense the result of his own negligence.

Story, Bailments, § 492a; St. Louis, I. M. & S. R. Co. v. Lesser, 46 Ark. 240; Evans v. Fitchburg R. Co. 111 Mass. 142, 15 Am. Rep. 19.

Where goods passed over the lines of several connecting carriers, with absence of proof showing upon what line the damage occurred, the presumption is that it occurred while the goods were in the hands of the last or final carrier.

Hutchinson, Carr. § 149; 5 Am. & Eng. Enc. Law, 2d ed. p. 357; 6 Am. & Eng. Enc. Law, 2d ed. pp. 625, 652, note 1; Gulf, C. & S. F. R. Co. v. Edloff, 89 Tex. 454, 34 S. W. 414, 35 S. W. 144; Texas & N. O. R. Co. v. Brown (Tex. Civ. App.) 37 S. W. 785; Laughlin v. Chicago & N. W. R. Co. 28 Wis. 204, 9 Am. Rep. 493; Moore v. New York, N. H. & H. R. Co. 173 Mass. 335, 73 Am. St. Rep. 298, 53 N. E. 816; Cote v. New York, N. H. & H. R. Co. 182 Mass. 290, 94 Am. St. Rep. 656, 65 N. E. 400; Forrester v. Georgia R. & Bkg. Co. 92 Ga. 699, 19 S. E. 811; 1 Greenl. Ev. 14th ed. § 79; Smith v. New York C. R. Co. 43 Barb. 225; Savannah, F. & W. R. Co. v. Harris, 26 Fla. 155, 23 Am. St. Rep. 551, 7 So. 544; Faison v. Alabama & V. R. Co. 69 Miss. 569, 30 Am. St. Rep. 577, 13 So. 37.

If the contract of shipment stipulates what should be the value of the goods in the event of loss or damage, it is binding upon the parties thereto.

Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151; Graves v. Lake Shore & M. S. R. Co. 137 Mass. 33, 50 Am. Rep. 282; Elkins v. Empire Transp. Co. 81 Pa. 315; 4 Elliott, Railroads, § 1500, p. 2320; Laybourn v. Seymour, 53 Minn. 105, 39 Am. St. Rep. 579, 54 N. W. 941; Douglas v. Leighton, 53 Minn. 176, 54 N. W. 1053; Primrose v. Western U. Teleg. Co. 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; St. Louis, I. M. & S. R. Co. v. Lesser, 46 Ark. 236; St. Louis, I. M. & S. R. Co. v. Weakly, 50 Ark. 410, 7 Am. St. Rep. 104, 8 S. W. 134.*

Messrs. E. C. Hornor and Rose, Hemingway, & Rose, for appellee:

The extent of damage could only be determined by the conditions prevailing in Chicago.

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St. Louis, I. M. & S. R. Co. v. Phelps, 46 Ark. 485; St. Louis, I. M. & S. R. Co. v. Mudford, 48 Ark. 502, 3 S. W. 814; Murrell v. Pacific Exp. Co. 54 Ark. 22, 26 Am. St. Rep. 17, 14 S. W. 1098.

There was no consideration for the relinquishment by the shipper of the carrier's common-law liability.

Little Rock & Ft. S. R. Co. v. Cravens, 57 Ark. 112, 18 L. R. A. 527, 38 Am. St. Rep. 230, 20 S. W. 803; St. Louis, I. M. & S. R. Co. v. Spann, 57 Ark. 127, 20 S. W. 914.

Hill, Ch. J., delivered the opinion of the court:

The evidence fairly establishes these facts: On the evening of June 10, 1896, Coolidge delivered at Lexa, Arkansas, a car of potatoes, in good order, to appellant railroad, for shipment over its line to St. Louis, and thence by connecting carriers to the consignee in Chicago. The time which should have been consumed in the trip was two days, of which eight hours should be allowed the Chicago & Alton Railway, the connecting carrier at St. Louis, to deliver in Chicago. The time actually consumed was about sixty-five hours, instead of forty, from Lexa to St. Louis, and about fifteen, instead of eight, from St. Louis to Chicago, and then about a day lost in Chicago in delivery after arrival. The car while in appellant's control took a side trip from Wynne to Memphis and return, which the evidence shows contributed to the delay, although contended otherwise by the appellant. The potatoes were heated and rotten when delivered to the consignee, who lost a sale at 75 cents per bushel on account of this condition. That price was the fair market price at Chicago at the time they should have arrived. The consignee put men into the car, and saved what he could from the lot, and peddled out the salable potatoes, realizing \$97 for the car load. This suit is for what they would have brought, had it not been for this damage to them. They cost at Lexa 30 cents per bushel, and were then properly packed into the car. There was no evidence of the condition of the potatoes from the time they left Lexa in good order till they reached the consignee rotten and heated. There is evidence that delay in transportation of potatoes at that season of the year causes them to heat and rot, and that the weather was very warm, and that the time consumed in the unnecessary trip from Wynne to Memphis and return would increase the likelihood of damage to the potatoes.

1. In the absence of evidence locating the damage to goods in transit over several connecting lines, a prima facie presumption

arises that the last carrier is the negligent one. *St. Louis, S. W. R. Co. v. Birdwell* (Ark.) 82 S. W. 835; *Moore v. New York, N. H. & H. R. Co.* 173 Mass. 335, 73 Am. St. Rep. 298, 53 N. E. 816; *Cote v. New York, N. H. & H. R. Co.* 182 Mass. 290, 94 Am. St. Rep. 656, 65 N. E. 400; *Faison v. Alabama & V. R. Co.* 69 Miss. 569, 30 Am. St. Rep. 577, 13 So. 37; *Savannah, F. & W. R. Co. v. Harris*, 26 Fla. 148, 23 Am. St. Rep. 551, 7 So. 544; *Texas & N. O. R. Co. v. Brown* (Tex. Civ. App.) 37 S. W. 785; *Gulf, C. & S. F. R. Co. v. Edloff*, 89 Tex. 454, 34 S. W. 414, 35 S. W. 144; *Laughlin v. Chicago & N. W. R. Co.* 28 Wis. 204, 9 Am. Rep. 493; *Smith v. New York C. R. Co.* 43 Barb. 225. When the initial carrier receives the goods in good order, the law presumes each successive carrier intermediate between the initial and last carrier receives them in good order; and this presumption working through to the last carrier, who delivers them in bad order, leaves the responsibility upon him, unless he can show as evidence that the damage occurred prior to his receiving them. *Louisville & N. R. Co. v. Jones*, 100 Ala. 263, 14 So. 114; *Savannah, F. & W. R. Co. v. Harris*, 26 Fla. 148, 23 Am. St. Rep. 551, 7 So. 544; *Hutchinson, Carr. § 761*; 6 Am. & Eng. Enc. Law, 2d ed. p. 752. All of these authorities declare this presumption only arises in the absence of evidence, and its purpose is to cast the burden of proof upon the party having the knowledge, or means of knowledge, to ascertain the truth. The appellant invokes the presumption as a defense here. If the evidence is sufficient to show negligence in the appellant, as the initial carrier, which caused the injury, then the presumption is overcome. The difficulty in this case is in determining whether the injury was caused by the delay of the initial or the last carrier, or both. The Georgia court announced this rule in regard to perishable goods: "Unreasonable delay in forwarding fruit would be negligence, because prolonging the time within which, by the operation of natural laws, decay would be produced, and therefore such negligence would contribute to causing the damage." *Forrester v. Georgia R. & Bkg. Co.* 92 Ga. 699, 19 S. E. 811. In a Massachusetts case where a carrier contracted to deliver apples to a connecting carrier by a fixed time, and negligently delayed delivering them, and they froze in the possession of the connecting carrier, the court said: "If the freezing had occurred on the defendant's line, it cannot be doubted that the law would regard the delay as the proximate cause of the damage. It is none the less so because it happened on a connecting line. The dam-

age was not caused by any extraordinary event subsequently occurring, but was caused by an event which was, according to the common experience, naturally and reasonably to be expected,—a change of temperature." *Fox v. Boston & M. R. Co.* 148 Mass. 220, 1 L. R. A. 702, 19 N. E. 222. In the absence of a contract fixing the time for delivery to the connecting carrier, the law fixes a reasonable time; and what is a reasonable time must be determined from the length of the journey, the usual time, the weather, the nature of goods transported, etc. *Hutchinson, Carr. § 329*.

Under these authorities, which are consonant to reason and justice, the evidence is sufficient to hold the initial carrier was guilty of a negligent act,—the delay in transportation of this class of goods in the season when weather conditions naturally produce delay,—which caused, in whole or in part, the condition in which they reached the consignee. It is evident that the last carrier was equally or more negligent than the initial carrier, but that does not change the rule, and merely renders each or both liable, when the act of either is an efficient and proximate cause of the injury. "This rule obtains, although it is impossible to determine in what proportion each of the wrongdoers contributed to the injury, although the act alone of the party sued might have caused the entire injury, and although, if his acts had not concurred in producing the wrong, the same damages would have resulted from the act of the other." 1 *Thomp. Neg. § 76*. This court, in *City Electric Street R. Co. v. Conery*, 61 Ark. 381, 31 L. R. A. 570, 54 Am. St. Rep. 262, 33 S. W. 426, announced this rule, as stated in the syllabus: "The concurring negligence of two parties makes both liable to a third party injured thereby, if the injury would not have occurred from the negligence of one of them only." It is impossible from this evidence, and likely from any evidence, to ascertain that the injury was caused solely by one of the carriers; and, finding both guilty of an efficient and proximate cause therefor, either or both must be held, unless the party guilty of such negligence can show, and does show, that its negligence did not produce, in whole or in part, that result which follows naturally and proximately from the negligent act.

2. The appellant claims the verdict is excessive. That depends on the measure of damages. Shall it be taken to be at Chicago at the time the goods were due there, or shall it be controlled by the bill of lading, which stipulates that the value of the same at point of shipment shall determine the measure in the event of loss of the

goods? Conceding, without deciding, that loss of goods includes loss in value, does the contract control? It cannot be disputed that, in the absence of this contract, the legal liability would be for the price at Chicago at the time the potatoes were due there. *St. Louis, I. M. & S. R. Co. v. Mudford*, 48 Ark. 502, 3 S. W. 814; *St. Louis, I. M. & S. R. Co. v. Phelps*, 46 Ark. 485; *East Tennessee, V. & G. R. Co. v. Johnson*, 85 Ga. 497, 11 S. E. 809; *Fox v. Boston & M. R. Co.* 148 Mass. 220, 1 L. R. A. 702, 19 N. E. 222; *Hutchinson, Carr.* § 767; *Ray, Negligence of Imposed Duties*, p. 1036. Contracts restricting the liabilities imposed on carriers by law are only valid where fair and reasonable, and upon a consideration,—usually a reduced rate of freight in consideration of the release from given legal liabilities. *Little Rock & Ft.*

S. R. Co. v. Cravens, 57 Ark. 112, 18 L. R. A. 527, 38 Am. St. Rep. 230, 20 S. W. 803; *St. Louis, I. M. & S. R. Co. v. Spann*, 57 Ark. 127, 20 S. W. 914. This rule is applied to contracts fixing a given value in case of loss. *St. Louis, I. M. & S. R. Co. v. Lesser*, 46 Ark. 236; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. 134; *Zouch v. Chesapeake & O. R. Co.* 36 W. Va. 524, 17 L. R. A. 116, 15 S. E. 185; *Ray, Negligence of Imposed Duties*, § 13.

These principles and authorities control, and without a consideration this clause of the contract is void. Applying the Chicago price as the measure, deducting the \$97 for the damaged goods, allowing 6 per cent interest from date of due delivery, and the verdict is a trifle less than it might be.

The judgment is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Charles L. LAMB, *Plff. in Err.*,
v.

POWDER RIVER LIVE STOCK COMPANY.

(132 Fed. 434.)

1. The re-enactment of a statute of limitations with a shortened limitation period applicable to judgments rendered without the state applies to actions upon judgments existing at the time of its passage, where, if not made so applicable, it would operate as a repeal of all limitation periods as to existing causes of action not barred at the time of its passage.
2. A period of three months within which to bring an action upon a judgment rendered in another state, against a bona fide resident of the state establishing such period, upon a cause of action which accrued more than six years before the action upon the judgment is brought, is unreasonably short, and renders the statute providing it invalid.

(September 5, 1904.)

ERROR to the Circuit Court of the United States for the District of Colorado to review a judgment in favor of defendant in an action brought to enforce a judgment which had been recovered in a state court. *Reversed.*

NOTE.—As to constitutionality of statute shortening period of limitations, see also cases in *note* to *Best v. Baumgardner*, 1 L. R. A. 359; and the later cases of *Bates v. Cullum*, 34 L. R. A. 440; *Gilbert v. Ackerman*, 45 L. R. A. 118; and *Osborne v. Lindstrom*, 46 L. R. A. 715, with *footnote* as to validity of statute of limitations as affecting prior rights of action. 67 L. R. A.

Statement by **Van Devanter**, Circuit Judge:

Lamb, a citizen and resident of Nebraska, commenced an action against the live stock company, a Colorado corporation, in the circuit court of the United States for the District of Colorado, on February 14, 1901, upon a judgment for the payment of money recovered by him against the company in a court of Nebraska. Defendant answered that it was a bona fide resident of Colorado; that the judgment sued upon was recovered March 4, 1895, more than three months prior to the commencement of the action, and was based upon a cause of action upon an express contract for the sale and delivery of merchandise, which accrued February 1, 1888—more than six years before the present action was commenced. The court sustained this answer under the acts of April 29, 1895, and April 6, 1899 (Colo. Sess. Laws 1895, chap. 106, p. 239; Id. 1899, chap. 113, p. 248), overruled plaintiff's demurrer thereto, and, plaintiff declining to plead further, rendered judgment for defendant. The act of April 29, 1895, is as follows:

"An Act to Limit the Time in Which Suits may be Brought upon Causes of Action Accrued or Judgments or Decrees Rendered without This State, and to Repeal Various Acts in Conflict or Inconsistent Therewith.

Be it enacted by the general assembly of the state of Colorado.

"Section 1. It shall be lawful for any person against whom an action shall be commenced in any court of this state,

wherein the cause of action accrued without this state, upon a contract or agreement expressed or implied, or upon a sealed instrument in writing, or upon a judgment or decree rendered in any court without this state, more than six years before the commencement of the action in this state, to plead the same in bar of the action in this state: Provided, that if said judgment or decree rendered without this state be based upon a cause of action which had accrued more than six years prior to the commencement of the action on such judgment or decree in this state, and the said judgment or decree had been rendered without this state more than three months prior to the bringing of such action thereon in this state, it shall be lawful for any person against whom any action or such judgment or decree shall be brought, to plead the same in bar thereof; and

"Provided further, that no defendant shall be allowed to plead the fact that the cause of action on which such judgment or decree was based accrued more than six (6) years, and that such judgment or decree was rendered without this state more than three (3) months, before the commencement of said action thereon in this state, unless the defendant shall be a bona fide resident of this state.

"Sec. 2. Section 16 of chapter 60 of the General Laws of 1877, concerning limitations; also, § 1 of an act entitled 'An Act Concerning Limitations of Actions in the Courts of Justice,' approved February 14, 1879; also, § No. 2178 of the General Statutes of the state of Colorado, the same being § 16 of chapter 66, and all other acts or parts of acts in conflict with this act, be and the same are hereby repealed."

"Approved April 29, 1895."

The act of April 6, 1899, adds a third or additional proviso to the 1st section of the prior act, and is styled an amendatory act in both its title and its body.

The statutes expressly repealed by the act of 1895 had theretofore prescribed the time within which the actions named in that act could be commenced. For sixteen years the period for suing upon a judgment or decree of any kind rendered without the state had been six years. The judgment sued upon was rendered less than two months before the act of 1895 was passed, and the cause of action upon which it is based accrued more than six years before the judgment was rendered. When the action in which the judgment was recovered was brought does not appear. The present action was commenced more than three months after the act of 1895 took effect, and within six years after the judgment was rendered.

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Argued before *Sanborn, Van Devanter, and Hook*, Circuit Judges.

Messrs. William T. Skelton and T. M. Morrow, for plaintiff in error:

If a bar had been created by the act of 1895, that act having been repealed and another substituted for it which was unconstitutional, the bar has been removed.

Campbell v. Holt, 115 U. S. 629, 29 L. ed. 487, 6 Sup. Ct. Rep. 209.

The statute may be pleaded by bona fide residents of the state of Colorado but may not be pleaded by any other person, and is in violation of § 2, art. IV., of the Constitution of the United States.

Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 271; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Cofrode v. Gartner*, 79 Mich. 332, 7 L. R. A. 511, 44 N. W. 623; *Eingartner v. Illinois Steel Co.* 94 Wis. 70, 34 L. R. A. 503, 59 Am. St. Rep. 859, 68 N. W. 664; *Steed v. Harvey*, 18 Utah, 367, 72 Am. St. Rep. 789, 54 Pac. 1011.

A citizen of one state has a right to pass into another state, and there defend an action on the same terms and conditions as the citizens of such state might do. This right is denied to him by the provisions of the law in question.

These statutes should receive a prospective construction only.

McClellan v. Pyeatt, 14 C. C. A. 140, 32 U. S. App. 104, 66 Fed. 846; *Chew Heong v. United States*, 112 U. S. 536, 38 L. ed. 770, 5 Sup. Ct. Rep. 255; *United States v. Heth*, 3 Cranch, 413, 2 L. ed. 483; *Murray v. Gibson*, 15 How. 421, 423, 14 L. ed. 755, 756; *McEwen v. Den*, 24 How. 242, 16 L. ed. 672; *Harvey v. Tyler*, 2 Wall. 347, 17 L. ed. 875; *Sohn v. Waterson*, 17 Wall. 596, 21 L. ed. 737; *People v. Columbia County*, 10 Wend. 365; *Nelson v. Nelson*, 6 Cal. 430; *Mattingly v. Corbit*, 7 B. Mon. 376; *Lewis v. Lewis*, 7 How. 778, 12 L. ed. 909; *Ross v. Duval*, 13 Pet. 62, 10 L. ed. 59; *Herring v. Modesto Irrig. Dist.* 95 Fed. 721; *McKean v. Archer*, 52 Fed. 791; *Huber v. Zimmerman*, 8 Okla. 573, 58 Pac. 737; *Southgate v. Frier*, 8 Okla. 435, 57 Pac. 841; 19 Am. & Eng. Enc. Law, 2d ed. p. 176, ¶ 3. *Baldwin v. Cross*, 5 Ark. 510; *Dickerson v. Morrison*, 5 Ark. 316; *Lee v. Leech*, 9 Ark. 423; *Central Bank v. Solomon*, 20 Ga. 408; *Ross v. Central R. & Bkg. Co.* 53 Ga. 371; *Weber v. Manning*, 4 Mo. 229; *Bowden v. Philadelphia, W. & B. R. Co.* 196 Pa. 562, 46 Atl. 843.

Messrs. E. E. Edmonds and J. C. Helm for defendant in error.

Van Devanter, Circuit Judge, delivered the opinion of the court:

No change in the statute law of Colorado was made by the act of April 6, 1899 (Sess. Laws 1899, chap. 113, p. 248). In form and in purpose it was an amendatory act conforming to the requirement of the state Constitution (art. 5, § 24) that when a law is amended it shall be re-enacted and published at full length. It re-enacted the act of April 29, 1895 (Sess. Laws 1895, chap. 106, p. 239), without other change than to add a third proviso at the end of the 1st section. For reasons not material to the present inquiry, the added proviso is void, as held by this court in *Keyser v. Lowell*, 54 C. C. A. 574, 117 Fed. 400. The other provisions continued in force without interruption from the time when the earlier act took effect, and are to be considered as speaking from that date, instead of from the time of their re-enactment.

Was the shortened limitation in the act of 1895 intended to apply to actions upon judgments theretofore rendered? One contention of the plaintiff in error is that it must be given a prospective operation, and that to apply it to causes of action which accrued before it became effective is to permit it to operate retrospectively. The rule that statutes are to be given a prospective, rather than a retrospective, operation, is well recognized; but, like other rules of interpretation, it is resorted to to give effect to the presumed and reasonably probable intention of the legislature, when the terms of the statute do not of themselves make the intention certain or clear, and cannot be invoked to change or defeat the intention when it is made obvious or manifest by the terms of the statute. *Sohn v. Water-son*, 17 Wall. 596, 21 L. ed. 737; *Stephens v. Cherokee Nation*, 174 U. S. 445, 477, 43 L. ed. 1041, 1052, 19 Sup. Ct. Rep. 722; *Webster v. Cooper*, 14 How. 488, 501, 14 L. ed. 510, 516. The act of 1895 contains internal and convincing evidence of the intention with which it was enacted. It is identical in its provisions with one of the statutes which it in terms repealed (Gen. Stat. 1883, § 2178), save that by two provisos it reduces, in some instances to three months, the period within which an action may be commenced upon a judgment rendered without the state upon a cause of action accruing more than six years before the commencement of the action upon the judgment. This repeal and re-enactment of all of the provisions of the existing statute by a single act, and with no other change than the addition of the two provisos, should be given the same effect that would be given to an amendatory act accomplishing the same purpose. The re-enactment

neutralized the repeal, and the new act should be construed as continuing in force the prior statute with such modification as was effected by the addition of the provisos. *Bear Lake & River Waterworks & Irrig. Co. v. Garland*, 164 U. S. 1, 11, 41 L. ed. 327, 331, 17 Sup. Ct. Rep. 7; *Sutherland*, Stat. Constr. § 134. The causes of action named in the prior statute, other than upon a judgment rendered without the state upon a cause of action accruing more than six years before the commencement within the state of an action upon the judgment, were no more affected by the act of 1895 than if it had not been enacted. The modification or change is limited to actions upon a specified class of judgments. The provisos are broad enough in their language to readily embrace every subsequent action upon a judgment of this class, no matter when rendered, and the act expressly repeals the existing statute regulating the time for commencing such actions. It is hardly conceivable that when the legislature was thus materially shortening the period of limitation it would have removed existing judgments from all limitation. Nor did the adoption of a new period of limitation in respect of future judgments require the complete abrogation of the old limitation, unless it was intended that the new one should apply to existing judgments.

Not infrequently in adopting new statutes of limitation special provision is expressly made for enforcing existing rights of action, but a provision of that character was not needed in this instance. Under the Constitution of the state (art. 5, § 19) the act of 1895, which contained no emergency clause, would not take effect for ninety days after its passage; a period which is practically the equivalent of the shortest limitation prescribed in the act. According to the decisions of many courts, a statute of limitation, the operation of which is postponed to an appointed time in the future, is effectual from the date of its enactment as public notice of its provisions and prospective operation, and, if it be not otherwise provided, operates to fix or designate the time which will elapse between its passage and its taking effect as the period within which to begin proceedings for the enforcement of such existing rights of action as will fall within the bar of the statute when it takes effect. *Stine v. Bennett*, 13 Minn. 153, Gil. 138; *Russell v. H. C. Akeley Lumber Co.* 45 Minn. 376, 48 N. W. 3; *Duncan v. Cobb*, 32 Minn. 460, 21 N. W. 714; *Holcombe v. Tracy*, 2 Minn. 241, Gil. 201; *Smith v. Morrison*, 22 Pick. 430; *Peirce v. Tobey*, 5 Met. 168; *Bigelow v. Bemis*, 2 Allen, 496; *Korn v. Browne*, 64 Pa.

55; *Clay v. Iseminger*, 187 Pa. 108, 41 Atl. 38, Affirmed in 185 U. S. 55, 46 L. ed. 804, 22 Sup. Ct. Rep. 573; *Hedger v. Rennaker*, 3 Met. (Ky.) 255; *Lockhart v. Yeiser*, 2 Bush, 231; *Eaton v. Manitowoc County*, 40 Wis. 668; *Horbach v. Miller*, 4 Neb. 31; *Wrightman v. Boone County*, 82 Fed. 412; *Merchants' Nat. Bank v. Braithwaite*, 7 N. D. 358, 372, 66 Am. St. Rep. 653, 75 N. W. 244; *Osborne v. Lindstrom*, 9 N. D. 1, 8, 46 L. R. A. 715, 81 Am. St. Rep. 516, 81 N. W. 72. In the opinion of other courts such a statute does not effectually charge any person with notice of its provisions, or have effect in any other way, until the time appointed for it to go into full operation. *Price v. Hopkin*, 13 Mich. 318; *Gilbert v. Ackerman*, 159 N. Y. 118, 45 L. R. A. 118, 53 N. E. 753; *Sutherland*, Stat. Constr. § 107. The supreme court of Colorado does not seem to have spoken upon the question, and we do not deem it necessary to consider which of the opposing views is the better one, because both lead to the same ultimate conclusion in this case. If the act of 1895 was not effectual as notice to holders of existing judgments in advance of the time appointed for it to take effect, then the new period of limitation did not commence to run against proceedings to enforce such judgments prior to that time. *Lewis v. Lewis*, 7 How. 776, 12 L. ed. 909; *Sohn v. Waterson*, 17 Wall. 596, 21 L. ed. 737. Thus, one of two things resulted from that act: Either the plaintiff was charged on the day of its enactment with notice of its prospective operation, and was restricted to the ninety days which would elapse before it would take effect in commencing an action upon his judgment, or he was charged on the day the act took effect with notice of its provisions, and was restricted to a period of three months thereafter in exercising his right of action. It is plain that in point of the length of the period limited for commencing actions thereon no discrimination was made between existing and future judgments. If it was reasonable to limit the right to sue upon a future judgment to a period of three months after its rendition, it was equally reasonable to limit the right to sue upon an existing judgment to a period of ninety days or three months after the time when its holder became charged with notice of the provisions of the act, and was thereby put to his remedy. We think the shortened limitation was intended to apply to actions upon existing judgments, and that, if that limitation is valid, plaintiff's right of action was barred ninety days after the passage of the act of 1895, or three months after it took effect, depending upon when he was put to his remedy by the act.

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In what has been said the validity of the shortened limitation has been assumed. It is now necessary to inquire whether or not a state may thus restrict the right to sue in her courts upon a judgment for the payment of money rendered in a court of a sister state upon a cause of action founded upon contract. It is elementary that statutes of limitation are part of the law of the forum. State statutes of that character may embrace causes of action upon contracts made or judgments rendered in other states, may prescribe a period of limitation in respect of them that is different from that prescribed in respect of similar rights of action arising within the state, and may subject existing rights of action to a limitation where none existed before, or to a shorter limitation than existed when they accrued (*M'Elmoyle v. Cohen*, 13 Pet. 312, 327, 10 L. ed. 177, 184; *Bank of Alabama v. Dalton*, 9 How. 522, 13 L. ed. 242; *Terry v. Anderson*, 95 U. S. 628, 633, 24 L. ed. 365, 366; *Hawse v. Burgmire*, 4 Colo. 313); but the power to enact such statutes is subject to the fundamental condition that a reasonable time must be given for the exercise of the right of action, whether existing or prospective, after it comes within the prospective or present operation of the statute, and before the bar becomes effective (*Keyser v. Lowell*, 54 C. C. A. 574, 578, 580, 117 Fed. 400, 404, 406; *Jackson ex dem. Hart v. Lamphire*, 3 Pet. 280, 290, 7 L. ed. 679, 683; *Hawkins v. Barney*, 5 Pet. 457, 466, 8 L. ed. 190, 193; *Bronson v. Kinzie*, 1 How. 311, 316, 11 L. ed. 143, 145; *Christmas v. Russell*, 5 Wall. 290, 300, 18 L. ed. 475, 478; *Curtis v. Whitney*, 13 Wall. 68, 72, 20 L. ed. 513, 514; *Sohn v. Waterson*, 17 Wall. 596, 21 L. ed. 737; *Terry v. Anderson*, 95 U. S. 628, 632, 24 L. ed. 365, 366; *Edwards v. Kearzey*, 96 U. S. 595, 603, 24 L. ed. 793, 797; *Koshkonong v. Burton*, 104 U. S. 668, 675, 26 L. ed. 886, 889; *Vance v. Vance*, 108 U. S. 514, 27 L. ed. 808, 2 Sup. Ct. Rep. 854; *McGahey v. Virginia*, 135 U. S. 662, 707, 34 L. ed. 304, 318, 10 Sup. Ct. Rep. 972; *Wheeler v. Jackson*, 137 U. S. 245, 255, 34 L. ed. 659, 663, 11 Sup. Ct. Rep. 76; *Turner v. New York*, 168 U. S. 90, 94, 42 L. ed. 392, 393, 18 Sup. Ct. Rep. 38; *Saranac Land & Timber Co. v. Comptroller (Saranac Land & Timber Co. v. Roberts)*, 177 U. S. 318, 44 L. ed. 786, 20 Sup. Ct. Rep. 642; *Wilson v. Iseminger*, 185 U. S. 55, 62, 46 L. ed. 804, 807, 22 Sup. Ct. Rep. 573; *Price v. Hopkin*, 13 Mich. 318, 324; *Gilbert v. Ackerman*, 159 N. Y. 118, 124, 45 L. R. A. 118, 53 N. E. 753; *Berry v. Ransdall*, 4 Met. (Ky.) 292; *Small v. Foley*, 8 Colo. App. 435, 450, 47 Pac. 64, 70).

In the case last cited Judge Thomson,

speaking for the court of appeals of Colorado, said: "The legislature may shorten the time by which actions on existing contracts will be barred, provided it does not fix the limitation so as to cut off the right of action on demands against which the former statute had not run, or does not unreasonably shorten the time within which suit may be brought on such demands. With these limitations such legislation, although retroactive, will be sustained."

Perhaps no better rule as to what is a reasonable time can be laid down than that it must be of sufficient duration to afford full opportunity for resort to the courts for the enforcement of the rights upon which the limitation is intended to operate. In the words of Mr. Justice Shiras in *Wilson v. Iseninger*, 185 U. S. 55, 62, 46 L. ed. 804, 807, 22 Sup. Ct. Rep. 573: "A statute could not bar the existing rights of claimants without affording this opportunity. If it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions." To the same effect is *Price v. Hopkin*, 13 Mich. 318, 324, where it was said by Judge Cooley: "It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought; . . . and a statute that fails to do this cannot possibly be sustained as a law of limitation, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law."

Not only is a right of action which springs from contract property within the protection of the 14th Amendment to the national Constitution, but any state statute which denies, unreasonably restricts, or oppressively burdens, the exercise of a right of action springing from a prior contract, impairs its obligation within the prohibition of the Constitution. Art. 1, § 10. The obligation of a contract consists in the binding force of its stipulations upon those who make them, and depends upon the continued existence of a means of enforcing its stipulations; otherwise a contract would be without obligation, and would have only such effect as the parties should choose to give it. Every lawful contract gives rise to a right in one party to require performance of the stipulations of the other, and to a corresponding duty of the other to perform them. A subsequent law of a state which denies or diminishes the right of the one, or excuses or discharges the other from the performance of his duty impairs the obligation of the contract, although professing to act only upon the remedy. *Sturges v. Crowninshield*, 4 Wheat. 122, 197, 4 L. ed. 67 L. R. A.

529, 549; *Bronson v. Kinzie*, 1 How. 311, 316, 320, 11 L. ed. 143, 145, 146; *McCracken v. Hayward*, 2 How. 608, 612, 11 L. ed. 397, 399; *Edwards v. Kearzey*, 96 U. S. 595, 603, 607, 24 L. ed. 793, 797, 798; *Barnitz v. Beverly*, 163 U. S. 118, 122, 41 L. ed. 93, 98, 16 Sup. Ct. Rep. 1042. A judgment for the amount due upon a contract does not terminate its obligation because it does not pay the debt. The debt remains contractual in character, and its payment is as much within the obligation of the contract after the judgment as it was before. Black, Const. Law, 2d ed. p. 615; Freeman, Judgm. 4th ed. § 4; *Sprott v. Reid*, 3 G. Greene, 489, 56 Am. Dec. 549. If the subsequent law, instead of directly abrogating the contract, unreasonably restricts or oppressively burdens the enforcement of a judgment rendered thereon it is none the less obnoxious to the constitutional prohibition (*Daniels v. Tearney*, 102 U. S. 415, 419, 26 L. ed. 187, 188) which is directed against all impairment of the obligation of contracts by state legislation, no matter in what form attempted. In delivering the opinion of the court in *Bronson v. Kinzie*, 1 How. 311, 316, 320, 11 L. ed. 143, 145, 146, Chief Justice Taney said of this prohibition: "It was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union by placing them under the protection of the Constitution of the United States. And it would but ill become this court, under any circumstances, to depart from the plain meaning of the words used, and to sanction a distinction between the right and the remedy, which would render this provision illusive and nugatory; mere words of form affording no protection and producing no practical result."

A judgment of a state court cannot be enforced out of the state by execution issued within the state, nor can execution be issued thereon without the state; but this does not mean that there is no means of enforcing a judgment out of the state in which it is obtained. It can be enforced in another state by action brought in a court of that state. *M'Elmoyle v. Cohen*, 13 Pet. 312, 325, 10 L. ed. 177, 183. While the original cause of action is merged in the judgment, and cannot be made the basis of another action, a right of action arises upon the judgment which can be exercised in other states as a means of obtaining payment of the debt. If the judgment is obtained as a means of enforcing a contract, the subsequent proceedings in another state are equally a means of its enforcement, although their apparent and more immediate

purpose is to compel satisfaction of the judgment. When the contract upon which the Nebraska judgment is founded was entered into, this right to enforce a judgment obtained in a court of one state in the courts of the several states was part of the law of the land. It was expressly recognized by the law of Colorado, which limited the time for commencing an action in the exercise of the right to a period of six years. The law establishing this right became part of the obligation of the contract in the enforcement of which the judgment sued upon was obtained. While continuing the recognition of this right, the act of 1895 shortened the period for commencing actions upon a class of judgments, including that of plaintiff, to a period of three months. Of the application of the contract clause of the Constitution to a statute of limitation Mr. Justice Swayne said, in speaking for the court in *Edwards v. Kearsey*, 96 U. S. 595, 603, 24 L. ed. 793, 797: "Statutes of limitation are statutes of repose. They are necessary to the welfare of society. The lapse of time constantly carries with it the means of proof. The public as well as individuals are interested in the principle upon which they proceed. They do not impair the remedy, but only require its application within the time specified. If the period limited be unreasonably short, and designed to defeat the remedy upon pre-existing contracts, which was part of their obligation, we should pronounce the statute void. Otherwise we should abdicate the performance of one of our most important duties."

The Constitution declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state" (U. S. Const. art. 4, § 1), and the act of Congress of May 26, 1790, provides that the records and judicial proceedings of each state "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence . . . [they have been] taken." 1 Stat. at L. 122, chap. 11; Rev. Stat. § 905, U. S. Comp. Stat. 1901, p. 677. The effect of these provisions is that in the courts of other states the judgment of a court of one state is not impeachable except for fraud or want of jurisdiction (neither of which is here suggested), is indisputable proof that it rests upon an unanswerable cause of action, is conclusive evidence that the right to its enforcement is wholly unaffected by any laches or lapse of time which preceded its rendition, and gives a right of action for its enforcement subject to limitation and other laws of the forum which regulate, but do not deny, un-

reasonably restrict, or oppressively burden, the exercise of that right. *Keyser v. Lowell*, 54 C. C. A. 574, 117 Fed. 400; *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475.

Thus, from whatever point the shortened limitation in the act of 1895 is considered, the question arises whether it is reasonable. No reported decision has come under our observation which sustains a like limitation. The following cases sustain limitations of approximately the periods named. *Terry v. Anderson*, 95 U. S. 625, 24 L. ed. 365, nine and one-half months; *Vance v. Vance*, 108 U. S. 514, 27 L. ed. 808, 2 Sup. Ct. Rep. 854, eight and one-half months; *Wheeler v. Jackson*, 137 U. S. 245, 34 L. ed. 659, 11 Sup. Ct. Rep. 76, six months; *Turner v. New York*, 168 U. S. 90, 42 L. ed. 392, 18 Sup. Ct. Rep. 38, six months; *Stine v. Bennett*, 13 Minn. 153, Gil. 138, four and one-half months; *Russell v. H. C. Akeley Lumber Co.* 45 Minn. 376, 48 N. W. 3, six months; *Bigelow v. Bemis*, 2 Allen, 496, five months; *Smith v. Paokard*, 12 Wis. 371, eight and one-half months; *Cameron v. Louisville, N. O. & T. R. Co.* 69 Miss. 78, 10 So. 554, one year; *Horbach v. Miller*, 4 Neb. 31, four and one-half months; *Myers v. Wheelock*, 60 Kan. 747, 57 Pac. 956, six months; *Power v. Kitching*, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737, seven months. In *McGahey v. Virginia*, 135 U. S. 662, 708, 34 L. ed. 304, 318, 10 Sup. Ct. Rep. 972, a limitation of one year was declared unreasonable, and in *Berry v. Randall*, 4 Met. (Ky.) 292, the same was said of a limitation of thirty days. In *Merchants' Nat. Bank v. Braithwaite*, 7 N. D. 358, 372, 66 Am. St. Rep. 653, 75 N. W. 244, it was doubted whether three and one-half months was a reasonable time, but thirteen months was pronounced reasonable. No useful purpose would be served by referring more particularly to the limitations which were sustained or rejected in these cases. It is sufficient to say that all of them recognize the true rule to be that a limitation is unreasonable which does not, before the bar takes effect, afford full opportunity for resort to the courts for the enforcement of the rights upon which the limitation is intended to operate, and that this opportunity must be afforded in respect of existing rights of action after they come within the present or prospective operation of the statute and in respect of prospective rights after they accrue.

It is usual in prescribing periods of limitation to adjust the time to the special nature of the rights of action to be affected, the situation of the parties, and other surrounding circumstances. A single period cannot be fixed for all cases, because what would be reasonable in one class of cases

would be entirely unreasonable in another. Each limitation must, therefore, be separately judged in the light of the circumstances surrounding the class of cases to which it applies, and, if the time is reasonable in respect of the class, it will not be adjudged unreasonable merely because it is deemed to operate harshly in some particular or exceptional instance; as where the person against whose right the limitation runs is under some disability, out of the state, or unavoidably prevented from suing within the time prescribed. *Vance v. Vance*, 108 U. S. 514, 521, 27 L. ed. 808, 811, 2 Sup. Ct. Rep. 854; *Bank of Alabama v. Dalton*, 9 How. 522, 528, 13 L. ed. 242, 244; *Amy v. Watertown*, 130 U. S. 320, 32 L. ed. 953, 9 Sup. Ct. Rep. 537. An examination of the act of 1895, which is copied at length in the statement preceding this opinion, shows that it first prescribes a general limitation of six years upon all actions upon judgments rendered without the state, and then, by two provisos or excepting clauses, declares that, if the judgment be based upon a cause of action which accrued more than six years prior to the commencement of the action upon the judgment, and if the judgment shall have been rendered more than three months prior to the bringing of the action, the defendant, if a bona fide resident of the state, may plead these facts in bar of the action. The concurrence of three things makes the bar effective: (1) Defendant's bona fide residence in the state; (2) the lapse of six years after the accrual of the cause of action upon which the judgment is based; (3) the lapse of three months after the rendition of the judgment. The purpose and effect of this special limitation would be more easily appreciated, but not altered, if the provision had been: "No action shall be maintained against a bona fide resident of this state upon a judgment rendered without the state unless the action thereon be commenced within six years after the accrual of the cause of action upon which the judgment is based, save that in no case shall the right of action be barred until three months after the rendition of the judgment." The result would also be the same if it had been declared: "No action shall be maintained against a bona fide resident of this state upon a judgment rendered without the state unless the action be commenced within three months after the judgment is rendered, save that in no case shall the right of action be barred until after six years from the accrual of the cause of action upon which the judgment is based." A right of action does not accrue upon a judgment until it is rendered, and, of course, the right cannot be exercised un-

til it accrues. The purpose of statutes of limitation is to compel the exercise of rights of action within a reasonable time after they accrue and before the evidence upon which their enforcement or resistance depends is lost, rendered difficult of production, or impaired by lapse of time. Nothing could be more unreasonable or more certainly violative of constitutional prohibitions than to bar rights of action because of the lapse of time prior to their accrual, when they could not have been exercised. Yet the bar of this special limitation is in all cases rested partly, and in some almost entirely, upon the lapse of time prior to the rendition of the judgment, when the right of action had not accrued. This portion of the act of 1895 is a law of limitation only as it attempts to interpose a bar because of inaction or laches in enforcing a judgment after it is obtained. It is unique in that it does not prescribe a fixed or definite time for commencing the actions to which it applies. Where the limitation begins to run more than five years and nine months after the accrual of the cause of action upon which the judgment is based, the action is barred if not brought in three months. Where the judgment is obtained upon the day when the original cause of action accrues, as it may be by confession or consent, the action upon the judgment is not barred for six years. Thus the period within which the bar becomes effective ranges all the way from three months to six years, and this is equally true of judgments existing at the time and of those subsequently rendered. At what time within these limits any particular action is barred depends upon the special facts of the case. The longest period is reasonable, and the shortest is altogether unreasonable. In these circumstances it may become a serious question whether the entire provision falls as wanting in the requisites of a law of limitation, or whether, as respects the various intermediate periods, every man must determine for himself and at his peril whether the time allowed for exercising his right of action is reasonable (*Ludwig v. Stewart*, 32 Mich. 27; *Osborne v. Lindstrom*, 9 N. D. 1, 9, 46 L. R. A. 715, 81 Am. St. Rep. 516, 81 N. W. 72), but the consideration of that question is not essential to the decision of the present case.

Our reasons for pronouncing the three-months limitation unreasonable are these: It is not founded upon any proper regard for the interests of the community or of judgment debtors, or for the nature of the actions affected, and it does not afford judgment creditors full or sufficient opportunity for recourse to the courts for the enforcement of their judgments. Before an ac-

tion upon a judgment recovered in one state can be brought in a court of another state, it is necessary to ascertain that the debtor, or property of his, is there, to discover in what county or court the action must be brought, and to obtain the assistance of counsel. This is usually accomplished through letter correspondence, and that requires time. A creditor cannot be expected or required, immediately upon obtaining a judgment against his debtor, or immediately upon a change in the existing statute of limitations, to devote his entire time and attention to the enforcement of the judgment, to the exclusion of his other affairs and duties. Nor does a just regard

for the interests of the debtor require it. The latter's interests will be better served if he has a reasonable opportunity to satisfy the judgment without further proceedings or expense. No presumption necessarily or immediately arises that he will not do so. There is little danger that the evidence to sustain the enforcement or resistance of a judgment will be lost, rendered difficult of production, or impaired within so brief a period as three months. A judgment does not become a stale demand within that time, and there is no laches in so short a postponement of its enforcement.

The judgment is reversed, with a direction to sustain the demurrer to the answer.

KENTUCKY COURT OF APPEALS.

Roy CRABTREE, by Next Friend, *Appt.*,
v.

John T. DAWSON.

(.....Ky.....)

1. A property owner, who, having removed from his premises an intoxicated person, strikes and injures a stranger who is attempting to enter the premises, under the belief, after exercising the highest care practicable under the circumstances to ascertain the facts, that it is the person whom he has just ejected returning, is excused from liability for the assault on the ground of self-defense and apparent necessity, if belief in the identity of the person is based on reasonable grounds, and, if, in the exercise of a reasonable judgment, he

further believes that it is necessary to strike the ejected person to defend himself, and uses no more force than is, or appears to be, necessary for the purpose.

2. To excuse a person for assaulting another under the belief that he is a third person, upon whom an assault would be justified, he must exercise the highest degree of care practicable under the circumstances to ascertain whether or not the person whom he is about to strike is in fact the one whom he believes him to be.

3. One who recklessly and wantonly strikes a stranger upon the pretext of defending himself against one with whom he has had an altercation is liable for exemplary, as well as compensatory, damages.

(November 29, 1904.)

NOTE.—Mistaken identity as justification for assault.

Circumstances not unlike those in *CRABTREE v. Dawson* appear in *Courvoisier v. Raymond*, 28 Colo. 113, 47 Pac. 284. Raymond, the defendant, being awakened by rowdies who had entered his house, apparently for the purpose of burglary, expelled them and followed them to the street, where he fired several shots to frighten them away. They were joined by others, however, who threw stones and brickbats at defendant. Several special police, attracted by the shots, came up together, two stopping to arrest the men in the street, while one advanced toward the defendant. The latter, mistaking him for one of the gang of rowdies, deliberately fired upon him, inflicting the injury complained of. In the trial the jury were instructed that, "If you believe from the evidence that at the time the defendant shot the plaintiff the plaintiff was not assaulting the defendant, then your verdict should be for the plaintiff." This instruction was held erroneous, on appeal, as excluding from the jury's consideration defendant's evidence that "the circumstances surrounding him at the time of the shooting were such as to lead a reasonable man to believe that his life was in danger, or that he was in danger of receiving great bodily harm at the hands of the plaintiff."
..... If the jury believed from the evidence
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that the defendant would have been justified in shooting one of the rioters had such person advanced towards him as did the plaintiff, then it became important to determine whether the defendant mistook plaintiff for one of the rioters, and, if such a mistake was in fact made, was it excusable in the light of all the circumstances leading up to and surrounding the commission of the act? If these issues had been resolved by the jury in favor of the defendant he would have been entitled to a judgment."

The court does not lay down any rule as to the amount of care required of the defendant in ascertaining the identity of his apparent assailant, but leaves it to the jury whether there actually was a mistake in regard thereto, and, if there was, then whether or not it was excusable.

Paxton v. Boyer, 67 Ill. 132, 16 Am. Rep. 615, which is the only other American case, is sufficiently noted in the opinion in *CRABTREE v. Dawson*.

Under the earlier English law, where trespass lay for any invasion of a party's right to security of person, such an assault was actionable. Thus, it appears in *James v. Campbell*, 5 Car. & P. 372, that at a public dinner X. and defendant became involved in a quarrel, in the course of which "defendant struck the plaintiff and gave him two black eyes, and otherwise in-

A PPEAL by plaintiff from a judgment of the Circuit Court for Daviess County in favor of defendant in an action brought to recover damages for an assault and battery. *Reversed.*

The facts are stated in the opinion.

Messrs. J. D. Atchison and L. P. Tanner for appellant.

Messrs. Wilfred Carico and La Vega Clements, for appellee:

If Dawson believed, or had reasonable grounds for believing, that appellant was Ollie Noble returning to assault him with bricks and to carry out his threat, then he had the right, using due care as a prudent man would under the circumstances, to strike Crabtree, and, if believing that he was striking Noble under such circumstances, he would not be held civilly or criminally for his act.

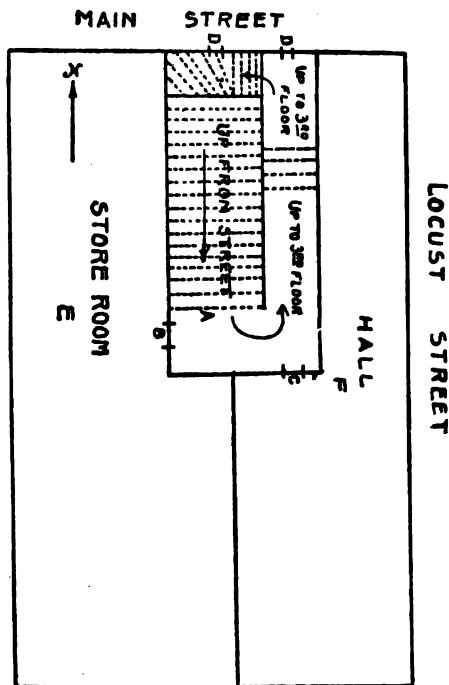
If a man does an act, criminal in its nature, but which is excusable under the criminal law, then he cannot be held civilly for such act.

Hughes, Crim. Law, § 2452; 1 Roberson, Ky. Crim. Law, p. 21; *Herron v. Dermody*, 15 Ky. L. Rep. 703; *Hart v. Com.* 8 Ky. L. Rep. 715, 2 S. W. 673; 1 Joyce, Damages, § 367, p. 424; 1 Thomp. Neg. § 14; *Higgins v. Minaghan*, 78 Wis. 602, 11 L. R. A. 138, 23 Am. St. Rep. 434, 47 N. W. 941; *Welch v. Durand*, 36 Conn. 182, 4 Am. Rep. 55; *Paston v. Boyer*, 67 Ill. 132, 16 Am. Rep. 615.

Burnam, Ch. J., delivered the opinion of the court:

This action for assault and battery instituted by appellant, Roy Crabtree, against the appellee, John T. Dawson, grew out of the following facts: Appellee, Dawson, owns a three-story building on the corner of Main and Locust streets, in Owensboro, Kentucky. The room on the first floor is used as a business house. The second floor is divided by a partition, the room on one side being used for private entertainments. The third floor is a large hall, which was rented by appellee for dancing and public entertainments. The following diagram of the second floor will give a fair understand-

ing of the location of the parties and place at the time of the assault:



THE RED MARK, REFERRED TO IN THE OPINION OF THE COURT, IS INDICATED BY THE DOTTED LINES.

A is Dawson at the head of the stairs when he struck Crabtree. The red mark is the stairway leading from the store to the landing of the second floor. B is a door entering the storeroom from the landing, which is about 6 feet wide, and which Dawson opened to get the musket with which he struck appellant. C is a door opening into the entertainment hall on the second floor. D, D, are two windows looking from the second floor to the third floor. E is a storeroom on the second floor, and F is the hall on the second floor. On the night on which this accident occurred, Dawson had rented the large hall in the third story to Philip Dorn and Ed Riney to give what was

jured him." There was evidence that plaintiff had been mistaken for X., and defendant's attorney contended that, if his client had not intentionally struck plaintiff, the jury should find for him. But the court instructed: "If you think . . . that the defendant struck the plaintiff, the plaintiff is entitled to your verdict whether it was done intentionally or not. But the intention is material in considering the amount of the damages."

See also *Lucas v. Mason*, L. R. 10 Exch. 251, where at an assembly a disturbance occurred in the rear of the hall, and the speaker ordered the ushers to "bring those men to the front." 67 L. R. A.

Plaintiff, who had had no part in the disturbance, was seized and dragged forward, receiving the injuries complained of. Without discussing the ultimate question of liability for the act, it was held that the ushers were not servants of the speaker in such sense as to render him liable for their acts.

No other cases, American or English, in which the element of mistaken identity appears, have been found after exhaustive search.

Upon the general subject of intent as an element of liability in assault, see cases collected in note to *Vosburg v. Putney*, 14 L. R. A. 228. W. A.

known as a "pay dance" for the benefit of the young people of the city. On the same night the daughter of appellee and a number of friends were giving a social entertainment in the small hall on the second floor. While these two entertainments were in progress, one Noble, while intoxicated, gained admittance to the hall on the third floor, without having paid the customary charge for admittance. Riney, one of the lessees, approached him, and insisted that he should either pay or leave the hall. He at first refused, but finally Riney succeeded in enticing him out of the room into the hall, and then closing the door, leaving Noble on the outside. He became disorderly, thereby attracting the attention of Dawson, who approached him. Dawson's version of what took place after this is as follows: "Noble remarked that he was going back and clean out the whole thing, and I said, 'No, you won't, friend.' He replied, 'I am doing no harm.' I told him he must go downstairs. He said that he would not. I replied, 'You will,' and took hold of him. He went down. I may have shoved him a little. He stopped in front of the door of the hall on the second floor, where he tried to go in. I pushed him by, and got down to the platform on the first floor, where he sat down. He then got up and said, 'If you will come down here, I will fix it with you.' I replied, 'I don't want to bother with you.' This platform goes into my storeroom. And when I got up to the head of the steps, somebody remarked, 'He is getting some bricks.' I stepped into the door and got an old musket. Just then Crabtree came running rapidly up the steps from the store below. I believed it was Noble returning to attack me, and called out to him, 'Don't come up here;' but he paid no attention to me, and, when he got up within striking distance, supposing it was Noble, I struck him with the butt of the musket, when I discovered that I had made a mistake and hit the wrong man." It is also shown that the hall at this point was somewhat dimly lighted, and that after appellee discovered his mistake he took appellant to a drug store, had his wounds dressed by a physician, and sent him home in a carriage, and that he went the next day to express his regret at the occurrence, and offered to pay his doctor's bill, for loss of time, and for a new suit of clothes, the one worn by appellant having been greatly injured. The testimony for plaintiff is to the effect that he was only seventeen years old; that he was on his way as a guest to the dance being given in the hall on the third floor; that, whilst he heard Dawson tell Noble not to come back at the time he

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pushed him out of the store, he did not hear anyone call to him not to come up; that, as a result of the blow, he was knocked to the bottom of the steps, and sustained serious injuries. The jury, on these facts and the instructions given by the court, returned a verdict for the defendant, and plaintiff has appealed.

The main ground for reversal is that the court did not properly instruct the jury. As the question is a somewhat novel one, we deem it best at this point to insert the instructions in full. They are as follows:

"(1) The court instructs the jury that if they believe from the evidence that the defendant on the — day of November, 1903, did wrongfully, wilfully, recklessly, or unlawfully assault, beat, bruise, or wound the plaintiff by striking him violently on the head with the butt of a heavy gun or musket, thereby inflicting a dangerous wound on his head, from the effect of which assault and wounding the plaintiff suffered physical and mental pain and anguish, and was damaged thereby, they should find for the plaintiff such a sum of money as will reasonably compensate for the physical and mental pain which he sustained as the proximate result of said assault, not exceeding the sum of \$5,000.

"(2) The court further instructs the jury that if they believe from the evidence that the assault of the defendant on the plaintiff was wilful and reckless, and the defendant did not believe, or have reasonable grounds to believe, when he made said assault that the person he was assaulting was Ollie Noble, then they may find any sum as punitive damages in favor of the plaintiff, provided, however, all damages they may find for the plaintiff do not exceed in the aggregate the sum of \$5,000.

"(3) The court further instructs the jury that if they believe from the evidence that the striking of the plaintiff by the defendant as set out in the petition was unintentional, and they further believe that it was recklessly committed by the defendant, and that the defendant did not use ordinary care and diligence, considering all the circumstances, to discover who the person was that he was about to strike before he struck, then the law is for the plaintiff, and the jury should find for the plaintiff; and, if they find for the plaintiff, the measure of their finding should be such sum as will reasonably compensate the plaintiff for the physical and mental pain which he sustained as the proximate result of said striking or assault, not exceeding the sum of all as mentioned in instruction No. 1.

"(4) The court further instructs the jury that, if they believe from the evidence

that the defendant believed, and had reasonable ground to believe, that the person whom he struck was Ollie Noble, and said Noble had been on the premises of the defendant immediately before said assault, and had been ordered to leave defendant's premises, and had threatened to return and assault the defendant or his guests, and the defendant believed, and had reasonable grounds to believe, that when the plaintiff was coming up his stairway that it was Ollie Noble, and that it was necessary to strike the plaintiff in order to defend himself and his guests from the threatened attack upon him and his guests, and the defendant used due care and diligence, considering all the circumstances and facts surrounding him, and his connection with said Noble, immediately before said time, and unintentionally struck the plaintiff, mistaking the plaintiff for the said Noble, then the law is for the defendant, and the jury should so find.

"(5) The court further instructs the jury that if they believe from the evidence that at the time the defendant assaulted the plaintiff he had just previously thereto had a difficulty with one Noble, and he had ordered said Noble to leave the premises, and took him out of his house, and that said Noble threatened to immediately return to the defendant's house, and threatened to assault the defendant, and immediately thereafter he did see the plaintiff coming up the plaintiff's stairway on his premises, and, after exercising due care to ascertain whether or not it was Noble, did believe the plaintiff to be said Noble, and defendant was in the exercise of reasonable care for his own safety and protection of his property and guests, and in his own house, and was also reasonably careful and exercised due care to discover whether the person he was about to strike or assault was or was not, the said Noble, and they further believe that before striking the plaintiff he ordered the plaintiff to leave defendant's premises, and the plaintiff did not do so, or offer to leave, and the defendant believed at the time he struck the person he was about to strike Ollie Noble, that he was then in danger of great bodily harm or death at the hands of the said Noble, and that it was necessary to strike him in order to protect his guests, property, family, or himself, from the threatened assault, and he had used no more force than was reasonably necessary to protect himself, his guests, or his property, from said assault, then the law is for the defendant, and the jury should so find, except they believe from the evidence that the defendant used more force and violence in striking than

was necessary to eject the person from his premises, if he believed it to be Ollie Noble, or more force and violence than was necessary to protect his property, his guests, his family, and himself from the threatened assault of said Ollie Noble.

"(6) The court further instructs the jury that, if they believe from the evidence that the striking of the plaintiff by the defendant was unintentional, and that the defendant was intending to strike one Ollie Noble, and that the defendant would not have struck the plaintiff, except for the plaintiff's own carelessness and negligence in coming up the stairway of the defendant, and they further believe that the plaintiff's own carelessness and negligence contributed to and brought about the damages now complained of, then the law is for the defendant, and the jury should so find.

"(7) 'Due care,' as used in the foregoing instructions, is that degree of care that a prudent man would exercise under the same or similar circumstances.

"(8) The court further instructs the jury that, if they believe from the evidence that the striking of the plaintiff by the defendant on the occasion mentioned in instruction No. 1 was wilful or reckless, or that the defendant did not exercise due care in ascertaining who he was about to strike, then the jury cannot consider mitigating circumstances, as against the actual damage that the plaintiff sustained by such striking, but can only consider the mitigating circumstances and the justification, if any, of the defendant, in so far as it affects the punitive damages sought to be recovered in this action."

Both the plaintiff and defendant excepted to all the instructions given by the court, and offered instructions covering their respective views of the law. Those offered by appellant were based upon the theory that he was, in any contingency, under the admitted facts of the case, entitled to compensatory damages for the injuries resulting from the assault and battery made upon him by the defendant. On the other hand, those offered by defendant are based upon the theory that, if he believed, and had reasonable grounds to believe, at the time he struck plaintiff, that it was Ollie Noble whom he was striking, and that it appeared to him to be necessary in order to protect himself or guests from a threatened assault at the hands of Noble, he was excusable on the grounds of apparent necessity and self-defense. From a careful examination of the decisions of this court and those of other jurisdictions, we feel warranted in asserting that no one is liable, civilly or criminally, for an unintentional

consequential injury which resulted from a lawful act, where neither negligence nor folly can be imputed to him, and that the burden of proving negligence or folly, where the act is lawful, is always upon the plaintiff. In other words, that the foundation of defendant's liability in all such cases is negligence, or the failure on his part to exercise that degree of care to avoid making a mistake which an ordinarily prudent man would exercise under the same or similar circumstances. A very full discussion of this class of cases is found in *Morris v. Platt*, 32 Conn. 84. As this is the oldest and best-considered case on the subject to which our attention has been directed, we quote from it liberally as follows: "An accident is an event or occurrence which happens unexpectedly, from the uncontrollable operations of nature alone, and without human agency, as when a house is stricken and burned by lightning, or blown down by tempest, or an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both; and a classification which will embrace all the cases of any authority may easily be made. In the first class are all those which are inevitable or absolutely unavoidable, because effected or influenced by the uncontrollable operations of nature; in the second class, those which result from human agency alone, but were unavoidable under the circumstances; and in the third class, those which were avoidable, because the act was not called for by any duty or necessity, and the injury resulted from the want of that extraordinary care which the law reasonably requires of one doing such a lawful act, or because the accident was the result of actual negligence or folly, and might, with reasonable care adapted to the exigency, have been avoided. Thus, to illustrate, if A burns his own house, and thereby the house of B, he is liable to B for the injury; but if the house of A is burned by lightning, and thereby the house of B is burned, A is not liable. The accident belongs to the first class, and was strictly inevitable and absolutely unavoidable. And if A should kindle a fire in a long unused flue in his own house, which has become cracked without his knowledge, and the fire should communicate through the crack and burn his house, and thereby the house of B, the accident would be unavoidable, under the circumstances, and belong to the second class. But if A, when he kindled the fire, had reason to suspect that the flue was cracked, and did not examine it, and so was guilty

of negligence, or knew that it was cracked and might endanger his house and that of B, and so was guilty of folly, he would be liable, although the act of kindling the fire was a lawful one, and he did not expect or intend that the fire should communicate." The learned writer goes on to say further: "The foundation of that liability in every case of accident, where it is the result of human agency, uninfluenced by the operations of nature, and the act is lawful, is really negligence. This is true of collisions between vessels on the water, or horses and vehicles and persons upon the land. . . . So, when a man in firing at a mark unintentionally wounds another, the injury is direct, and the form of action is trespass; but the ground of liability is negligence in doing an unnecessary and avoidable, though lawful, act without that extraordinary degree of care which the law demands in such circumstances, and which would have prevented the accident."

In *Brown v. Kendall*, 6 Cush. 292, which was an action of assault and battery, the defendant accidentally hit the plaintiff, a bystander, while raising a stick to strike and part two dogs which were fighting. Chief Justice Shaw, in his opinion in that case, held that the defendant was not liable, unless the act was done in the want of the exercise of due care adapted to the exigencies of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it. In *Paxton v. Boyer*, 67 Ill. 132, 16 Am. Rep. 615, the action was for an assault and battery. It appeared that defendant and plaintiff's brother were in a conflict. When defendant struck plaintiff with a knife, supposing him to be the brother, plaintiff had in fact given no provocation. The jury found for the plaintiff, and assessed his damages. The court instructed for that plaintiff "that it was no defense, so far as actual damages are concerned, that the defendant had been violently assaulted by persons other than the plaintiff, or was then being assaulted by such other persons, or that he may have honestly believed he was striking . . . [the plaintiff's brother] when he struck the plaintiff, or that he may have honestly believed it was necessary for his self-defense to assault the plaintiff, if the jury find from the evidence that the plaintiff was not a party to such assault upon the defendant; such evidence of mistake of facts or good intentions on the part of the defendant can only be considered . . . by the jury as a defense against the inflict-

tion by the jury of vindictive damages, and not as a defense against such actual damages as the evidence may show the plaintiff has suffered from such assault, or as naturally resulted from such assault." The instructions were disapproved of in the opinion of the supreme court, the court saying: "If a person, doing a lawful act in a lawful manner, with all due care and circumspection, happens to kill another, without any intention of doing so, he is not liable criminally. How, then, can it be said he shall be responsible in a civil case, when, in doing a lawful act with due care, and an injury happens, he shall be deemed in fault, and mulcted in damages? It is said by appellee the rule is different in civil cases; that the motive, . . . intent, or design of the wrongdoer towards the plaintiff is not the criterion as to the form of the remedy, for, when the act occasioning the injury is unlawful, the intent of the wrongdoer is immaterial; but appellant here is no wrongdoer, as the jury have said by the special verdict." The judgment in the case was reversed.

In 1 Joyce on Damages, p. 427, § 367, the author says: "Though an assault may be unintentional, yet, if it is recklessly committed, the party guilty will be liable in damages therefor, and the injured party may recover such damages as are the natural and direct result of the act of violence, including mental and physical pain and suffering. But one who, in the exercise of his rights of self-defense, inflicts an unintentional injury upon a third party, is not responsible in damages therefor, as where a person was assaulted by another, when he struck a third person, mistaking him for the assailant." Roberson's Criminal Law & Procedure, in § 542, p. 752, lays down the rule as follows: "This right of self-defense exists although the danger is not real, but apparent only. A person will not be held responsible civilly or criminally if he acts in self-defense from a real and honest conviction induced by reasonable evidence, although he may have been mistaken as to the extent of the actual danger;" citing a number of Kentucky cases in support of the text.

When we apply the principles of law announced in these decisions to the case at hand, it follows that if the defendant, at the time he struck the plaintiff, believed, and had reasonable grounds to believe, that he was Ollie Noble, and that he further be-

lieved that it was necessary, in the exercise of a reasonable judgment, to strike Noble, in order to defend himself from a threatened attack about to be made upon him by Noble, and that he used no more force than was necessary, or appeared to him to be necessary, for this purpose, then he is excused on the ground of self-defense and apparent necessity. But it was the duty of the defendant to have exercised the highest degree of care practicable under the circumstances to have ascertained whether the person whom he was about to strike was in fact the one whom he believed him to be, and from whom he apprehended danger to himself. And if he recklessly and wantonly struck plaintiff, he was entitled, in addition to compensatory damages, to exemplary damages as well.

Whilst the instructions given in the case by the trial court are based upon the proper theory, they are in several important respects technically erroneous. For instance, in the third instruction only "ordinary care and diligence" are required of the defendant in ascertaining whether the person he was about to strike was in fact the person from whom he anticipated injury. This is error. He should have been required to exercise the highest or utmost care practicable under the circumstances by which he was surrounded.

In the fourth and fifth instructions the words "due care and diligence" are used. While the word "due" is defined to be "that which is owed," or "that which one has a right to demand or claim," we think it hardly comes up to the requirements of this case.

Instruction No. 5 is also objectionable in that it specifically calls the attention of the jury in detail to the facts testified to by the defendant, and relied on to excuse his conduct. This error has been frequently pointed out and condemned by this court.

The sixth instruction is based upon the plea of contributory negligence, and is, in our opinion, out of place in this case. There is not a particle of evidence to show contributory negligence on the part of the plaintiff. He was at the place and doing exactly what he had the right to do. The instruction should therefore have been omitted altogether.

For reasons indicated, *the judgment is reversed*, and cause remanded for a new trial not inconsistent with this opinion.

WYOMING SUPREME COURT.

Abe FRANK *et al.*, *Plffs. in Err.*,
v.

Claude STRATFORD-HANDCOCK, *Exr.*,
etc., of S. Henrietta Carlile-Kent, De-
ceased.

(.....Wyo.....)

1. In a suit to compel specific performance of a contract to convey land which, subsequently to the execution of the contract, has been conveyed by the vendor to, and paid for by, a third person, the decree should require a conveyance by the latter, and entitle him to the purchase money, and not declare his deed void, and direct payment of the purchase money to the original vendor.
2. Absence of obligation, on the part of one who has an option to purchase land, to make the purchase, will not bar his right to have the contract enforced against the vendor, when he elects to exercise the option, and tenders the purchase price.
3. A lease with the affirmative covenants of the lessee is sufficient consideration for a contract giving him a right to purchase the property during the continuance of the lease, so that the option cannot be withdrawn by the lessor during that time.
4. A clause requiring the lessee to deposit money with the lessor to secure the faithful performance by the lessee of the covenants of the lease is not a covenant, but a condition, failure to perform which will prevent the lease from taking effect, although the terms of the contract indicate a present demise, where the covenants to be secured relate to the payment of taxes, the operation and use of the property, and the delivery of a portion of the crops as rent.
5. Demand for compliance with a condition precedent to the taking effect of a lease is not necessary to put the lessee in default for failure to comply, and thereby defeat the operation of the instrument.
6. A lease which does not become operative because of failure to comply with a condition precedent does not constitute a consideration for an agreement contained in it, giving the lessee an option to purchase the property.
7. The fact that the lessee is in possession of the leased property at the time of the execution of the lease, with nothing to show that possession was delivered to him by the lessor, is not sufficient to give validity to the lease, which would otherwise be of no

NOTE.—As to rights conferred by a "refusal" or "option," including right to specific performance of contract created thereby, see also, in this series, *Litz v. Goosling*, 21 L. R. A. 127, and note, and *Higler v. Baker*, 24 L. R. A. 255.

As to necessity of mutuality generally to entitle one to specific performance of contract, see *Woodruff v. Woodruff*, 1 L. R. A. 380; *Graybill v. Brugh*, 21 L. R. A. 133; *Moayon v. Moayon*, 60 L. R. A. 415; and *Livesley v. Johnston*, 65 L. R. A. 783.

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effect because of failure to comply with a condition precedent.

8. An agreement, without consideration, giving an option to purchase real estate, may be revoked at any time before it is accepted, and a revocation is effected by a sale and conveyance of the property to a stranger.
9. A tender made for the purpose of exercising an option to purchase real estate which has been conveyed by the vendor to a third person after the execution of the contract is properly made to the original vendor.
10. A lessee who has not entitled himself to possession under the lease because of failure to comply with a condition precedent is not entitled to damages for being evicted from and kept out of possession of the property.

(June 27, 1904.)

ERROR to the District Court for Crook County to review a judgment in favor of plaintiff in an action brought to compel specific performance of an alleged contract for the conveyance of real estate, and to recover damages for being evicted from and deprived of the possession of the premises. *Reversed.*

The facts are stated in the opinion.

Messrs. Nichols & Adams, W.S. Metz, and *Gibson Clark*, for plaintiffs in error:

If the agreement, when concluded, lacks mutuality of right and obligation, no subsequent event or act of the party seeking to enforce it can obviate the objection, and render it capable of specific execution.

Pom. Contr. § 166; Duvall v. Myers, 2 Md. Ch. 401; *Bronson v. Oahill*, 4 McLean, 19, Fed. Cas. No. 1,926; *Tyson v. Watts*, 1 Md. Ch. 13.

A person cannot repudiate one portion of a contract and then enforce the others, even in case of fraud.

2 *Parsons, Contr.* 813, note 2; *Grant v. Law*, 29 Wis. 99; *Fetter, Eq.* 278; *Haggerty v. Elyton Land Co.* 89 Ala. 428, 7 So. 651; *Eastman v. Plumer*, 46 N. H. 464; *Alexander v. Wunderlich*, 118 Pa. 610, 12 Atl. 580; *Chicago Municipal Gaslight & Fuel Co. v. Lake*, 130 Ill. 42, 22 N. E. 616.

For specific performance, mutuality of obligation is essential.

Fetter, Eq. 273; *Flight v. Bolland*, 4 Russ. Ch. 301; *Rutland Marble Co. v. Ripley*, 10 Wall. 339, 19 L. ed. 955; *Iron Age Pub. Co. v. Western U. Teleg. Co.* 83 Ala. 498, 3 Am. St. Rep. 758, 3 So. 449; *Bourget v. Monroe*, 58 Mich. 563, 25 N. W. 514; *Brown v. Munger*, 42 Minn. 482, 44 N. W. 519; *Butman v. Porter*, 100 Mass. 337; *Glass v. Rowe*, 103 Mo. 513, 15 S. W. 334; *Waterman, Spec.*

Perf. § 196; 3 Pom. Eq. Jur. § 1405; *Bear Track Min. Co. v. Clark*, 6 Idaho, 196, 54 Pac. 1007; *Chapman v. Morgan*, 55 Mich. 124, 20 N. W. 820; *Barker v. Critzer*, 35 Kan. 459, 11 Pac. 382; *Maynard v. Brown*, 41 Mich. 298, 2 N. W. 30; *McMurtrie v. Bennette*, Harr. Ch. 124; *Hawley v. Sheldon*, Harr. Ch. 420; *Chambers v. Livermore*, 15 Mich. 381; *Federal Oil Co. v. Western Oil Co.* 112 Fed. 373; *Pullman Palace Car Co. v. Texas & P. R. Co.* 11 Fed. 625; *Duff v. Hopkins*, 33 Fed. 599; *Adderley v. Dixon*, 1 Sim. & Stu. 610; *Jackens v. Nicolson*, 70 Ga. 198; *Blalock v. Waggoner*, 82 Ga. 122, 8 S. E. 48; *Ikerd v. Beavers*, 106 Ind. 485, 7 N. E. 326; *Old Colony R. Corp. v. Evans*, 6 Gray, 25, 66 Am. Dec. 394; 1 Story, Eq. Jur. §§ 750, 769-777.

It is always an answer to a bill for a specific performance of an agreement by one party, that, if the defendant were to seek performance of the same agreement against the plaintiff, he could not obtain it; both parties must be bound, otherwise there can be no valid agreement.

5 Wait, Act. & Def. p. 788; *Beard v. Linthicum*, 1 Md. Ch. 345; *State v. Baum*, 6 Ohio, 383; *Rutland Marble Co. v. Ripley*, 10 Wall. 359, 19 L. ed. 961; *Ewins v. Gordon*, 49 N. H. 444; *Tarr v. Scott*, 4 Brewst. (Pa.) 49; *Moore v. Fitz Randolph*, 6 Leigh, 175, 29 Am. Dec. 208; *Luse v. Deitz*, 46 Iowa, 205; *Hills v. Croll*, 2 Phill. Ch. 62; *Gervais v. Edwards*, 2 Drury & War. 80; *Kimberley v. Jennings*, 6 Sim. 340; *Chadwick v. Chadwick*, 121 Ala. 580, 25 So. 631; *Dunn v. McGovern*, 116 Iowa, 663, 88 N. W. 938; *Vawter v. Bacon*, 89 Ind. 565; *Clarke v. Koenig*, 36 Neb. 572, 54 N. W. 842; *Ford v. Euker*, 86 Va. 75, 9 S. E. 500; *King v. Gildersleeve*, 79 Cal. 504, 21 Pac. 962; *Wakeham v. Barker*, 82 Cal. 46, 22 Pac. 1131; *Stanton v. Singleton*, 126 Cal. 657, 47 L. R. A. 334, 59 Pac. 146; *Anson v. Townsend*, 73 Cal. 415, 15 Pac. 50; *Chadbourne v. Stockton Sav. & L. Soc.* 88 Cal. 636, 26 Pac. 529; *Banbury v. Arnold*, 91 Cal. 606, 27 Pac. 935.

The petition does not state facts sufficient to entitle the plaintiff to the relief demanded, nor to the relief the court below granted, nor to any relief whatever.

Meason v. Kaine, 63 Pa. 340; 22 Am. & Eng. Enc. Law, p. 1019; *Newell's Appeal*, 100 Pa. 513.

There must be a valid consideration to support the agreement.

Vasser v. Vasser, 23 Miss. 378; *Re Webb*, 49 Cal. 541; *Murphy v. Rooney*, 45 Cal. 78; *Wright v. Weeks*, 3 Bosw. 372; 22 Am. & Eng. Enc. Law, p. 1022.

A contract which a party is at liberty to revoke at any time cannot be enforced against another party.
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Alworth v. Seymour, 42 Minn. 526, 44 N. W. 1030; *Shenandoah Valley R. Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239; *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526; *Corson v. Mulvany*, 49 Pa. 100, 88 Am. Dec. 485; *Shollenberger v. Brinton*, 52 Pa. 99; *Corbitt v. Salem Gaslight Co.* 6 Or. 405, 25 Am. Rep. 541; *Utica & S. R. Co. v. Brinckerhoff*, 21 Wend. 139, 34 Am. Dec. 220; *Finley Shoe & Leather Co. v. Kurtz*, 34 Mich. 89.

The agreement to deposit with the party of the first part the sum of \$500 for the faithful performance of the lease was a condition precedent, and, until the deposit was so made, the contract, agreement, or lease, or whatever it may be called, had no force.

First Nat. Bank v. Perris Irrig. District, 107 Cal. 55, 40 Pac. 45; 2 Parsons, Contr. 519; *Shipman*, Eq. Pl. 262, note 11; 2 Story, Eq. Jur. § 1311.

Miss Kent agreed to perform, and, instead, repudiated; so, What good would it have done had they demanded?

Caines v. Smith, 15 Mees. & W. 189.

Plaintiff must prove that she has complied.

Tidball v. Challburg (Neb.) 93 N. W. 679.

It is not necessary that there should be a positive withdrawal of the option.

Dickinson v. Dodds, L. R. 2 Ch. Div. 463; *Coleman v. Applegarth*, 68 Md. 21, 6 Am. St. Rep. 417, 11 Atl. 284; *Childs v. Gillespie*, 147 Pa. 173, 23 Atl. 312.

The making of the deposit was a condition precedent to the acquisition of any right or estate by Miss Kent under the contract.

Cassity v. Robinson, 8 B. Mon. 279; *Hard v. Brown*, 18 Vt. 90; *Jenkelson v. Ruff*, 31 Misc. 276, 64 N. Y. Supp. 40; *Andis v. Personett*, 108 Ind. 202, 9 N. E. 101; 1 Beach, Contr. § 90; 1 Warvelle, Vendors, 2d ed. § 440; *Bucksport & B. R. Co. v. Brewer*, 67 Me. 295; 4 Enc. Pl. & Pr. p. 627; *Soderberg v. Crockett*, 17 Nev. 409, 30 Pac. 826; *Hirschorn v. Canney*, 98 Mass. 149; *Dresser Mfg. Co. v. Waterston*, 3 Met. 9; *Newmark, Sales*, §§ 299, 300; *McGauntien v. Wilbur*, 1 Cow. 257.

Inasmuch as Miss Kent wholly and willfully failed and refused to make this deposit, Mr. Frank was acting entirely within his legal right when he conveyed the premises in question to Mrs. McKenzie.

Pom. Spec. Perf. 2d ed. §§ 334, 335; *Gannett v. Albree*, 103 Mass. 372.

There must be strict and literal performance by the party to whom the offer is made, before he can rightly demand performance on the other side.

Harding v. Gibbs, 125 Ill. 85, 8 Am.

St. Rep. 345, 17 N. E. 60; *Coleman v. Applegarth*, 68 Md. 21, 6 Am. St. Rep. 417, 11 Atl. 284; *Parry v. Tobacco Ins. Co.* 1 Cin. Sup. Ct. Rep. 251; *Miller v. Cameron*, 45 N. J. Eq. 95, 1 L. R. A. 554, 15 Atl. 842; Pom. Spec. Perf. 2d ed. § 335; *Clarno v. Grayson*, 30 Or. 111, 46 Pac. 426; *Kelsey v. Crowther*, 162 U. S. 404, 40 L. ed. 1017, 16 Sup. Ct. Rep. 808.

The tender to Mr. Frank was ineffectual to bind Mrs. McKenzie.

King v. Finch, 60 Ind. 420; 20 Enc. Pl. & Pr. p. 452; *Kelsey v. Crowther*, 162 U. S. 404, 40 L. ed. 1017, 16 Sup. Ct. Rep. 808.

The covenant to sell is a covenant running with the land, and binding upon all persons having notice of it who afterwards succeed by purchase or otherwise to the estate of the original covenantor.

Laffan v. Naglee, 9 Cal. 662, 70 Am. Dec. 678; *Gear, Land. & T.* §§ 84, 103; Pom. Spec. Perf. 2d ed. § 465.

Such subsequent purchaser stands, with relation to the estate, in the shoes of the original covenantor, with the same rights and obligations in respect thereto which appertained to him.

22 Am. & Eng. Enc. Law, p. 934; *Bristol v. Bristol & W. Waterworks*, 19 R. I. 413, 32 L. R. A. 740, 34 Atl. 359; *Champion v. Brown*, 6 Johns. Ch. 398, 10 Am. Dec. 343; *Hildreth v. Shelton*, 46 Cal. 383.

Messrs. E. E. Enterline and H. A. Alden, for defendant in error:

As the plaintiff accepted the offer, and made tender before the expiration of the time given in the contract, under the weight of authority she is entitled to specific performance.

People's Street R. Co. v. Spencer, 156 Pa. 85, 36 Am. St. Rep. 22, 27 Atl. 113; *Ross v. Parks*, 93 Ala. 153, 11 L. R. A. 148, 30 Am. St. Rep. 47, 8 So. 368; *Gustin v. Union School District*, 94 Mich. 502, 34 Am. St. Rep. 361, 54 N. W. 156; *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695; *Warren v. Castello*, 109 Mo. 338, 32 Am. St. Rep. 669, 19 S. W. 29; *Moses v. McClain*, 82 Ala. 370, 2 So. 741.

Defendant, Frank, was to receive something of value in the event that the plaintiff did not purchase.

Specific performance cannot be denied for the reason that the contract is unilateral, and that it lacks mutuality.

Where the option is given in a lease, specific performance will be decreed.

Hawralty v. Warren, 18 N. J. Eq. 124, 90 Am. Dec. 613; *Lane v. Pacific & I. W. R. Co.* 8 Idaho, 230, 67 Pac. 656.

The failure on the part of the plaintiff to deposit \$500 with Frank, provided for in the contract, did not work a forfeiture of 67 L. R. A.

her rights to purchase or to remain in possession.

A forfeiture may result from a nonpayment of rent in accordance with the terms of the lease when there is a covenant to that effect; but it is essential that the lease provide for such forfeiture, and that there be a demand for the rent.

12 Am. & Eng. Enc. Law, p. 758k; *Langley v. Ross*, 55 Mich. 163, 20 N. W. 886.

A forfeiture will not be implied, nor is it favored by the rules of law.

Williams v. Vanderbilt, 145 Ill. 238, 21 L. R. A. 489, 36 Am. St. Rep. 486, 34 N. E. 476; *Guffy v. Hukill*, 34 W. Va. 49, 8 L. R. A. 759, 26 Am. St. Rep. 901, 11 S. E. 754; *Miller v. Havens*, 51 Mich. 482, 16 N. W. 865; *Moses v. Loomis*, 156 Ill. 392, 47 Am. St. Rep. 197, 40 N. E. 952; *Castleberry v. Hay*, 8 Idaho, 670, 70 Pac. 1055; *Winkler v. Gibson*, 2 Kan. App. 621, 42 Pac. 937.

The court had a right to allow damages from the time of dispossession until the entering of judgment.

Cosgriff Bros. v. Miller, 10 Wyo. 190, 98 Am. St. Rep. 977, 68 Pac. 206.

Potter, J., delivered the opinion of the court:

S. Henrietta Carlile-Kent sued the plaintiffs in error, Abe Frank and Grace E. McKenzie, for the specific performance of an alleged contract for the conveyance of certain lands situated in Crook county, entered into by Frank, the grantor of Mrs. McKenzie, and damages for taking and withholding possession of the premises. The allegations of the first cause of action are substantially that on April 4, 1901, Frank was the owner of the lands, and on that date entered into a written agreement with plaintiff, which is set out *in hæc verba*; that thereafter, and on the same day, plaintiff went into possession of the premises under the terms of the agreement, and remained in possession until July 26, 1901, when Mrs. McKenzie forcibly and wrongfully evicted her; that on September 20, 1901, plaintiff tendered the purchase price to defendant Frank, and demanded a deed, which was refused; that plaintiff has duly performed all the conditions of the agreement on her part to be performed, and brings the purchase price into court, and offers it to defendant Frank, upon his executing and delivering a conveyance according to the contract; and that on April 17, 1901, Frank wrongfully sold and conveyed the premises to the defendant McKenzie, who had full knowledge of the agreement between the plaintiff and Frank. The second cause of action is based upon the alleged wrongful eviction of plaintiff and the withholding of possession, and charges that the same occurred under the direction of the

defendant Frank, and there are certain averments of special damages.

The agreement set out in the petition, and which was introduced in evidence, is in form a lease for the period of six months from April 1st, containing a clause giving the lessee, the plaintiff below, the right to purchase the premises at any time within said six months upon the payment of \$5,000, with interest at the rate of 8 per cent per annum. The alleged right to specific performance is based on that clause. The plaintiff, as lessee, covenanted to pay as rental the taxes on the premises for the current year, 1901, to have the fences and buildings in good repair, and not to pasture upon a certain portion of the land, designated as "the bottom pasture," to exceed ten head of saddle and work horses and two milch cows. It was agreed that she should have full use of "back pasture" for her own stock, and that she should not have the right to turn stock upon the hay meadows, nor be allowed to pasture upon certain specified "ranches." It was also agreed that, in the event she should not purchase the premises within the time granted, one half of the hay crop and one third of the other crops raised on the land should belong to the lessor, Frank. The lease then concludes with the following provision: "It is further agreed that the party of the second part [the lessee] shall deposit with the party of the first part the sum of \$500 for the faithful performance of this lease and the payment of the taxes as aforesaid." The paper is signed by both parties.

The answer not only denied the allegations of the petition as to the eviction of plaintiff, but averred that the latter had voluntarily delivered possession to the defendant McKenzie. There was some conflict of evidence on that issue, and the trial court determined it in favor of the plaintiff, expressly finding that on July 26, 1901, Mrs. McKenzie, with the consent and connivance of the defendant Frank, took possession of the premises against plaintiff's consent, and continued to withhold possession, and that plaintiff never voluntarily surrendered it. The point of conflict in the testimony was as to whether or not the plaintiff had voluntarily surrendered possession. Upon that question the finding of the trial court will be accepted, and, so far as material, the fact will be considered as established that Mrs. McKenzie took possession of the premises against plaintiff's consent. It is not denied that she continued in possession. In the view we are constrained to take of the case under the issues and proof: Frank's alleged connection with the act of Mrs. McKenzie in taking possession may not become material; but we deem it proper to say that the

evidence totally failed to connect him with that act in any way, unless the fact that he had previously conveyed the land ought to be given that effect, which is at least doubtful. There is not the slightest evidence, outside the mere fact of his conveyance, that Frank either consented to or aided in the act of taking possession, or that he even knew of it until after it had occurred.

The remaining material averments of the answer are in substance and effect that the privilege given to the plaintiff to purchase the premises was without consideration, that there was lack of mutuality in the contract for the sale, and that the lease never became operative, for the reason that plaintiff (the lessee) failed to make the deposit required by the contract for her faithful performance of the lease and the payment of the taxes, which it is alleged was a condition precedent to the acquirement of any right by the plaintiff under the lease. The reply met these averments, first, by a general denial; second, by alleging that the defendant Frank never demanded that the \$500 mentioned in the agreement be deposited with him; and, third, that said Frank never demanded of the plaintiff that she comply with any or all the terms of the agreement, and never notified plaintiff that she had violated any of such terms. The case was tried to the court on all the issues, and there was a separate statement of the conclusions of fact and law.

Briefly state, the conclusions of fact were as follows: That plaintiff substantially complied with the terms and conditions of the contract; that she was in possession of the premises prior to and at the time of the execution of the contract, and at the time of the execution of the deed from Frank to Mrs. McKenzie, and until July 26, 1901; that Mrs. McKenzie took her deed with full knowledge and notice of the terms and conditions of the contract set up in the petition; that plaintiff never recognized the validity of the deed to Mrs. McKenzie, but always insisted on her rights under the contract and did not voluntarily surrender possession; that with the consent and connivance of Frank Mrs. McKenzie wrongfully took possession against plaintiff's consent and continued to withhold possession; that plaintiff tendered the purchase price to Frank (\$5,300) September 20, 1901, within the life of the contract, and then demanded a deed, and has kept the tender alive by bringing the money into court; that defendant Frank had failed to execute and deliver a deed to plaintiff; that plaintiff had been damaged by the wrongful entry and withholding possession in the sum of

\$1,000. Upon these conclusions of fact and the admissions in the pleadings, the conclusions of law were, to state them briefly, as follows: That the contract was during its term a valid one, and obligated the defendant Frank to convey the lands to plaintiff upon a substantial compliance by her with its terms; that the deed to Mrs. McKenzie ought to be set aside, and the title to the lands quieted in the plaintiff; that defendant Frank should be required to execute and deliver a deed to plaintiff; that the defendants are wrongfully detaining possession of the lands from plaintiff, and she ought to recover from defendants her damages, in the sum of \$1,000. Thereupon a decree was entered in accordance with the conclusions of law.

A motion for new trial was filed and overruled, and the defendants prosecute error, assigning as error the overruling of the motion for new trial and the insufficiency of the findings to support the judgment. The motion for new trial challenged each finding of fact and conclusion of law on the ground of insufficiency of the evidence to sustain it, and as contrary to law, as well as the sufficiency of the evidence to support the judgment, and also various rulings of the court on the trial in the admission and rejection of evidence. Since the submission of the cause the defendant in error died, and the cause has been revived in the names of her devisee and legal representatives.

Before discussing the questions involved upon the errors assigned, we think attention should be called to the objectionable method adopted in enforcing the alleged right of the plaintiff to a conveyance. There was no claim that Mrs. McKenzie's deed was without consideration, and there was no necessity of adjudging it void and vacating it, nor was that theoretically proper. A purchaser of real property, with notice of a prior contract to convey the same to another, takes it subject to the equitable rights of the original contractor to a completion of his bargain, and may be compelled in equity to perform the contract of his vendor; and, upon a bill filed by the original vendee against the vendor and such subsequent purchaser, the proper practice is to direct a specific performance of the contract by the subsequent purchaser, in whom resides the legal title. 2 Warvelle, Vendors, 2d ed. § 735; Waterman, Spec. Perf. § 75; 1 Tiffany, Real Prop. § 110; Pom. Spec. Perf. of Contracts, § 465. In the case of an executory contract for the sale of land, capable of specific performance, upon the principle that equity regards as done that which ought to be done, the equitable estate is considered as vested in the purchaser, unless a contrary inten-

tion appears, and the vendor is regarded as holding the legal title in trust for the benefit of the purchaser, while the latter is regarded as the trustee of the vendor for the unpaid purchase money, and anyone thereafter taking a conveyance of the land from the vendor, with notice of the contract, takes it subject to the same equity in favor of the purchaser that controlled the title in the hands of the vendor. Waterman, Spec. Perf. §§ 512 *et seq.*; Tiffany, Real Prop. § 110; Pom. Spec. Perf. of Contracts, § 314. If the court's conclusions as to the respective rights and obligations of the parties under and in view of the contract were correct, the decree should have directed a conveyance by Mrs. McKenzie to the plaintiff; and as everything in this record indicates that the former had paid to Frank for her deed the same amount of money named as the price to be paid by plaintiff, and had become the owner of the property, subject only to the rights of the plaintiff under her alleged contract, the purchase price on deposit in the court should have been ordered paid to her, or, to overcome any doubt on the subject, the court might have directed an inquiry to ascertain which of the two parties, Frank or Mrs. McKenzie, was equitably entitled to the money. The decree as entered not only declared Mrs. McKenzie's deed void, but directed the money paid into court by the plaintiff to be paid to Frank, who, for all that the evidence discloses, had already received the same amount substantially from Mrs. McKenzie when he conveyed to her.

The defendants tendered the issue of want of consideration and lack of mutuality in the contract sought to be specifically enforced, and the errors assigned depend largely upon the contention that the contract is not enforceable by specific performance, for the reason that it lacked both mutuality and consideration. The agreement relied on is expressed in the written contract as follows: "It is further agreed that the party of the second part shall have the right to purchase the above-described premises at any time before the expiration of said six months upon the payment of the sum of \$5,000, and the interest on the same at the rate of 8 per cent during said time." The older authorities declare the doctrine that, as a prerequisite to specific performance, there must exist both mutuality of obligation and remedy, and, as a general or fundamental rule, that doctrine seems still to be maintained; but in modern equity practice it has become very much narrowed in its application by the recognition of a number of so-called exceptions, though the exceptions are so thoroughly established that it would seem more accurate to consider them as a

part of, or a modification of, the doctrine itself. Where a contract is intended to bind both parties, or where it is of such form or nature that it contains mutual executory provisions,—that is to say, where both parties have bound themselves or intended to bind themselves by reciprocal obligations,—then no doubt the doctrine as to the requirement of mutuality applies: and in such a case, if for any reason one of the parties is not bound, he cannot compel performance by the other. 2 Warvelle, Vendors, 2d ed. § 739; Pom. Spec. Perf. of Contracts, § 169.

But the doctrine is not applicable to contracts unilateral in form, though bilateral in effect, such as bonds and similar obligations; for contracts of that description are constantly enforced. 2 Warvelle, Vendors, 2d ed. § 739. Nor does it apply to an optional contract for the purchase or sale of land that is founded upon a proper and sufficient consideration. *Mathews Slate Co. v. New Empire Slate Co.* 122 Fed. 972; *Watts v. Kellar*, 5 C. C. A. 394, 12 U. S. App. 274, 56 Fed. 1; *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; 1 Warvelle, Vendors, §§ 125, 126; Pom. Spec. Perf. of Contracts, §§ 167–169, and notes. In *Watts v. Kellar*, 5 C. C. A. 394, 12 U. S. App. 274, 56 Fed. 1, the United States circuit court of appeals said: "When one holding a buyer's option makes his election to purchase, and tenders the money according to the terms of the contract, it is the duty of the seller to accept the price, and execute a deed to the purchaser for the property; and when one holding an option to sell elects to make the sale, and tenders a deed, it is the duty of the buyer to accept the deed and pay the price. Such contracts are perfectly valid, and it is now well settled that a court of equity may decree a specific performance of them." In *Mathews Slate Co. v. New Empire Slate Co.* 122 Fed. 972, it is said: "This court is of the opinion that, if two persons enter into a contract in writing under seal, by which the one party, in consideration of \$1, the payment of which is acknowledged, agrees to sell and convey to the other party within a specified time certain lands and premises, on payment by the other party of a specified consideration, such contract is valid and binding, and ought to be and may be specifically enforced. The seller has the right to fix his price, and covenant and agree that, on receiving that price within a certain time, he will convey the premises; and if within that time the purchaser of the option tenders the money and demands the conveyance he is entitled to it. To hold otherwise is to destroy the efficacy of such contracts and agreements."

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the proposition that an agreement by one party to sell and convey land to another for a stated price, if given upon a proper consideration, may be specifically enforced upon an acceptance and tender of the price within the time allowed by the contract; and it is not a valid objection in such case that prior to acceptance and tender no obligation rested upon the option holder to purchase. "And it is now well settled that an optional agreement to convey, or renew a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced in equity, if it is made upon proper consideration, or forms part of a lease or other contract between the parties that may be the true consideration for it." *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; 21 Am. & Eng. Enc. Law, p. 928; Waterman, Spec. Perf. § 200; 1 Warvelle, Vendors, §§ 125, 126; Pom. Spec. Perf. of Contracts, §§ 167–169; *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580; *Wilcox v. Cline*, 70 Mich. 517, 38 N. W. 555; *Ross v. Parks*, 93 Ala. 153, 11 L. R. A. 148, 30 Am. St. Rep. 47, 8 So. 368; *Hall v. Center*, 40 Cal. 63. Waterman, in the section cited, states that it is doubtful if such an agreement should be called an exception to the general rule as to mutuality, since it is in fact a conditional contract, and, when the condition has been made absolute by a compliance with its terms, the contract becomes mutual and capable of enforcement by either party. See also 2 Warvelle, Vendors, 2d ed. § 739. Such an agreement—that is, an optional agreement to convey, made upon proper consideration, or forming part of a lease or other contract that is in fact the consideration for it—cannot be revoked by the vendor within the period granted for the exercise of the option. Authorities *supra*. But a mere proposal without consideration creates no obligation, unless accepted according to its terms; and it may, therefore, be withdrawn at any time before acceptance, though, if such an offer is allowed to remain open until accepted, it will become a binding contract. When the option given upon a consideration is accepted within the time allowed, and according to its terms, the offer and acceptance constitute a contract of sale; and the same result flows from the acceptance of an offer without consideration, if accepted before the offer is withdrawn or revoked. 1 Warvelle, Vendors, §§ 125, 126. An agreement in a lease, granting the lessee the privilege of purchasing the premises within a stated period upon specified terms, is regarded as a continuing offer to sell, which may not be revoked during the period within which the agreement permits the option to be exercised. *Ibid.* In such case,

where no other consideration is stated or shown, the lease itself, with the affirmative covenants of the lessee, is usually considered as a sufficient consideration for the agreement to sell and convey at the lessee's option.

Now, in the case at bar, the optional agreement does not recite a consideration; but it is contained in a written contract signed by the parties, and it is maintained on the part of defendants in error that the contract, being a lease of the premises, constituted a sufficient consideration for the agreement to convey, and it seems to be relied on as the sole consideration. On the other hand, it is contended that the contract never took effect or became operative as a lease, or for any other purpose, for the reason that the plaintiff neglected to perform a condition precedent to its operation, *viz.*, the agreement to deposit \$500 as security for her faithful performance of the lease and the payment of the taxes. Hence it is insisted that the paper did not amount to a lease, and could not, therefore, be regarded as a proper consideration for the optional agreement, and that the lessor, Frank, revoked the agreement by the sale and conveyance of the premises to his codefendant, Mrs. McKenzie, which fact was brought to the knowledge of the plaintiff shortly thereafter, and before any acceptance on her part of the privilege of purchase. It becomes important, therefore, to consider the character of the agreement to make the deposit, and whether the failure to do so rendered the lease ineffective. There is no dispute upon the facts as to the deposit. It was neither made nor offered at any time; but, on the contrary, the plaintiff stated, after her eviction, and when her attention was called to her neglect to comply with her agreement to secure her performance of the terms of the lease by making a deposit of \$500, that she repudiated that part of the contract.

Conditions precedent are to be strictly complied with. Such a condition is one that must happen or be performed before the estate dependent upon it can arise or be enlarged, while a condition subsequent defeats the estate in case it does not happen or is not performed. In determining whether a particular provision amounts to a condition or not, the rule is that the intention of the grantor governs. Such intention is to be gathered from the whole instrument and the existing facts. The authorities lay down the principle that whether a condition is precedent or subsequent depends upon the intent of the parties, as collected from the whole contract, whatever the order in which they are found, or the manner in which they are

expressed, although certain words are customary when a condition rather than a covenant is intended. But it seems that the same words may be employed to create either a covenant or a condition. The words employed in the beginning of the instrument are words of present demise. It reads: "This article of agreement, made and entered into this 4th day of April, 1901, by and between Abe Frank, party of the first part, and S. Henrietta Carlile-Kent, party of the second part, witnesseth: That the party of the first part has this day leased to the party of the second part the following described lands [description] for a term of six months from April 1, 1901, and the party of the second part agrees to pay as rental of said premises the taxes on the same for the current year 1901." Then follows the clause giving the privilege of purchase, and following that are the other agreements as to the use of the premises, and the instrument then concludes with the agreement for the deposit that is quoted in an earlier part of this opinion.

The deposit was required for a specified purpose, *viz.*, to secure the faithful performance by plaintiff, the lessee, of the lease, and the payment of the taxes. She had agreed to keep the fences and buildings in repair, to refrain from pasturing stock upon certain designated lands, and to limit her use of the premises in other respects; and the only rental was to be the taxes for the year, and a certain portion of the crops, should she not exercise the option of purchase. Now, we know, as the parties doubtless also knew, that the taxes would not become due or payable until a very short time before the expiration of the lease. The statutes require the tax list to go into the hands of the collector by the third Monday of September, and the taxes would not become delinquent until the last day of December. Indeed, the amount of the taxes could not have been ascertained until September. Here, then, is to be perceived a substantial reason for the requirement of security in advance. A reason is also to be found in the nature of the covenants of the plaintiff respecting the use to be made of certain parts of the premises, as well as to the keeping of the improvements in repair. This would all indicate that the agreement for the security was intended as a condition, rather than a mere covenant. Moreover, as a covenant, it would have added nothing substantially to the contract. The damages that might be recovered upon its breach could not have exceeded the damages sustained by a breach of the covenants which it was intended to secure; and those damages would be as capable of recovery by assigning and proving a breach

of the principal covenants. The very nature of the provision would seem to stamp it as a condition precedent. There would be little necessity for requiring security by a deposit of money after the time for performance of the lease had expired, and the lessee had enjoyed on her part all its benefits. As no time for making the deposit was stated, doubtless a reasonable time would be implied, and, had the lessee been out of possession, a tender of the security and demand for possession within a reasonable time might no doubt have entitled her to possession under the lease. But no such question arises here. It was clearly proved, and so found by the court, that she was in possession at and prior to the making of the contract. There is nothing in the evidence to show that Frank did any act toward placing her in possession; nor is the title or right under which she had been in possession disclosed, except, perhaps, it may be inferred from a circumstance to which we shall have occasion to refer.

There is no question of waiver of the condition which we are permitted to consider. The pleadings set out a full compliance with all conditions, and the judgment of the court was based upon a finding that they had been substantially complied with. The reply, indeed, alleges that Frank did not demand the deposit; but he was not required to do so. There is no showing, however, as to that averment. The evidence is silent as to whether or not such a demand was made. But, when the plaintiff was charged with failing to furnish the security, she responded by saying that she repudiated that agreement. It is not disclosed, moreover, that Frank did anything toward recognizing the possession of the plaintiff, after the making of the contract, or that he did any act in relation to the property, except to sell and convey it to Mrs. McKenzie on April 17th; and after that the record is silent concerning him until his refusal of the tender of the purchase price September 20th, except that he appears to have been present at an interview between the plaintiff and Mrs. McKenzie, and their attorneys, after plaintiff had been evicted from the premises. But we think the question of waiver is not the case now before us. The trial court made no finding in that respect, and such an issue is not presented by the pleadings.

The above facts have been adverted to for the purpose of showing that nothing appears, even by the subsequent conduct of Frank, to indicate an intention to treat the agreement for security as anything other than a condition precedent to any right of the plaintiff to the premises under the lease.

Similar provisions have, so far as we have been able to discover, been held to amount to conditions precedent. In the English case of *John v. Jenkins*, 1 Crompt. & M. 227, the lease there before the court contained words of present demise: "He, the said Esau Jenkins, lets this farm to David Jones," etc. But the following clause was contained in it: "David Jones is to give two sureties to answer for the rent." The court said that the provision as to sureties was very important, and showed that the instrument was never intended to operate as a lease at all events, but to operate as an agreement only, and that it was not to so operate, except security should be given for the rent by two sureties on the part of plaintiff; and, as no sureties were given, the instrument was for that reason, as well as others unnecessary to mention, held to be without effect, and the plaintiff's possession was held to have been under the terms of a previous tenancy. In that case the plaintiff was in possession as tenant under a former agreement when the one in controversy was entered into. In *McGaunt v. Wilbur*, 1 Cow. 257, a house was hired on October 31st for six months from the 1st day of November following, for which the hirer agreed to pay \$150, \$50 to be paid in advance, and the residue to be secured by a bill of sale of his furniture in the nature of a mortgage. At the time of the hiring the hirer mentioned that he would not want possession for a fortnight. On the 3d of November the owner of the house, not having received the advance payment or security, rented it to another tenant. A few days later the first party tendered the \$50 and bill of sale, and demanded possession. It was held that, as the tenancy under the agreement was to commence November 1st, and the advance payment had not been made on that day, nor the security given, the owner had the right to consider the contract at an end, and let his house to any other person. To the same effect are the following cases: *Andis v. Personett*, 108 Ind. 202, 9 N. E. 101; *Hard v. Brown*, 18 Vt. 87. See also *Cassidy v. Robinson*, 8 B. Mon. 279; *Stainton v. Brown*, 6 Dana, 248; *Burlington & M. River R. Co. v. Boestler*, 15 Iowa, 555.

It is impossible, therefore, to construe the provision in question as anything other than a condition precedent, and hence, until performed, the instrument was only an agreement for a lease; but, not having been performed, the lease did not become effective or binding upon the owner of the premises, and cannot be regarded as constituting a consideration for the optional agreement to convey. There is nothing in the fact of plaintiff's possession to change the situation.

She was in possession at and before the signing of the contract, and there is no proof that Frank delivered possession to her. It is not perceived, therefore, upon what ground such possession can be regarded as imparting vitality to the lease. In the absence of any other showing, she would be but a mere tenant by sufferance. Rev. Stat. 1899, § 2772. The taking and keeping possession by the plaintiff, without more, was clearly not a part performance of the contract on her part. Possession is what she contracted to receive, not to give, and there is no opportunity or foundation in this case upon the record for the application of the principle that, when a party has voluntarily accepted the benefits of part performance, he may be precluded from insisting upon the performance of the residue as a condition precedent to his liability to pay for what he has received. No doubt, had the lessor put the lessee in possession, that act might have indicated an intention not to treat the agreement for security as a condition precedent; and possibly the same intention might have been gathered from affirmative acts of the lessor in recognition of the possession and an existing tenancy under the contract. But there is no evidence of such acts on Frank's part. The evidence does disclose a notice served upon the plaintiff in the early part of July by Mrs. McKenzie, which seems to recognize in a way that plaintiff was holding under the lease, but asserted that she had not complied with its terms, and that the giver of the notice reserved the right to declare the lease forfeited. But Mrs. McKenzie was not a party to the contract, and we do not understand that she could, by recognizing the lease at that time and in that manner, render it effective, so as to make the obligation to convey binding upon Frank, her vendor. There is nothing to show that the latter advised or consented to the notice, or knew of it, and hence it can hardly be deemed persuasive of an intention on his part, or of the parties to the contract, to consider the contract as a present demise, and the provision as to security as a mere covenant.

We are constrained, therefore, to hold that the finding of substantial compliance with the terms of the contract is not sustained by the evidence. No doubt the contract was valid, so far as effective, and the agreement to convey upon payment of the specified price, although without consideration, obligated Frank to make the conveyance, had there been an acceptance and tender before a revocation on his part. But as his promise was, so far as the record discloses, without consideration, it was his privilege to revoke it at any time previous

to acceptance; and the sale and conveyance of the property to Mrs. McKenzie, which does not appear to have been otherwise than in good faith and for a valuable consideration, and which was brought to the knowledge of the plaintiff before any attempted acceptance of the option, amounted to a sufficient revocation. *Dickinson v. Dodds*, L. R. 2 Ch. Div. 463; *Coleman v. Applegarth*, 68 Md. 21, 6 Am. St. Rep. 417, 11 Atl. 284; *Little v. Thurston*, 58 Me. 86; *Warren v. Richmond*, 53 Ill. 52. There was no apparent attempt on the trial to show, nor is it now suggested, that the optional agreement was based upon any other consideration than the lease. There is a fact disclosed by the evidence that seems to point to the probability of an executed consideration independent of the lease. The plaintiff introduced in evidence a warranty deed of the same date as the contract in question, whereby it appears that the plaintiff conveyed the identical premises to the defendant Frank, in which the consideration is stated to be \$5,000; and it is shown that plaintiff had before that date been in possession of the property. But the deed is not in any way explained, nor is there any proof that it formed a part of the transaction out of which grew the optional agreement. Had the agreement of Frank to subsequently convey the premises to plaintiff at her option been made in consideration of her conveying the property to him, and as a part of the same transaction, we are inclined to think that it would have been competent for plaintiff to have shown that fact, and that it might have rendered the optional agreement binding for the period in which the option was permitted to be exercised, notwithstanding that no right of possession was acquired under the lease because of the failure to furnish the required security. It is true that in her testimony plaintiff speaks of her right to "repurchase" the property. But there was no attempt to show that she obtained or contracted for that right at the time she executed her deed or as a part of that transaction.

Counsel for plaintiff asked her, when she was on the witness stand, to state the conversation between herself and Frank at the time she "signed this deed;" and, upon objection being interposed, counsel stated that the proof was offered particularly in support of the second cause of action, to show that Frank did not intend to comply with his agreement, and to show malice and wrongful acts on the part of both defendants. The objection was sustained, and the proof offered excluded. The deed and the conversation at the time, therefore, do not seem to have been offered as proof of con-

sideration for the optional agreement; and, as the deed and contract were not connected by the evidence, we are not at liberty to supply the omission by inference, if, indeed, there was any omission. It is not our privilege to assume that they were related. It may be that the agreement sought to be enforced was an afterthought, and entered into after the transaction resulting in the conveyance of the property to Frank had been entirely closed. There is nothing in the findings of the trial court to indicate that any reliance was placed upon the deed.

It follows, from our conclusions as to the contract relied on under the pleadings and evidence, that the district court erroneously found it to be obligatory upon the vendor, Frank, during its term, and to be binding upon him to convey the property upon the tender by plaintiff of the purchase price in September, when the tender was made. As the cause must be remanded for new trial, it will be proper for us to say that we do not coincide with the contention of counsel for plaintiffs in error that the tender was made to the wrong party, assuming that the agreement to convey was then in force. Mrs. McKenzie was not a party to the contract. Frank's conveyance to her would not have released him from his obligations to perform the contract, had it been incapable of revocation on his part. The doctrine of specific performance of contracts for the sale and purchase of land is said to mainly depend upon the principle of the transmission by the contract of an equitable estate, and the impressing of a trust upon the legal estate for the benefit of the vendee; and a subsequent purchaser from the vendor, with notice of the previous contract, stands in equity in the place of his vendor, and is as much a trustee as he was; and therefore he may be compelled to specifically perform his vendor's contract by conveying the legal title to the first purchaser. *Waterman*, Spec. Perf. § 512. The object of the tender was to exercise the claimed option within the time limited, and to show an acceptance of the option according to its terms; and, under the circumstances of this case, had the option been a subsisting one, we are of the opinion that the tender was properly made to Frank, who had entered into the covenant to convey; and thereupon both

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Frank and his grantee, Mrs. McKenzie, would have become bound to make the conveyance. *Sizer v. Clark*, 116 Wis. 534, 93 N. W. 539.

It further follows that the court erroneously awarded the plaintiff damages for the withholding of possession from her from the time of her eviction up to the date of the decree. Not having performed the condition precedent to her right of possession under the lease, she could not lawfully retain it. Even had there been shown an independent consideration for the agreement to convey, she would not have been entitled to possession, in consequence, merely, of such an option, in the absence of an express stipulation to that effect, until, at least, she had made the tender and demanded a deed. 2 *Warvelle, Vendors*, 2d ed. §§ 891, 958. It is evident that the damages were awarded upon the second cause of action on the theory that both defendants had wrongfully and maliciously dispossessed the plaintiff and used and occupied the premises. Upon that theory, as already indicated, we think it doubtful if there was a sufficient showing to hold Frank accountable for the acts of his codefendant. But, as the case must go back upon other grounds, it is not necessary to express a decided opinion upon that question; and for obvious reasons it is not necessary to consider whether, had the optional contract been shown to be binding and incapable of revocation by the vendor during its term, Frank would have been liable in damages for plaintiff's loss of possession after the tender, upon the theory that after tender she became in equity the owner, and thereafter entitled to possession or the rents and profits, and that a court of equity, in order to adjust the rights of the parties, in furtherance of justice, might, in an action for specific performance, award damages for deprivation of possession. See 2 *Warvelle, Vendors*, § 958; *Waterman*, Spec. Perf. § 519; *Worrall v. Munn*, 38 N. Y. 137; *Cole v. Tyson*, 43 N. C. (8 Ired. Eq.) 170.

For the reasons stated, *the judgment will be reversed*, and the cause remanded for new trial.

Corn, Ch. J., and **Knight**, J., concur.

FLORIDA SUPREME COURT.

John C. L'ENGLE, *Plff. in Err.*,
v.

SCOTTISH UNION & NATIONAL IN-
SURANCE COMPANY.

(.....Fla.....)

*1. Chapter 4173, p. 101, act approved June 2, 1893, providing for the recovery of attorneys' fees in certain actions against fire and life insurance companies, was not repealed by chapter 4677, p. 33, act approved May 31, 1899, nor is it repugnant to any provision of the Constitution of Florida or the Constitution of the United States.

2. A policy of insurance for \$2,500 on two buildings contained a clause providing that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." Attached to the policy were three indorsement slips, all same date as the policy, one fixing the insurable value of the property at \$2,500, in compliance with the requirements of chapter 4677, p. 33, act approved May 31, 1899, another being the standard mortgage clause with full contribution, and the third containing a description of the property insured, with the amount of insurance written thereon, and a clause as follows: "Two thousand five hundred total concurrent insurance permitted." *Held*, that the clause last quoted, construed in connection with the language of the entire policy, permitted other concurrent insurance not to exceed \$2,500.

3. In construing the different provisions of a contract of insurance, all must be so construed, if it can reasonably be done, as to give effect to each. Where two interpretations equally fair may be given, that which gives the greater indemnity will prevail. If one interpretation, looking to the other provisions of the contract and to its general object and scope, would lead to an absurd conclusion, such interpretation must be abandoned, and that adopted which will be more consistent with reason and probability. In all cases the policy must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity which, in making the insurance, it was his object to secure. When the words are, without violence, susceptible

of two interpretations, that which will sustain the claim of the insured and cover his loss must, in preference, be adopted.

4. If a written contract is ambiguous or obscure in its terms, so that the contractual intention of the parties cannot be understood from a mere inspection of the instrument, extrinsic evidence of the subject-matter of the contract, of the relations of the parties to each other, and of the facts and circumstances surrounding them when they entered into the contract, may be received to enable the court to make a proper interpretation of the instrument.

(Hocker, J., and Taylor, Ch. J., dissent.)

(July 18, 1904.)

ERROR to the Circuit Court for Duval County to review a judgment in favor of defendant in an action brought to enforce payment of the amount alleged to be due on a fire-insurance policy. *Reversed*.

Statement by **Carter, P. J.**:

On July 25, 1901, plaintiff in error began an action against the defendant in error in the circuit court of Duval county to recover upon a fire-insurance policy. There was a verdict and judgment for defendant, from which this writ of error was taken by the plaintiff.

The original declaration contains three counts. The first is substantially in the form prescribed by chapter 4935, p. 67, act approved May 31, 1901. It makes no reference to other insurance upon the property. It claims attorneys' fees under chapter 4173, p. 101, act approved June 2, 1893.

The court sustained a demurrer to the second count, and, in view of the conclusions reached on other assignments of error, it is not deemed necessary to state the substance of that count, or to consider the assignment of error based upon that ruling.

The third count was for attorneys' fees under chapter 4173, *supra*. Upon motion the court struck out so much of the first count as claimed attorneys' fees, and sustained a demurrer to the third count.

After the ruling upon the demurrers the plaintiff amended his declaration by adding

*Headnotes by **CARTER, P. J.**

NOTE.—For a somewhat similar case in this series holding that a standard guaranty to maintain 80 per cent insurance stamped on a policy of fire insurance does not supersede a provision that the policy shall be void in case of other insurance, see *Cutler v. Royal Ins. Co.* 41 L. R. A. 159.

As to constitutionality of provision for attorneys' fees in particular class of cases, see also *note* to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L. R. A. 586, and the 67 L. R. A.

later cases in this series of *Union Cent. L. Ins. Co. v. Chowning*, 24 L. R. A. 504; *Hocking Valley Coal Co. v. Rosser*, 29 L. R. A. 386; *Vogel v. Pekoc*, 30 L. R. A. 491; *Cameron v. Chicago, M. & St. P. R. Co.* 31 L. R. A. 553; *Dell v. Marvin*, 45 L. R. A. 201; *Davidson v. Jennings*, 48 L. R. A. 340; *Gano v. Minneapolis & St. L. R. Co.* 55 L. R. A. 263; *Missouri, K. & T. R. Co. v. Simonson*, 57 L. R. A. 765; and *Atkinson v. Woodmansee*, 64 L. R. A. 325.

two new counts, numbered, respectively, second and third. The second count of the amended declaration alleges: That on or about January 10, 1901, plaintiff, being the owner of the property insured, applied to defendant to issue a policy of insurance for \$2,500 thereon against loss or damage by fire, and directed the defendant to provide in said policy for \$2,500 additional insurance upon said property. That thereafter, in compliance with such request and direction, the defendant issued and delivered to plaintiff, in consideration of \$56.25 to it then paid by plaintiff, its policy of insurance, which said policy permitted \$2,500 other and additional insurance, and thereby promised to insure plaintiff against loss or damage by fire to the amount of \$2,500, and to make good unto plaintiff the loss or damage that might happen to an amount not exceeding \$2,500 for one year from the 10th day of January, 1901, to the 10th day of January, 1902, on the two-story frame shingle-roof buildings and additions situate 231-233 West Beaver street, Jacksonville, Florida, being \$1,250 specifically on each building, the loss to be paid sixty days after due notice and proofs made by the plaintiff and received by the defendant; and in said policy sundry provisions, conditions, prohibitions, and stipulations were and are contained and thereto annexed, as by a copy of said policy filed therewith and made a part of the declaration more fully appears. That at the time said policy was issued and delivered there was other and additional insurance upon the property to the amount of \$1,500, of which defendant had notice at and before the time it issued and delivered its policy to the plaintiff, and said other and additional insurance to the amount of \$1,500 was in force and effect at the time the property was destroyed by fire. That afterwards, on May 3, 1901, the property was totally burned and destroyed by fire, and damage and loss was thereby occasioned to plaintiff to the amount of \$2,500, being \$1,250 upon each of said buildings, in such manner and under such circumstances as to come within the promise and undertaking of the policy, and to render liable and oblige the defendant to pay plaintiff said sum of \$2,500 on account of its policy, of which loss defendant had due notice, to wit, on or about May 10, 1901, whereupon defendant then and there denied that it was liable under and by virtue of the policy, and denied that there was anything due plaintiff on account of the policy, and refused to pay said loss, or any part thereof, for the reason that at the time said property was destroyed by fire there was other

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and additional insurance upon the property to the amount of \$1,500. That, although all conditions had been performed and fulfilled, and all events and things existed and happened, and all periods of time had elapsed to entitle plaintiff to a performance of the contract and to the sum of \$2,500, and nothing had occurred to prevent plaintiff from maintaining the action, yet the defendant had not paid or made good to the plaintiff the amount of loss and damage, or any part thereof; wherefore plaintiff claims \$4,000 damages.

The third count of the amended declaration is substantially the same as the second, except in two particulars, as follows: (1) It alleges that the policy permitted "\$2,500 total concurrent insurance," while the second count alleges that the policy permitted "\$2,500 other and additional insurance."

Second. It alleges that long prior to the loss under the policy the plaintiff paid the defendant the premium demanded by it for the issuance of the policy, and defendant received and accepted the same, and that after such payment and receipt of the premium the defendant knew of the existence of the other and additional insurance on the property, and with such knowledge kept and retained the premium so paid, and never at any time paid or returned the same, or any part thereof, to plaintiff, or tendered or offered so to do, but still retains and keeps same; while the second count omits such allegations. Each count contains other allegations not necessary to be mentioned.

The policy was attached to and made a part of the declaration. Three riders, or indorsement slips, each signed by the agent, and purporting to be attached to the policy, appear as parts of the policy. The first indorsement slip contains the following among other provisions: "Two thousand five hundred dollars on the two-story frame shingle-roof buildings and additions, including foundations, plumbing, steam, gas, and water pipes and connections, and all permanent fixtures for heating and lighting, occupied as dwellings and situate 231-233 West Beaver street, Jacksonville, Fla., being \$1,250 specifically on each building." "Two thousand five hundred dollars total concurrent insurance permitted." The second indorsement slip is a standard mortgage clause with full contribution. The third indorsement slip is as follows:

Florida indorsement slip. For policy covering two or more buildings. The in-

surable values of the buildings herein described are fixed at the following amounts:

Value of buildings:

Building No. 1 1250 Building No. 3.

Building No. 2 1250 Building No. 4.

Attached to policy No. 263958, Scottish Union & National Insurance Company, to comply with the act of the legislature of the state of Florida regulating the issue of policies by fire insurance companies, approved May 31, 1899.

The body of the policy contains a stipulation as follows: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

The defendant filed its pleas, making them applicable to each count as follows:

(1) The alleged policy was void, in that, without an agreement indorsed thereon or added thereto, the plaintiff, at the time said alleged policy issued, had another contract of insurance on property covered by the alleged policy.

(2) The alleged policy was void in that, without an agreement indorsed thereon or added thereto, the plaintiff at the time of the alleged loss by fire had another contract of insurance on property covered by said alleged policy.

(3) At the time said alleged policy was issued and delivered there was other and additional insurance upon said property, procured by the plaintiff, to the amount of \$1,500.

(4) At the time said property was destroyed by fire there was in force and effect other and additional insurance upon said property, procured by the plaintiff, to the amount of \$1,500.

(5) At the time said alleged policy was issued and delivered there was other and additional insurance upon said property, procured by the plaintiff, to the amount of \$1,500, and said defendant had no notice or knowledge of said other and additional insurance.

(6) At the time said property was destroyed by fire there was in force and effect other and additional insurance upon said property, procured by the plaintiff, to the amount of \$1,500, and said defendant had no notice or knowledge of said other and additional insurance until after the alleged loss by fire.

The plaintiff filed his demurrer to each of the defendant's pleas, and assigned as matters of law to be argued:

(1) The pleas do not issuably deny or 67 L. R. A.

avoid any material allegation of the amended declaration.

(2) Said pleas do not allege any facts constituting a defense to the several counts of the amended declaration.

(3) It appears by the declaration that the policy of insurance permitted other and additional insurance.

The court sustained this demurrer to the first, second, third, and fourth pleas, so far as the third count of the amended declaration was concerned, and overruled it as to each of the six pleas so far as the first and second counts of the amended declaration were concerned. Issue was thereafter joined on the pleas, and a trial had, with the result stated.

Among the rulings assigned as error are included those disposing of the motion to strike, the demurrer to the third count of the original declaration and the demurrer to the pleas, and the court does not deem it necessary to consider any other.

Messrs. E. P. Artell and E. J. L'Engle, for plaintiff in error:

The policy in question by its terms permitted other and additional insurance to the amount of \$2,500.

If there is any doubt as to the proper construction of this stipulation regarding concurrent insurance the doubt should be resolved against the defendant.

McMaster v. New York L. Ins. Co. 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10; *Imperial F. Ins. Co. v. Coos County*, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379; *Liverpool & L. & G. Ins. Co. v. Kearney*, 180 U. S. 132, 45 L. ed. 460, 21 Sup. Ct. Rep. 326; *Thompson v. Phenix Ins. Co.* 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019; *First Nat. Bank v. Hartford F. Ins. Co.* 95 U. S. 673, 24 L. ed. 563; *London Assur. Co. v. Companhia de Moagens do Barreiro*, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. Rep. 785; *Palatine Ins. Co. v. Ewing*, 35 C. C. A. 236, 92 Fed. 111; *Kratzenstein v. Western Assur. Co.* 5 L. R. A. 799, note, 116 N. Y. 54, 22 N. E. 221; *Webster v. Dwelling House Ins. Co.* 53 Ohio St. 558, 30 L. R. A. 719, 53 Am. St. Rep. 658, 42 N. E. 546; *Hoffman v. Aetna F. Ins. Co.* 32 N. Y. 405, 88 Am. Dec. 337; *Western Ins. Co. v. Cropper*, 32 Pa. 351, 75 Am. Dec. 561; *Orient Mut. Ins. Co. v. Wright*, 1 Wall. 456, 17 L. ed. 505; *Berryman, Ins. Digest*, 346, §§ 12, 30.

Where the language of a promisor may be interpreted in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee.

Hoffman v. Aetna F. Ins. Co. 32 N. Y.

413, 88 Am. Dec. 337; *Webster v. Dwelling House Ins. Co.* 53 Ohio St. 558, 30 L. R. A. 719, 53 Am. St. Rep. 658, 42 N. E. 546; *Wallace v. German-American Ins. Co.* 41 Fed. 742; *International Nav. Co. v. Atlantic Mut. Ins. Co.* 100 Fed. 304.

If the policy is susceptible of two interpretations that will be adopted which is most favorable to the insured.

Thompson v. Phenix Ins. Co. 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019; *Philadelphia Tool Co. v. British American Assur. Co.* 132 Pa. 236, 19 Am. St. Rep. 596, 19 Atl. 77; *Illinois Mut. Ins. Co. v. Hoffman*, 132 Ill. 522, 24 N. E. 413; *Rogers v. Phenix Ins. Co.* 121 Ind. 570, 23 N. E. 498; *Wallace v. German-American Ins. Co.* 41 Fed. 742; *Meyer v. Queen Ins. Co.* 41 La. Ann. 1000, 6 So. 899; *Pettit v. State Ins. Co.* 41 Minn. 299, 43 N. W. 378; *Kratzenstein v. Western Assur. Co.* 116 N. Y. 54, 5 L. R. A. 799, 22 N. E. 221.

Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms used; and, if they are clear and unambiguous, their terms are to be understood in their plain, ordinary, and popular sense.

Universal L. Ins. Co. v. Devore, 88 Va. 778, 14 S. E. 532; *Imperial F. Ins. Co. v. Coos County*, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379.

Forfeiture of insurance policies are not favored, and courts will enforce a waiver when possible.

Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234, 24 L. ed. 689; *Hartford Life Annuity Ins. Co. v. Unsell*, 144 U. S. 449, 36 L. ed. 496, 12 Sup. Ct. Rep. 671.

The receipt and retention by the defendant company of the premium upon said policy after the defendant had notice that there was additional insurance thereon are a waiver of the terms of said policy prohibiting additional insurance, and the company is liable upon the policy.

Marshall Farmers' & Home F. Ins. Co. v. Liggett, 16 Ind. App. 598, 45 N. E. 1062; *Phenix Ins. Co. v. Covey*, 41 Neb. 724, 60 N. W. 12; *Mississippi Home Ins. Co. v. Dobbins*, 81 Miss. 623, 33 So. 504; *Mississippi Fire Asso. v. Dobbins*, 81 Miss. 630, 33 So. 506; *Schreiber v. German-American Hail Ins. Co.* 43 Minn. 367, 45 N. W. 708; *Fishbeck v. Phenix Ins. Co.* 54 Cal. 422; *Western Assur. Co. v. Phelps*, 77 Miss. 625, 27 So. 745; *Schroeder v. Springfield F. & M. Ins. Co.* 51 S. C. 180, 28 S. E. 371; *Wilson v. Commercial Union Assur. Co.* 51 S. C. 540, 64 Am. St. Rep. 700, 29 S. E. 245; *Phœnix Mut. L. Ins. Co. v. Raddin*, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. Rep. 500; *Sharp v. Scottish Union & Nat. Ins. Co.* 136 Cal. 542, 69 Pac. 253, 615; *German Ins.* 67 L. R. A.

Co. v. Shader (Neb.) 60 L. R. A. 918, 93 N. W. 972; *Georgia Home Ins. Co. v. Smithville* (Tex. Civ. App.) 49 S. W. 412; *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84, 9 L. R. A. 317, 21 Am. St. Rep. 203, 25 N. E. 126; *Johnson v. Dakota F. & M. Ins. Co.* 1 N. D. 167, 45 N. W. 799; *Home Mut. Life Asso. v. Riel*, 1 Monaghan (Pa.) 615, 17 Atl. 36.

Under the laws of Florida, the plaintiff is entitled to recover from the defendant a reasonable attorney's fee.

Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662; *Iowa L. Ins. Co. v. Lewis*, 187 U. S. 335, 47 L. ed. 204, 23 Sup. Ct. Rep. 126; *Farmers' & M. Ins. Co. v. Dobney*, 189 U. S. 301, 47 L. ed. 821, 23 Sup. Ct. Rep. 565.

Messrs. A. W. Cockrell & Son for defendant in error.

Carter, P. J., delivered the opinion of the court:

The rulings upon the motion to strike that portion of the first count relating to attorneys' fees, and upon the demurrer to the third count of the original declaration, which also claimed attorneys' fees, are erroneous, for the reason that chapter 4173, p. 101, act approved June 2, 1893, authorizes such recovery in cases of this kind. That act was not repealed by chapter 4677, p. 33, approved May 31, 1899, nor is it repugnant to any provision of the Constitution of this state or the Constitution of the United States. This was expressly decided in *Hartford F. Ins. Co. v. Redding* (Fla.) 37 So. 62. We do not mean to intimate that the judgment in favor of defendant would be reversed for these errors if no other was found in the record.

In determining the propriety of the ruling upon the demurrer to the pleas, it will be necessary to ascertain the meaning of the clause in the first indorsement slip attached to the policy, reading, "\$2,500 total concurrent insurance permitted," as the policy was filed with the declaration and made a part of each count thereof. It is not claimed that any of the pleas should be construed as denying the execution of the policy or of the indorsement slip, except the first and second, and as to these it is contended that the allegation, "Said alleged policy was void, in that without an agreement indorsed thereon or added thereto the plaintiff . . . had another contract of insurance on property covered by said alleged policy," should be held to constitute a denial that the clause, "\$2,500 total concurrent insurance permitted," was made a part of the policy by indorsement. The court is of opinion that no such effect can be given these pleas. They do not deny the

execution of the policy, nor do they deny that the indorsement slip was duly executed and attached to the policy as appears from the policy itself made a part of the declaration. They proceed upon the theory that nothing in the policy can be construed as a permission for other insurance, and that no agreement relating to other insurance was indorsed on the policy other than such as appears upon its face. By the terms of the policy it was to be void, unless otherwise provided by agreement indorsed thereon or added thereto, if the insured then had or should thereafter make or procure any other contract of insurance, etc. The clause quoted from the indorsement slip purports to give the insurer's consent to, or permission for, insurance. It has direct reference to the provision against other insurance, and can have no reference to any other provision in the policy. It was inserted at the time the policy was written, for it appears upon the indorsement slip along with the description of the property insured, which bears the same date and the signature of the same agent as the policy itself. It purports clearly and definitely to give the insurer's consent or permission for "\$2,500 total concurrent insurance." Unless other or additional concurrent insurance was intended, then the clause means nothing more than that the insured is permitted to take out and carry this particular policy, which is absurd, for no such permission was within the contemplation of the parties, or required by the terms of the policy. The use of the word "permitted," shows that the insurer intended to give its consent to something that was prohibited by the policy. As the prohibition extends only to other insurance, and not to the insurance then written, we must apply the permission to the kind of insurance prohibited, *viz.*, other insurance, for the conclusion is irresistible that the parties so intended it. Suppose the clause had read, "Concurrent insurance permitted," can it be doubted that the permission was intended to relate to other insurance, and to authorize any amount, provided it was concurrent? Or suppose the clause had read "\$1,500 total concurrent insurance permitted," would it be doubted for a moment that \$1,500 additional concurrent insurance was intended to be permitted? The clause permits "concurrent" insurance. The word "concurrent" means "acting in conjunction; agreeing in the same act, or opinion; contributing to the same event or effect; co-operating, . . . existing or happening at the same time; . . . operating on the same objects." Webster's International Dict. See also *East Texas F. Ins. Co. v. Blum*, 76 Tex. 653, 13 67 L. R. A.

S. W. 572; *Senor v. Western Millers' Mut. F. Ins. Co.* 181 Mo. 104, 79 S. W. 687; *Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. F. Ins. Co.* 110 Iowa, 423, 80 Am. St. Rep. 311, 81 N. W. 707,—as to the meaning of the word as used in insurance contracts. It is very evident that none of these definitions give the word the precise meaning of "other" so that one can say that concurrent insurance necessarily means other insurance exclusively; but in every instance the word necessarily implies the existence of two or more things or conditions. Therefore the term "concurrent insurance," used in granting permission for insurance, cannot be construed as embracing the one amount covered by the one policy in which the permission is granted, but necessarily embraces another amount or another policy, though it might, under some circumstances, include the former; otherwise we have an amount or a policy concurrent with itself alone, which is an impossibility under any definition of the word. In *East Texas F. Ins. Co. v. Blum*, 76 Tex. 653, 13 S. W. 572, the policy contained a provision, "total concurrent insurance \$4,000." The word "permitted" was not used, but the court held that an amount of other or additional insurance (\$3,000), which, with the policy so indorsed, would not exceed \$4,000, was thereby consented to. In *Senor v. Western Millers' Mut. F. Ins. Co.* 18 Mo. 104, 79 S. W. 687, the policy covered \$3,500 on buildings, boiler, engines, and machinery, and \$1,000 on stock. It also contained a provision as follows: "\$3,500 total insurance permitted, concurrent herewith, on buildings, boiler, engines, and machinery. Other insurance permitted concurrent herewith on stock." The court held that the first clause of the permit for insurance did not authorize any other insurance on buildings, boiler, engines, and machinery; but the decision was largely influenced by the last clause, which, using the words "other insurance," not found in the first clause, was thought by the court to constitute a controlling circumstance showing the intention not to use the term "concurrent herewith," in the first clause, as authorizing additional insurance. There is no such clause in the policy we are dealing with to control the interpretation of the clause we have: "Two thousand five hundred dollars total concurrent insurance permitted." That clause, construed naturally according to the obvious meaning of the language used and the purposes for which it was inserted, carries to the mind the idea that permission is granted to do something that the policy prohibits, *viz.*, to procure insurance; but this insurance must be concurrent with

that secured by the policy to which the permission is attached, and must not exceed \$2,500,—that is, the total concurrent insurance which is permitted is \$2,500. See *Strauss v. Phenix Ins. Co.* 9 Colo. App. 386, 48 Pac. 822; *Palatine Ins. Co. v. Ewing*, 34 C. C. A. 236, 92 Fed. 111. It may be admitted that the language is somewhat ambiguous, but, under well-settled rules for the interpretation of contracts, the conclusion we reach is correct. Thus, the different provisions of the contract must be so construed, if it can reasonably be done, as to give effect to each. Where two interpretations equally fair may be given, that which gives the greater indemnity will prevail. If one interpretation, looking to the other provisions of the contract and to its general object and scope, would lead to an absurd conclusion, such interpretation must be abandoned, and that adopted which will be more consistent with reason and probability. In all cases the policy must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to the indemnity, which in making the insurance it was his object to secure. When the words are without violence, susceptible of two interpretations, that which will sustain the claim of the insurer and cover his loss must, in preference, be adopted. 1 May, Ins. §§ 174, 175, and notes; *Strauss v. Phenix Ins. Co.* 9 Colo. App. 386, 48 Pac. 822; *Palatine Ins. Co. v. Ewing*, 34 C. C. A. 236, 92 Fed. 111. See also *McMaster v. New York L. Ins. Co.* 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10; *Hagan v. Scottish Union & Nat. Ins. Co.* 186 U. S. 423, 46 L. ed. 1229, 22 Sup. Ct. Rep. 862; *First Nat. Bank v. Savannah, F. & W. R. Co.* 36 Fla. 183, 18 So. 345. It is insisted that this interpretation loses sight of the fact that by the third indorsement slip attached to the policy the insurable value of the property was fixed at \$2,500, being \$1,250 on each building, and that it cannot be presumed the insurer intended to permit the insured to carry other insurance equal in amount, its policy being for the full insurable value as fixed in the policy. This slip was attached in obedience to the requirements of chapter 4677, p. 33, act approved May 31, 1899. This statute requires the insurer to cause the building insured to be examined by its agent, and full description thereof to be made, and the insurable value thereof to be fixed by him and written in the policy. It estops the insurer from denying that at the time of insuring the property was worth the amount of the insurable value as fixed by the agent. It fixes the measure of damages in case of total loss at the amount upon which the insured paid a premium, and in

case of partial loss at such part of the amount upon which premiums are paid as the damage sustained is part of the insurable value of the building as fixed by the agent. The court fails to see that the third indorsement slip has any controlling effect in the interpretation of the one relating to permission for concurrent insurance. The insurable value is required to be fixed, not for the purposes of permitting other insurance, but for the purpose of arriving at the measure of damages in case of loss. The insurer is not permitted to deny that the property was worth the amount fixed as the insurable value, but the statute does not deprive either party of the privilege of showing that it was worth more, if such fact should become material. The insurable value is fixed with reference to the particular policy in which it is written, and not with reference to all other insurance that may be permitted upon the property. The matter of other insurance rests in contract. The law does not forbid it by rendering the policies void, even if the total insurance exceeds the value of the property. In such a case a moral hazard would result, and the insurer might be put to inconvenience in making settlement in case of loss if the insurance was not concurrent; but, in the absence of contract provisions to that effect, the policy would not be void, though the measure of damage might be different. So that the prohibition against other insurance does not come from the statute requiring the insurable value to be fixed, but results from contract provisions. These provisions render the policy void, unless otherwise provided by agreement indorsed thereon or added thereto, if other insurance exists. The clause permitting "\$2,500 total concurrent insurance" is an agreement indorsed on or added to the policy, having direct reference to and modifying the provision against other insurance; and there is nothing in the insurable value clause which can be construed as annulling or modifying the permission given by the first indorsement slip.

In view of the interpretation placed upon the clause permitting insurance, it is evident that the pleas set up no defense to either count, for neither plea alleges that other insurance in excess of the limit permitted, viz., \$2,500, existed upon the property. The fact that the company did not know of the existence of the other insurance is not material, as the permission to carry it is general, and the insured was not required by the policy to give the insurer any notice in regard thereto further than to obtain permission to carry other insurance.

We have thus far considered the question of interpretation from a consideration of

the language of the policy alone, without the aid of extraneous circumstances. The second count alleges that the plaintiff "applied to the defendant to issue a policy of insurance for \$2,500 on said property against loss or damage by fire, and directed said defendant to provide in said policy for \$2,500 additional insurance upon said property. And thereafter, in compliance with said request and direction, the said defendant did issue and deliver to the plaintiff, in consideration of the sum of \$56.25 to it then paid by the plaintiff, its policy of insurance, which said policy permitted \$2,500 other and additional insurance." The third count contains the same allegations, except that it alleges that the policy issued "permitted \$2,500 total concurrent insurance." The pleas do not deny that the plaintiff directed the defendant to provide in its policy for \$2,500 additional insurance. And, if the clause we have been considering was inserted in response to such a direction, can it be doubted that the proper construction of the clause authorizes \$2,500 additional or other concurrent insurance? In 9 Cyc. Law & Proc. p. 772, it is said that, "if a written contract is ambiguous or obscure in its terms, so that the contractual intention of the parties cannot be understood from a mere inspection of the instrument, extrinsic evidence of the subject-matter of the contract, of the relations of the parties to each other, and of the facts and circumstances surrounding them when they entered into the contract may be received to enable the court to make a proper interpretation of the instrument." This rule has been approved in this state. *Solary v. Webster*, 35 Fla. 363, 17 So. 646; *Robinson v. Hyer*, 35 Fla. 544, 17 So. 745. See also the authorities cited in *Robinson v. Barnett*, 18 Fla. 602, 43 Am. Rep. 327. The same principle has also been applied to contracts of insurance. *Reed v. Merchants' Mut. Ins. Co.* 95 U. S. 23, 24 L. ed. 348; *Butterworth v. Western Assur. Co.* 132 Mass. 489.

From the views announced, it results that the judgment must be reversed, and a new trial granted.

The judgment is reversed, with directions to the Circuit Court to deny the motion to strike, overrule the demurrer to the third count of the original declaration, and to sustain plaintiff's demurrer to defendant's pleas, and for such further proceedings as may be agreeable to law and conformable to the views announced in this opinion.

Shackleford and Whitfield, JJ., concur.

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Cockrell, J., being disqualified, took no part in the decision of this case.

Hoeker, J., dissenting:

I am in the embarrassing position of being obliged by a conviction of duty to dissent from the reasoning and conclusions of the court as to the sufficiency of the defense to the declaration set up by the pleas of the defendant in error.

The general rules for the construction of insurance contracts are like those which apply to other contracts. Forfeitures are generally obnoxious, and any contract—insurance included—should be construed to avoid a forfeiture if it can be done without violence to the rules of law or the accepted meaning of words and figures. I do not contest the propriety of the rule that when there is ambiguity in the language of an insurance contract—that is, where words are used which have two or more meanings—the meaning should be preferred which leans to the side of the insured. But it seems to me that a practical application of the principles of construction to the case at bar, especially as they are applied in the cases cited in the majority opinion, lead to a conclusion the reverse of that of the majority opinion.

In the case of *Senor v. Western Millers' Mut. F. Ins. Co.* 181 Mo. 104, 79 S. W. 687, there was an insurance policy for \$4,500 to Senor, of which \$1,200 was on buildings, \$1,600 on machinery, etc., in mill building, \$700 on steam boilers, engines, etc., in boiler and engine house, \$1,000 on grain, etc., which was in said building, and, lastly, "\$3,500 total insurance permitted concurrent herewith on buildings, boiler, engines, and machinery. Other insurance permitted concurrent herewith on stock." The policy contained a provision that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." Senor obtained from another company a second policy for \$2,000; \$500 applicable to the frame flour-mill building, including, etc., covered by the policy of the defendant, the Western Millers' Mutual Fire Insurance Company. It was contended by Senor and denied by the defendant (Western Millers' Mutual Fire Insurance Company) that the \$500 additional insurance was warranted by the policy. The court, on this phase of the case, held the defendant company's contention was sound. The court, among other things, says: "We are unable to reach the conclusion that it was intended by the term 'concurrent here-

with' to authorize additional insurance. The terms employed in the concluding part of the provision, 'other insurance permitted concurrent herewith on stock,' clearly excludes the idea that such meaning was to be attributed to the first clause of the provision. While the provision, '\$3,500 total insurance permitted concurrent herewith on buildings, boiler, engines, and machinery,' is not most happily expressed, and is deservedly subject to criticism, and furnishes the able and ingenious counsel (which he is fully warranted in entering) a great field for a play upon terms, if this provision is to be construed as contended for by respondent, it would be necessary to change the term 'total,' and add in its stead the word 'additional.' 'Total insurance,' as used, contemplates the entire insurance upon the property. *'Concurrent herewith' relates to the terms 'total insurance,' in other words, it means that the total insurance must all concur with this,—that is, this policy provides the subjects upon which there must be a concurrence. This policy designates the property upon which the insurance operates, and the time of its operation, and there must be a concurrence of the total insurance in harmony with the time and property as fixed by the policy in suit.* [Italics ours.] Let us transpose the first clause of the provision thus,—'\$3,500 total insurance permitted on the buildings,' etc. In that form it is apparent that the limitation embraces the entire insurance. Does the adding of the words 'concurrent herewith' convey the meaning that \$3,500 additional insurance is permissible? We think not. It simply means that there must be a concurrence of the total insurance upon the subjects provided in the policy before us,—that is, the total insurance must operate at the same time and upon the same property as is fixed by the policy upon which this suit is brought." The court then says that "the conclusion reached upon this proposition is emphasized [not that it was a controlling circumstance, or that the conclusion was largely influenced thereby] by the concluding clause of the provision. It will be observed in that clause where it is apparent that the parties intended to provide for additional insurance that such terms were used as clearly expressed such intent. It was there expressly stated, 'other insurance permitted concurrent herewith on stock.'" It is apparent from this whole quotation, if the court were satisfied the last clause alone was a controlling circumstance, and clearly excluded the idea that concurrent insurance could not mean additional insurance in the first clause, that the whole rea-

soning of the court subsequent to the two first quoted sentences was futile and useless, and a mere waste of words. The statements of the first two quoted sentences would have settled the matter. But as the court did not rest its views there, but reasoned out its views upon the first clause, we, in fairness of criticism, are constrained to say, with it, that its views thus reasoned out were (in its own language) emphasized—not "largely influenced" or "controlled" in any way—by the concluding clause of the provision. The court does not indicate that there was any infirmity or weakness in its deductions made upon the language of the first clause, which it was necessary to buttress by calling in the aid of the second clause. The deductions made from the language of the first clause were simply emphasized by the deductions made from the language of both clauses taken together.

Thus viewed, this decision, so far from sustaining the majority opinion, overthrows it; for in this case the total insurance of Senor on the mills, machinery, and steam boilers, etc., in boiler and engine house was \$3,500, and \$3,500 was the total insurance permitted "concurrent herewith." Afterwards, without proper indorsement of consent on the policy, Senor obtained \$500 additional insurance on a part of the same property. The court held that this act of Senor made the policy void as to him. If the case of *East Texas F. Ins. Co. v. Blum*, 76 Tex. 653, 13 S. W. 572, has any bearing on the case at bar, it is rather against, than in support of, the majority opinion. In that case, at the time of the issuing of the policy sued on for \$1,000, there was \$3,000 insurance on the property. The policy sued on contained the following and other provisions: "Total concurrent insurance, \$4,000." "This policy shall become void unless consent in writing is indorsed by the company thereon in each of the following instances, viz.: Section 1. . . . Sec. 2. If the assured have or shall hereafter obtain any other policy or agreement for insurance, whether valid or not, on the property above mentioned, or any part thereof." Says the court: "Additional insurance was obtained without the consent of the company, and, in accordance with its terms, the policy became void unless the insertion in the policy of the words 'total concurrent insurance . . . ' gave to the assured the right to procure other insurance without further consent of the company." It was contended by the insured that the policy entitled him to take out \$5,000 insurance without consent of the insurance company,—construing the contract as authorizing him to take out

\$4,000 insurance in addition to his \$1,000 in the policy sued on without the consent of the company. The court, in effect, held that the phrase, "total concurrent insurance \$4,000," was a limitation on the total amount of insurance, without further consent, and that taking out other insurance without consent made the policy void, and consequently that "total concurrent insurance \$4,000" did not mean "total additional insurance \$4,000." In the case at bar the result of the reasoning of the majority opinion makes the word "concurrent" equivalent to the word "additional." The quoted case does not, in my judgment, authorize such a construction. In the case of *Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. F. Ins. Co.* 110 Iowa, 423, 80 Am. St. Rep. 311, 81 N. W. 707, the only question relevant in any sense to the case at bar was whether the phrase "other concurrent insurance permitted" required later policies to exactly concur in covering all the insured property for all of the period of time of insurance. The court held that it should not be so construed. I have failed to find in any case cited in the majority opinion, or in any dictionary, or in any other authority, the adjective "concurrent" defined as equivalent to or synonymous with the adjective "additional." It is stated that, "when words are, without violence, susceptible of two interpretations, that which will sustain the claim of the insurer and cover his loss must be preferred." To this proposition I entirely agree. But is no violence done to the usual meaning of language by making the word "concurrent" the equivalent of the word "additional?" I can discover no escape from an affirmative answer to this question. It is argued that the mere fact that the clause, "\$2,500 total concurrent insurance permitted," was attached to the policy, shows clearly an intent to permit other insurance than that provided for by the policy, or otherwise its presence is an absurdity. It is possible that the clause shows some sort of intent to permit other insurance. Its infirmity is that it does not show enough.

In the case of *Philadelphia Underwriters' Ins. Co. v. Bigelow* (Fla.) 37 So. 210, the concurrent insurance clause is as follows: "\$—— total concurrent insurance permitted." The daily report of the agent showed this clause, and also: "Additional insurance \$——. Are the policies concurrent? Yes." The argument that these 67 L. R. A.

indorsements were absurd and useless unless they were construed to show that other insurance was thereby intended to be permitted was made, but was not thought to be constraining; and this court held that they did not, of themselves, show a purpose to allow other insurance. I see no practical difference between that case and the one at the bar. It is true that in the former case there was no sum of money placed after the dollar mark. In this case there is \$2,500. But this amount is too small by \$1,500 to cover any insurance except that in the policy to which it is attached. If A should go into the business of keeping a ferry over a sheet or stream of water 4,000 feet wide, and should order 4,000 feet of wire from his hardware merchant, and the merchant should send him 2,500 feet of wire, how much better off would A be, so far as the operation of his ferry was concerned, than if the merchant had sent him no wire at all? I am not able to discover. And so \$2,500 cannot, by any violence of construction, be made the equivalent of \$4,000. What the plaintiff in error needs to meet the allegations of his declaration is a policy permitting \$4,000 concurrent insurance, or \$1,500 in addition to the amount of his policy. This he has not. If, from fraud or mistake, the policy does not state the true contract between the parties, then the plaintiff's remedy was in equity, and not at law. 4 Joyce, Ins. §§ 3510, 3511; *Taylor v. Glens Falls Ins. Co.* 44 Fla. 273, 32 So. 887. It is emphasized that, if the terms of a policy are capable of two or more interpretations equally reasonable, it is proper to adopt that construction which is most favorable to the insured. But my judgment is that this rule will not authorize a court to construe \$2,500 as the equivalent of \$4,000 or \$5,000, for the simple reason that figures and numbers do not symbolize different and contradictory notions or ideas. Believing, as I do, that these views are sustained by the cases of *Senor v. Western Millers' Mut. F. Ins. Co.* 181 Mo. 104, 79 S. W. 687, and *Philadelphia Underwriters' Ins. Co. v. Bigelow* (Fla.) 37 So. 210, by the rules of construction and by reason, I think the demurrer to the pleas should not have been sustained.

Taylor, Ch. J., concurs.

Petition for rehearing denied October 14, 1904.

MINNESOTA SUPREME COURT.

John W. SCHMITT, Trustee, etc., of Peter
H. Dahl, Bankrupt, Appt.,
v.

Peter H. DAHL et al., Respts.

(88 Minn. 506.)

*In an action by a judgment creditor to set aside as fraudulent a conveyance of property made prior to the entry of the judgment.—*Held:*

1. It is necessary to prove that the claim upon which the judgment is

based existed prior to the time of the conveyance, but the judgment itself does not prove such fact. It is not required to establish the fact that the claim was lawful. In such action the grantee is estopped from setting up any defenses which might have been interposed by his grantor in the original action. Such judgments cannot be impeached in collateral proceedings, except for fraud.

2. A trustee in bankruptcy is entitled to maintain such action to set aside the fraudulent conveyance where the estate of the judgment debtor is in the bankrupt court, and the claim has been filed.

*Headnote by LEWIS, J.

(February 13, 1903.)

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I. Introductory.

This note is not concerned with the question whether a judgment in his favor is necessary to entitle a creditor to bring his bill to set aside a fraudulent conveyance of his debtor,—that being a matter of statute in most cases; or whether, if a judgment be necessary, an execution upon it must have been returned *nulla bona*, and the plaintiff's remedy at law must have been exhausted. It is limited to the discussion of what grounds of attack upon the judgment will avail the grantee defendant, whose attack must necessarily be collateral: there being, in the first place, no question that a judgment rendered without jurisdiction or collusively may be attacked either directly or collaterally. See, upon this point, *Thornly v. Prentice*, 121 Iowa, 89, 100 Am. St. Rep. 317, 96 N. W. 728.

II. The judgment considered as evidence.

a. As *prima facie* evidence of the debt.

In an action based upon a judgment debt, or upon the position of the plaintiff as a creditor, the judgment for the debt is naturally admissible as evidence. It remains to be seen of what facts it is evidence, and to what extent it is decisive.

In an action against both grantor and grantee to set aside a conveyance as fraudulent, the plaintiff's judgment against the grantor is, as against the grantor, conclusive evidence of the indebtedness at the time of the commencement of the suit, and is, as against the grantee, *prima facie* evidence of the same fact, being made conclusive by proof of the facts in the first action; and an admission in the vendee's answer of such facts is sufficient proof of them. *New York & H. R. Co. v. Kyle*, 5 Bosw. 587.

So in an action of trover against a deputy sheriff who defended upon the ground that the sale under which the plaintiff claimed was fraudulent as to the vendor's creditors, by one of whom the property had been attached, the judgment obtained in the attaching plaintiff's favor was pertinent evidence to prove that he was a creditor of the vendor, and the plaintiff's objection that as to him the judgment was *res inter alios acta* was not sound, since it would apply with equal force to any other evidence of transactions between the judgment debtor, the vendor, and the judgment creditor, and so it

APPPEAL by plaintiff, trustee in bankruptcy of Peter H. Dahl, from a judgment of the District Court for Brown County refusing to set aside a transfer of real estate which was alleged to be in fraud of creditors. *Reversed.*

The facts are stated in the opinion.

Mr. J. W. Schmitt, with **Messrs. H. L. Schmitt and Joseph A. Eckstein**, for appellant:

Hahl's judgment against Peter H. Dahl is, in this action, conclusive against him and the whole world, as to the amount and validity of the debt on which it was recovered and it cannot be collaterally attacked by the defendant, Amelia Dahl, except for fraud, collusion, or want of jurisdiction in procuring it.

would be impossible to prove the debt; but, from the necessity of the case, each party must prove his transactions with the vendor in order to establish his right to contest the title of the other party. *Goodnow v. Smith*, 97 Mass. 69.

On a writ of entry for land on which the demandant's execution had been extended, an instruction was correct that the note in favor of the demandant and the judgment entered upon it were prima facie evidence of the grantor's debt, and were sufficient to entitle the demandant to show the defendant's deed to be fraudulent, unless the latter could prove that the note was not due or had been paid, and that the judgment was collusive or fraudulent. *Reed v. Davis*, 5 Pick. 388. In accord is *Vogt v. Ticknor*, 48 N. H. 242.

So the judgment roll was properly admitted to prove the debt and the exhaustion of legal remedies. *Baxter v. Heberd*, 5 N. Y. S. R. 854.

In an action to set aside as fraudulent a general assignment for the benefit of creditors the judgment roll on which a creditor's action is brought is binding upon the assignor defendants so far as it adjudicates that they are debtors of the plaintiff, but, as against the assignee and the creditors that he represents, it is not evidence as to any other facts in it. *St. Nicholas Bank v. DeRivera*, 3 N. Y. Supp. 666.

Where a mortgagee of chattels sued a sheriff for levying on them as the property of the mortgagor, and the defendant, alleging fraud against creditors in the execution of the mortgage, justified the seizure of the property under the judgment and execution, and plaintiff denied that the judgment alone was sufficient evidence as against him of the mortgagor's indebtedness to the judgment creditor, it was held that the rule was well settled that a judgment, *in personam*, at least, of a court of competent jurisdiction may be offered in evidence in a subsequent suit as evidence of its own existence, and of its legal effect; to prove which it is admissible for and against strangers, as well as for and against parties and privies. *Pabst Brewing Co. v. Jensen*, 68 Minn. 293, 71 N. W. 384.

In the first instance the judgment by itself is competent and sufficient and indispensable proof of the debt recovered, although it is not conclusive on the grantee from the judgment 67 L. R. A.

Ferguson v. Kumler, 11 Minn. 104, Gil. 62.

It is not sufficient for the plaintiff to allege and prove a judgment. He must, by proper allegations and proof, connect his judgment with the indebtedness on which it is founded, and show that the indebtedness antedated the fraudulent conveyance; but, having done that much, the judgment is conclusive proof of the amount and validity of his claim.

State Ins. Co. v. Prestage, 116 Iowa, 466, 90 N. W. 62; *Fuller v. Nelson*, 35 Minn. 213, 28 N. W. 511; *Scanlan v. Murphy*, 51 Minn. 536, 53 N. W. 799.

No other or different rule is promulgated in *Bloom v. Moy*, 43 Minn. 397, 19 Am. St. Rep. 243, 45 N. W. 715, or *Hoerr v. Mei-*

debtor. *Hafner v. Irwin*, 26 N. C. (4 Ired. L.) 529.

On the question whether one is or is not a debtor, an adverse judgment is evidence, prima facie, that he is a debtor, even against strangers who claim under him property affected by the judgment. *Garland v. Rives*, 4 Rand. (Va.) 282, 15 Am. Dec. 756.

In *Troy v. Smith*, 33 Ala. 469, and *Sweet v. Dean*, 43 Ill. App. 650, it is held that the judgment is not evidence of the existence of the debt at the time of the commencement of the suit.

In other cases it is declared that the judgment is evidence only of its rendition and its time (*Donley v. McKiernan*, 62 Ala. 34); and not of the facts on which it is based (*Hartman v. Welland*, 36 Minn. 223, 30 N. W. 815).

In *Hoerr v. Melhofer*, 77 Minn. 228, 77 Am. St. Rep. 674, 79 N. W. 964 (distinguished in *SCHMITT v. DAHL*, merely upon the ground that the meaning of "indebtedness" was not there considered), an action being brought to set aside as fraudulent a conveyance made before the entry of the judgment, it was held that the judgment was not, at least as against the grantee, evidence of the antecedent existence of the indebtedness for which the judgment was rendered; and the plaintiff could not succeed upon evidence tending merely to show the existence of a similar debt, the amount of the indebtedness nowhere appearing.

When a sheriff, sued for chattels which he levied upon as the property of a judgment debtor, defended upon the ground that the debtor had made a fraudulent conveyance of the property without relinquishing possession, and offered in evidence the judgment on which execution was issued, it was held that a judgment entered in an action in which the service of summons is by publication, and in which property is attached as was the case here, could not be used as evidence in another proceeding not affecting the property attached; but, as the action did affect the attached property, and nothing else, the judgment was admissible. *Mosgrove v. Harris*, 94 Cal. 162, 29 Pac. 490.

The allowance of a claim in a probate court against the administrator of a deceased person is not more than prima facie evidence of the validity of the claim; but, as against heirs of the decedent in an action to set aside as fraudulent as against creditors grants to them by the decedent in his lifetime the allowance-

Hofer, 77 Minn. 228, 77 Am. St. Rep. 674, 79 N. W. 964.

In the absence of an allegation and proof of fraud or collusion between the debtor and creditor, a judgment procured by the latter against the former (after a fraudulent conveyance of property by the debtor) upon a pre-existing debt or claim, in a court of competent jurisdiction, is conclusive evidence against the fraudulent grantee of the validity and amount of the claim, in an action by the judgment creditor or his representative to set the conveyance aside.

Sidensparker v. Sidensparker, 52 Me. 481, 83 Am. Dec. 527; *Mt. Desert v. Tremont*, 72 Me. 352; *Candee v. Lord*, 2 N. Y. 269, 51 Am. Dec. 294.

If the judgment debtor sees fit to waive

defenses, no one else has any right to interpose them for him in an action involving the judgment procured against the debtor.

McMannomy v. Chicago, D. & V. R. Co. 167 Ill. 497, 47 N. E. 712; *Pickett v. Pipkin*, 64 Ala. 520; *Scott v. Indianapolis Wagon Works*, 48 Ind. 75; *Faber v. Matz*, 86 Wis. 370, 57 N. W. 39; *Edmunds v. Mister*, 58 Miss. 765; 1 Herman, *Estoppel & Res Adjudicata*, § 161, pp. 165-174; *Ferguson v. Kumler*, 11 Minn. 104, Gil. 62; *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527; *Burgess v. Simonson*, 45 N. Y. 225; *Carpenter v. Osborn*, 102 N. Y. 552, 7 N. E. 823; *Swihart v. Shaum*, 24 Ohio St. 432; *Strong v. Lawrence*, 58 Iowa, 55, 12 N. W. 74; *Minnesota Thresher Mfg.*

of the claim is not competent evidence of the claim's validity. *Willett v. Malli*, 85 Iowa, 675, 22 N. W. 922. The court distinguished *Strong v. Lawrence*, 58 Iowa, 55, 12 N. W. 74, *infra*, III. c. 7, deciding that a judgment rendered against a fraudulent grantor may be pleaded as conclusive against the fraudulent grantee, upon the ground that in that case the judgment defendant was charged personally.

And it has been held that a judgment against an administrator is not evidence, in an action by a creditor of an intestate to set aside a deed by him in his lifetime, except to prove that the creditor has pursued his legal remedy and failed. *Alexander v. Quigley*, 2 Duv. 399. (As to what is a judgment on which may be based a creditor's bill to set aside a conveyance as fraudulent, see *infra*, VI.)

Under the Louisiana law allowing the grantee to set up anything that his grantor might have set up, the court in a revocatory action properly admitted the plaintiff's original judgment as prima facie evidence of the claim, and it then became the duty of the defendant to controvert the demand of the plaintiff, although it was liquidated by a judgment, in the same manner as the original debtor might have done before judgment. *Lanata v. Planas*, 2 La. Ann. 544.

So the court did not err in permitting the record in the first suit to be given in evidence to prove simply the fact that such a judgment had been recovered; but the evidence upon which that judgment was obtained was not admissible in the second action. *Lopez v. Bergel*, 12 La. 197.

b. What must, or may, be produced.

A rule, in creditors' bills to set aside fraudulent conveyances, requiring an exhibition of the regularity of all the proceedings upon the judgment in the court of law, would lead to prolixity, and be productive of no good results. All that is required to give the court jurisdiction is to show that the complainant has had execution upon his judgment in the hands of the proper officer, and that he has been unable to find any property leviable. *Williams v. Hubbard*, 1 Mich. 446. Following *Sandford v. Sinclair*, 8 Paige, 373.

A certified transcript of the entry in the docket book of the supreme court of the judgment on which the creditor's action is based, is not sufficient evidence of the judgment and 67 L. R. A.

that the person in whose favor it was entered was a creditor of the defendant; but the objection, if not taken at the trial by motion or otherwise, is not available on appeal. *Lalliman v. Hovey*, 92 Hun, 419, 36 N. Y. Supp. 662.

But a transcript of the plaintiff's judgment against the grantor is admissible to establish the fact of the indebtedness of the grantor to the plaintiff, and an objection to the form of the clerk's certificate to the transcript, if not made on the trial, is not available on appeal. *Hunsinger v. Hofer*, 110 Ind. 390, 11 N. E. 463.

The certificate of a justice of the peace is conclusive as to the existence of the judgments on which the creditor's bill is based. *Helatt v. Barnes*, 5 Dana, 219.

But when a judgment creditor in an execution issued on a judgment of a justice of the peace is sued as for a trespass by the grantee of the judgment debtor, and wishes by way of defense to attack the grantee's deed as fraudulent, it has been held that he must, in order to show himself a judgment creditor, produce the whole transcript of the justice's docket in order that it may appear, not only that there was an execution, but a judgment to warrant the execution, and other previous proceedings to warrant the judgment. *Dameron v. Williams*, 7 Mo. 138.

In detinue against a sheriff for a slave levied upon under an execution against the plaintiff's donor, when the defendant had offered the judgment in evidence, as proof of indebtedness, in order to prove fraud in the gift to the plaintiff, the plaintiff might put in evidence the entire record in the case for the purpose of showing the effect of the judgment and execution. *Easley v. Dye*, 14 Ala. 158.

But it was error in an action between a creditor and the vendee of the debtor to determine the title to property, to admit the recitals of the record in judgments taken by the creditor against the debtor in order to prove that the debts existed before the date of the judgment. The record of a judgment between other parties is always admissible to prove the mere fact of the existence of the judgment when that fact is material to the issue; but this comprehends only the judgment of the court and such parts of the record as are necessary to show when and by what court it was rendered. All other parts must be considered as to all other persons than the parties to the judgment, and their privies,

Co. v. Schaaek, 10 S. D. 511, 74 N. W. 445; *Sawyer v. Moyer*, 109 Ill. 461.

Creditors can attack a judgment collaterally when it is a fraud upon them, as when it has been obtained by collusion; but they cannot set it aside merely because it is a fraud upon the debtor.

Thompson's Appeal, 57 Pa. 175; *Lewis v. Rogers*, 16 Pa. 21; *Clark v. Douglass*, 62 Pa. 408; *Ludington's Petition*, 5 Abb. N. C. 323; 1 *Herman, Estoppel & Res Adjudicata*, p. 425; 2 *Van Fleet, Former Adjudication*, pp. 917, 921, 922; *Strong v. Lawrence*, 58 Iowa, 55, 12 N. W. 74; *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527; *Mt. Desert v. Tremont*, 72 Me. 352; 2 *Black, Judgm.* § 605, pp. 724, 725; *Bump, Fraud.*

res inter alios acta. *Snodgrass v. Branch Bank*, 25 Ala. 161, 60 Am. Dec. 505. Followed by *Marshall v. Croom*, 60 Ala. 121; *Jacobson v. Sims*, 60 Ala. 185. (As to the necessary recitals in the judgment, see *Jones v. Read*, 1 *Humph.* 335, *infra*, III., a.)

And some proof seems always to be necessary; so the fact that the judgment was entered in an action before the same court and judge trying the creditor's action is not of itself ground for dispensing with proof of the judgment; and, if proper objection is made, it cannot be proved by putting in evidence executions issued upon it, nor by the docket containing an abstract of it, nor by oral evidence, if there is no proof which will allow introduction of secondary evidence. *Amundson v. Wilson*, 11 N. D. 193, 91 N. W. 37.

III. Conclusive effect of the judgment.

a. Generally.

Unquestionably the general rule is that the judgment is conclusive against the grantee, as to the fact of the indebtedness upon which it is founded, if rendered by a court of competent jurisdiction, and in the absence of fraud and collusion.

In the leading New York case it is held that the right of the creditor to impeach the act of the debtor arises out of the relation which exists between them at the commencement of the suit for that purpose, and does not depend upon the time when the fraud was consummated; hence, the fraudulent grantee is not permitted to allege, in bar of the action against him, that the parties seeking relief were not creditors, either before or at the time of the conveyance. *Candee v. Lord*, 2 N. Y. 269, 51 Am. Dec. 294.

And in accordance with this rule, the judgment being, in the absence of fraud, conclusive evidence of the debt as against the grantee, testimony to disprove the existence of such a debt is inadmissible. *Burgess v. Simonson*, 45 N. Y. 225.

The usual rule, however, is represented in *Mattingly v. Nye*, 8 Wall. 370, 19 L. ed. 380, which holds that a judgment for money against one making a voluntary conveyance cannot be questioned upon a creditor's bill; but that it is also necessary for the complainant to show, otherwise, that the grantor was indebted to him at the time of the conveyance.

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Conv. 4th ed. 557, 558; *Michaels v. Post*, 21 Wall. 427, 22 L. ed. 526.

Even if all the representations that were testified to by the defendant were made by Hahl, Dahl had no right to rely on them, if he really did.

14 *Am. & Eng. Enc. Law*, 2d ed. p. 118; *Columbia Electric Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244; *Tretheway v. Hulett*, 52 Minn. 448, 54 N. W. 486; *Farnsworth v. Duffner*, 142 U. S. 43, 35 L. ed. 931, 12 Sup. Ct. Rep. 164; *Plano Mfg. Co. v. Richards*, 86 Minn. 94, 90 N. W. 120.

Messrs. Holdale & Somsen, for respondents:

Fraud in the transaction on which the judgment was founded might be shown as

A merely voluntary conveyance, not tainted with fraud, is void only as to antecedent debts; but, if made with the intent to hinder, delay, or defraud creditors, it is void as to subsequent, as well as existing, creditors. When one aggrieved by such a conveyance moves to set it aside those claiming under it may demand that he shall prove himself to be a creditor with a valid, subsisting debt. The principle that no grantee is affected by a judgment against the grantor since the alienation, since otherwise his rights could be divested without his consent, does not conflict with that other principle that a judgment, rendered by a court having jurisdiction, and without fraud or collusion, is conclusive evidence of the amount of the debt at the time, and that, in a proceeding to set aside an alleged fraudulent conveyance such a judgment, whether rendered before or after the conveyance, is competent evidence of the debt. If the complainant would use the judgment to the prejudice of the grantee in a deed alleged to be only voluntary and constructively fraudulent, he must produce independent facts showing the cause of action which authorized the rendition of the judgment, and that it is older than the conveyance. *Yeend v. Weeks*, 104 Ala. 331, 53 Am. St. Rep. 50, 16 So. 165, Following *Pickett v. Pipkin*, 64 Ala. 520.

So when a judgment creditor has ineffectually attempted to collect his judgment at law, and resorts to a court of equity to enforce it, the judgment, upon due proof of every allegation necessary to entitle him to a verdict, must be presumed to have been regularly obtained, and it will not be inquired into in equity. *Schley v. Dixon*, 24 Ga. 273, 71 Am. Dec. 121.

These cases, in requiring that other proof than the judgment must be produced of the existence of a "debt" at the time of the conveyance, differ from *SCHMITT v. DAHL*, which requires only proof of the existence, at that time, of a "claim."

These decisions, moreover, treat only the case of an adverse judgment; but there are others declaring a different rule when the judgment is entered without contest.

So when property was taken in execution while in the possession of one who had it by virtue of a sale from the owner, upon which the vendee brought an action and the defendant insisted that the sale was fraudulent as against him, he being a creditor by judgment, "Holt, Ch. J., said that, if the judgment was

a defense in the action to set aside the transfer.

Bruggerman v. Hoerr, 7 Minn. 337, 82 Am. Dec. 97, Gil. 264; *Stone v. Myers*, 9 Minn. 303, 86 Am. Dec. 104, Gil. 287; *Olmsted County v. Barber*, 31 Minn. 256, 17 N. W. 473, 944; *Hartman v. Weiland*, 36 Minn. 223, 30 N. W. 815; *Bloom v. Moy*, 43 Minn. 397, 19 Am. St. Rep. 243, 45 N. W. 715; *Braley v. Byrnes*, 20 Minn. 435, Gil. 389; *Hoerr v. Meishofer*, 77 Minn. 228, 77 Am. St. Rep. 674, 79 N. W. 964; *Gage v. Stimson*, 26 Minn. 64, 1 N. W. 806; *Pabst Brewing Co. v. Jensen*, 68 Minn. 293, 71 N. W. 384; *Maloney v. Finnegan*, 40 Minn. 281, 41 N. W. 979; *Nowak v. Knight*, 44 Minn. 241, 46 N. W. 348; *American*

Bldg. & L. Asso. v. Stoneman, 53 Minn. 212, 54 N. W. 1115.

One whose demand is the offspring of fraud and misrepresentations has no business in an equity court, and equity will not exercise its peculiar jurisdiction to grant him relief.

1 Pom. Eq. Jur. §§ 397, 400, pp. 433, 435.

Without proof that Hahl or Damron parted with something in consideration of the notes upon which the suit is based, it is certainly unnecessary for defendant to prove that any offer to reconvey was ever made.

Even if a person seeking relief did examine the land, this is not conclusive that he

upon a point tried, that then he need not to prove the consideration, but it shall be intended good; but, if it be a judgment by confession, etc., he ought to prove it to be for a just debt, otherwise he shall not overthrow the sale though it be fraudulent, for it is good against all the creditors for a just debt bona fide due." *Sanders v. ———*, *Skinner*, 586, *Holt*, 327.

And from *O'Connor v. Docen*, 50 App. Div. 610, 64 N. Y. Supp. 206, it seems that a confession of judgment is not sufficient proof to establish the status of the person in whose favor it is confessed as a creditor, so as to entitle him to maintain an action to set aside a conveyance by the debtor as fraudulent, if the confession is made after the conveyance.

And the fact that judgment was taken by default in the action upon which a creditor's bill is based to set aside a conveyance as fraudulent does not dispense with the necessity of the plaintiff's making full proof of the indebtedness of the original debtor to him, and of the facts, such as his capacity as executor. *Fink v. Martin*, 1 La. Ann. 117.

The recovery, however, of an adverse judgment by executors in their representative character is conclusive evidence of their right to sue as executors so far as respects that debt; and it is not necessary for them to show how they became entitled to sue as the representatives of the testator, to whom the demand was originally due. *Rogers v. Rogers*, 3 Paige, 379.

That the judgment is not conclusive as to the debt and its amount at the time of the transfer is held in *Lynch v. Burt*, 132 Fed. 417, and *Finch v. Kent*, 24 Mont. 268, 61 Pac. 658; although in the latter case testimony of the grantor, that he did not owe the amount of the judgment against him, is held incompetent, since, "in the absence of evidence tending to show fraud, accident, mistake, or satisfaction, the judgment was conclusive evidence of his liability."

On the other hand, in *Morley Bros. v. Stringer*, 133 Mich. 690, 95 N. W. 978; *Carter v. Baker*, 10 Helsk. 640; and *Young v. Pate*, 4 Yerg. 164,—it is simply held that when the judgment is valid upon its face it cannot be collaterally attacked.

But the judgment, nevertheless, should recite the ground upon which it was rendered, and the fact that the question at issue was proved to the satisfaction of the court, as well as all the 67 L. R. A.

facts which were necessary to give the court jurisdiction. *Jones v. Read*, 1 Humph. 335.

In a scire facias against a garnishee in an attachment execution based upon the allegation of a mortgage fraudulently purchased by the garnishee in the name of his wife, it was held that the validity of the original judgment could not be denied, or even inquired into, by the garnishee; nor could the judgment creditors themselves give any evidence in support of it. *Black v. Nease*, 37 Pa. 483.

But upon the general question of going behind the judgment, as for fraud, or collusion, in the ordinary case of a creditor's bill, this case is not authority. See *Posten v. Posten*, 4 Whart. 27, *infra*, III., d. 2.

In an Ohio case the rule was laid down that the complainant's judgment could not be controverted, and was conclusive that the judgment debtor owed the judgment creditor the debt for which it was rendered, at the time stated in the proceedings. *Starr v. Starr*, 1 Ohio, 321.

But in *Swihart v. Shaum*, 24 Ohio St. 432, such a judgment is held to be conclusive merely in the absence of fraud or collusion in obtaining it, and it is stated that it can make no difference whether the conveyance is fraudulent in fact or fraudulent in law.

In *Salemonson v. Thompson* (N. D.) 101 N. W. 320, and *Bensimer v. Fell*, 35 W. Va. 15, 29 Am. St. Rep. 774, 12 S. E. 1078, it is laid down that such a judgment, without allegation and proof of fraud or collusion, is conclusive of the debt and its amount, apparently without regard to the time of rendition.

And it precludes question as to whether there were irregularities or errors in the conclusion of the court, which cannot be inquired into collaterally. *Moore & H. Hardware Co. v. Curry*, 106 Ala. 284, 18 So. 46.

But a judgment rendered by a court without jurisdiction, or by fraud or collusion, can be impeached by a grantee of the debtor; and he may also show that the debt for which the judgment was recovered accrued subsequent to the conveyance to him, or that the plaintiff prosecuted the action against the debtor for the benefit of the debtor. *Minnesota Thresher Mfg. Co. v. Schaack*, 10 S. D. 511, 74 N. W. 445.

And other courts allow the grantee much greater latitude in his desire to go behind the record of the judgment.

So in Maine it is held that where a creditor

relied upon his own knowledge; and, if he relies, even in part, upon the false representations made to him, the court will hear him.

14 Am. & Eng. Enc. Law, p. 112; *Burr v. Willson*, 22 Minn. 206; *Moline-Milburn Co. v. Franklin*, 37 Minn. 137, 33 N. W. 323.

All that is necessary to show is that defendant was induced by material false representations to enter into a contract which he would not have entered into except for such misrepresentations.

MacLaren v. Cochran, 44 Minn. 255, 46 N. W. 408; *Martin v. Hill*, 41 Minn. 343, 43 N. W. 337; *Fox v. Tabel*, 66 Conn. 397, 34 Atl. 101; 14 Am. & Eng. Enc. Law, pp. 122, 128, 141.

Hahl's claim, if he in fact had one, was

calls in question a conveyance made by his debtor upon the ground of fraud, in an action between him and the grantee the demand of the creditor must be subject to examination in order to see whether he has a right, as such, to question the validity of the conveyance. If judgment has been obtained by him, still, as between him and the grantee, who is no party to it, it will not be regarded as precluding the latter from an examination of the grounds of it. The grantee may be allowed to show that it was obtained by fraud, or that the cause of action accrued under circumstances which would not give the creditor a right to impeach the conveyance. *Miller v. Miller*, 23 Me. 22, 39 Am. Dec. 597.

So the grantee, not being a party to it, is not concluded by the judgment against his grantor (*Sargent v. Salmond*, 27 Me. 539; *Inman v. Mead*, 97 Mass. 310); especially when it is subsequent to his deed (*Warner v. Percy*, 22 Vt. 155). *Law v. Payson*, 32 Me. 521, apparently holding that a judgment under such circumstances must be held valid until reversed or proved to have been obtained by collusion or fraud, does not directly declare this.

Upon a bill for an injunction filed by a married woman to protect her separate property, which had been levied upon to satisfy a judgment against her husband, the defendants maintaining that the complainant's title was fraudulent, it was held that the judgment on which the levy had been issued, no cause of action having been filed and the declaration not disclosing and stating when the cause of action accrued, was only evidence of the indebtedness of the husband to the defendant on the day of its rendition; but that no question affecting the rights of the complainant was determined by that suit, since she was neither a party nor a privy to it. *Miller v. Johnson*, 27 Md. 6.

b. Effect of the time of the conveyance.

It is fundamental that one who was a creditor before a merely voluntary, and so constructively fraudulent, conveyance by the debtor, may successfully attack it without showing fraud in the parties; but that one becoming a creditor after a conveyance cannot have it set aside, unless he can show actual fraud in it as against creditors.

So the fact that the debt did or did not exist 67 L. R. A.

never proved in bankruptcy proceedings. Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim.

Re Elder, 1 Sawy. 73, Fed. Cas. No. 4,326; *Bump*, Fraud. Conv. 632; *Black*, Judgm. 175; *Brandenburg*, Bankr. 501; *National Bank v. Sawyer*, 3 N. B. N. Rep. 266; *Re Stevens*, 104 Fed. 325; *Re Howard*, 6 Nat. Bankr. Reg. 372, Fed. Cas. No. 6,751.

The proof of a note which did not state the consideration is defective.

Re Loder, 4 Ben. 125, 3 Nat. Bankr. Reg. 655, Fed. Cas. No. 8,456; *Re Jaycox*, 7 Nat. Bankr. Reg. 303, Fed. Cas. No. 7,240; *Re Lake Superior Ship Canal, R. & Iron Co.*

before the time of the conveyance bears only upon the character of the proof of fraud required. *Thompson v. Williamson* (N. J. Eq.) 58 Atl. 602, *infra*, III., c. 10, (c).

Under the rule as laid down in *Edmunds v. Mister*, 58 Miss. 765, *infra*, III., c. 3, allowing the severance, or denying the doctrine of the entirety, of judgments, a court of equity will not treat as a subsequent creditor one whose judgment is rendered on an account part of which was contracted before and part after the date of a voluntary conveyance which he seeks to have set aside, and compel him thus to lose a valid claim. *Chapman v. Hughes*, 61 Miss. 339.

But in Maine, if the creditor of a fraudulent grantor joins together in one suit several demands accruing some before and some after the date of the conveyance which he seeks to set aside, recovers judgment upon all of them, and extends an execution, he must be regarded as a creditor subsequent to the conveyance of the land in question by his debtor, and therefore cannot impeach that conveyance except by showing actual fraud. *Reed v. Woodman*, 4 Me. 400, Followed in *Usher v. Hazeltine*, 5 Me. 471, 17 Am. Dec. 253; *Miller v. Miller*, 23 Me. 22, 39 Am. Dec. 597; *Quimby v. Dill*, 40 Me. 528; and *Holmes v. Farris*, 63 Me. 318.

And where the plaintiff's claim, on which he had obtained judgment, consisted of an account, all of which, except one item, accrued before the conveyance, and there was a credit in the account for more than sufficient to balance that item, although there did not appear to have been any appropriation of the payment by either party, the court was compelled to follow the general rule in such cases, and apply the credit to extinguish the oldest debt, leaving the last item uncancelled and of a date later than the conveyance; and under the rule of *Reed v. Woodman*, 4 Me. 400, *supra*, this prevented the plaintiff from attacking the conveyance without proof of actual fraud. *Miller v. Miller*, 23 Me. 22, 39 Am. Dec. 597.

In New York it is held that it is immaterial whether the debt was created before or after the fraudulent conveyance; the right of a creditor to impeach the act of the debtor arises out of the relation between them when the action against the grantee is begun; hence, a conveyance made to defraud subsequent creditors may be upset by them, and the fraudulent grantee cannot set up that the plaintiff was not a

7 Nat. Bankr. Reg. 376, Fed. Cas. No. 7,997; Bump, Fraud. Conv. 632.

And a statement that the consideration was goods sold and delivered, without setting forth the date, items, and kind of goods, is insufficient.

Re Elder, 1 Sawy. 73, 3 Nat. Bankr. Reg. 670, Fed. Cas. No. 4,326; *Re Port Huron Dry Dock Co.* 14 Nat. Bankr. Reg. 253, Fed. Cas. No. 11,293; *Re Northern Iron Co.* 14 Nat. Bankr. Reg. 356, Fed. Cas. No. 10,322; Bump. Fraud. Conv. 632.

A new promise, or new contract, affecting the claim upon which plaintiff relies, has been made and entered into by and between Hahl and Peter H. Dahl subsequent to the commencement of bankruptcy proceedings. This, if true, takes the matter out of bankruptcy court, and the trustee has nothing

further to do in regard to that particular claim.

Anderson v. Clark, 70 Ga. 362; *Dewey v. Moyer*, 72 N. Y. 75; *Willis v. Cushman*, 115 Ind. 100, 17 N. E. 168; *Everts v. Hyde*, 51 Vt. 183; *Jersey City Ins. Co. v. Archer*, 122 N. Y. 376, 25 N. E. 338; *Lawrence v. Harrington*, 122 N. Y. 408, 25 N. E. 406; *Depuy v. Swart*, 3 Wend. 140, 20 Am. Dec. 673; *Collier*, Bankr. 218; *Black*, Judgm. 115; *Brandenburg*, Bankr. 250; *Knapp v. Hoyt*, 57 Iowa, 591, 42 Am. Rep. 59, 10 N. W. 925; *Griel v. Solomon*, 82 Ala. 85, 60 Am. Rep. 733, 2 So. 322.

Lewis, J., delivered the opinion of the court:

In 1895 Peter H. Dahl, a resident of Brown county, Minnesota, purchased certain

creditor at the time of the conveyance. *Candee v. Lord*, 2 N. Y. 269, 51 Am. Dec. 294.

So testimony to disprove the debt is inadmissible, although the grant in question was made before the rendition of the judgment. *Burgess v. Simonson*, 45 N. Y. 225.

And when a judgment for breach of promise was the basis of a creditor's action to set aside a conveyance made the year before the entering of the judgment, it was held that the grantee might inquire into the grounds of the judgment, and show that it did not give the attacking creditor a right to impeach the transfer and thus to show that the debtor was not under a contract to marry the plaintiff at the time the conveyance was made, or to show that the debt or liability was created after the transfer. *Gregory v. Lamb*, 101 Ky. 727, 42 S. W. 339.

But when it appeared in an action to set aside a conveyance as fraudulent that the plaintiff's debt on which he had recovered judgment was for a sale after the conveyance, it was held to be no error to allow the grantor to testify that he purchased the property as agent for his son, and that he did no business for himself. The judgment was conclusive between him and the plaintiff as to the existence of the debt and his liability for it; but, since the debt was subsequent to the conveyance, the grantor being at the time free from debt, the plaintiff could successfully assail the conveyance only by showing that it was made with the view of continuing business, and creating future debts, and saving his property from them, or for the purpose of defrauding his future creditors; and it was therefore competent for the grantee to show that the grantor did not in fact carry on any business on his own account, or actually contemplate the creation of future debts. *Teed v. Valentine*, 65 N. Y. 471.

Whether it is rendered before or after the gift or conveyance, a judgment against the donor or grantor is competent evidence of the debt,—of the fact that the party in whose favor it was rendered stands in a relation to be injured or affected by the gift or conveyance (*Pickett v. Pipkin*, 64 Ala. 520; *Lawson v. Alabama Warehouse Co.* 73 Ala. 289); or it is sufficient evidence of the same fact (*Young v. Pate*, 4 Yerg. 164).

The judgment rendered by a court of competent jurisdiction, and in the absence of fraud or collusion, though it may be conclusive evi-

dence of the debt existing at the time of its rendition, is not evidence of an indebtedness existing at the time of the conveyance (*Lynch v. Burt*, 132 Fed. 417; *Finch v. Kent*, 24 Mont. 268, 61 Pac. 653); or at any time before its rendition (*Lawson v. Alabama Warehouse Co.* 73 Ala. 289); and it is not conclusive against the grantee that the grantor was a debtor, even at the time when the action was begun (*Jenness v. Berry*, 17 N. H. 549; *Troy v. Smith*, 33 Ala. 469; *Sweet v. Dean*, 43 Ill. App. 650).

And at all events a grantee of land from a judgment debtor is not concluded by a judgment later increased by usury under an agreement between the creditor and the judgment debtor. *Bensimer v. Feil*, 35 W. Va. 15, 29 Am. St. Rep. 774, 12 S. E. 1078.

And a confession of judgment, if made after the conveyance, is not sufficient proof to establish its owner as a creditor. *O'Connor v. Docen*, 50 App. Div. 610, 64 N. Y. Supp. 206.

In Florida no allenee, grantee, assignee, or mortgagee, is bound or affected by a judgment or decree to which he is not a party, rendered in a suit against the allenee, grantor, assignor, or mortgagor, begun after the alienation, grant, assignment, or mortgage. *Austin v. Hoxsle*, 44 Fla. 199, 32 So. 878. Following *Logan v. Stieff*, 36 Fla. 473, 18 So. 762.

And in Louisiana, in a revocatory action to annul a sale of land as fraudulent as against the plaintiff's rights, under article 1971 of the Louisiana Code, which authorizes the purchaser in such a case to controvert the demand of the plaintiff, although liquidated by a judgment, in the same manner as the debtor might have done before the judgment, the defendant denied the indebtedness of the vendor to the plaintiff, alleging that his action had been barred by prescription before the commencement of that suit, and it was held that the right of the plaintiff to attack the sale as fraudulent depended upon his showing that he was a creditor of the vendor before the date of the act; the judgment recovered against the vendor was certainly not conclusive upon his vendee, and, as the latter was not made a party, he had a right to controvert the demand, and to avail himself of every defense which might have been pleaded by the original defendant. *Lopez v. Bergel*, 12 La. 197. To the same effect is *Dumas v. Lefebvre*, 10 Rob. (La.) 399.

real estate in Texas, made a cash payment thereon, and executed and delivered his certain promissory notes, maturing from one to four years, for the remainder of the purchase price. In 1900 an action was commenced in Brown county, Minnesota, against him, to recover the amount due upon these notes, by C. W. Hahl, who was then the owner of the same. Dahl appeared and answered, admitted the execution of the notes, alleged that they were given in payment of certain Texas real estate, and that subsequent thereto the plaintiff in that action had taken back the real estate in full payment and settlement of the notes. The action came on for trial, and plaintiff made motion for judgment upon the pleadings, and it was stipulated by the parties that the judgment might be entered for plaintiff

against defendant for \$2,411.03. Judgment was entered accordingly on January 8, 1901. On July 17, 1900, Dahl, his wife joining, conveyed to their daughter, Amelia Dahl, 80 acres of land located in Brown county, Minnesota, which conveyance was recorded on December 19, 1900. On January 3, 1901, Dahl filed his petition in bankruptcy, and was duly adjudged bankrupt, and plaintiff was thereafter appointed trustee of his estate in bankruptcy. On January 26, 1901, Hahl, the judgment creditor, filed his claim in bankruptcy, which was duly allowed on the same day. This action was commenced by the trustee for the purpose of subjecting the 80 acres of land conveyed to Amelia Dahl to the claim filed in the bankruptcy court. The complaint alleged that Amelia Dahl was a fraudulent grantee, having

One, however, acquiring land in Louisiana since the recovering of a judgment against the grantor cannot raise against the judgment any defense that his grantor could not raise. *Gal-laughter v. Hebrew Congregation*, 35 La. Ann. 829.

c. As to defenses to the original action.

1. Defense by way of denial, generally.

It is sufficiently obvious that, although one may impeach a judgment in a suit to which he was not a party or privy when the court rendering it had no jurisdiction, or when it was obtained by fraud or collusion, or erroneously or unlawfully rendered to the prejudice of his rights, yet, in an action by a judgment creditor against the voluntary grantee of the judgment debtor, the grantee may not attack the original judgment merely upon the ground that the jury erred in determining a question of fact, as to matters alleged in defense of the action; and against such an objection the judgment is conclusive as to the relation of debtor and creditor between the parties and the amount of indebtedness. This would be an attempt of a stranger to retry a judgment already determined between the parties, in accordance with the forms and principles of law, and without fraud or collusion. *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527.

Where, however, the defense set up in the later action is that the defendant in the first action failed to make a certain valid defense to it, these considerations would seem not to prevail.

On a writ of entry to recover land levied upon by an execution in the plaintiff's favor, where the judgment debtor had conveyed the land to one who again had conveyed it for a valuable consideration, to a third person, who took it with notice that it had been seized on an execution in favor of the plaintiff; and the second grantee, the defendant, offered evidence tending to show that the plaintiff's judgment was unfounded and erroneous, and that the judgment debtor was not indebted, and could have successfully resisted the plaintiff's claim, —it was held that the exclusion of this evidence was error, and that the judgment was not conclusive upon the second grantee as evidence of the indebtedness of the original de-

fendant to the plaintiff. *Inman v. Mead*, 97 Mass. 310.

Where a judgment was recovered against an employee for money embezzled by him from 1841 to 1848, and execution was levied upon land conveyed by the judgment debtor in 1844 to a third person for the separate use of the grantor's wife, and the judgment creditor, having received a deed from the sheriff, brought an action against the three parties to remove the cloud upon his title, it was held that, although the judgment concluded the fraudulent grantor as to the nature and dates of the several items of indebtedness on which the recovery was had, it did not conclude the other defendants so as to prevent their showing that no such indebtedness existed at the times indicated, and, accordingly, it was error to exclude proof offered by the alleged fraudulent grantee that the deficits in the account in question were caused by the meddling and interference of the plaintiff. The court said: "We are not aware of, nor have we been referred to, any case to this [contrary] effect." *Eddy v. Baldwin*, 23 Mo. 588.

But in a later decision of the same court it is held that, in an action to set aside a fraudulent conveyance based upon a judgment against the grantor upon his warranty of title in a deed to land which he did not own, it cannot be shown as a defense that the defendant never executed the deed, but signed it simply as a witness, such matter being proper as a defense to the damage suit. *Swinford v. Teegarden*, 159 Mo. 635, 60 S. W. 1089.

In harmony with the last decision, where one conveyed his property to another upon the agreement that the grantee should pay the grantor's firm's debts, a judgment based upon this agreement, obtained by a creditor of the firm against the firm and the grantee, was held to be conclusive evidence, in the judgment creditor's action to set aside a conveyance of the same property to the grantee's wife as fraudulent, that the first grantee was indebted to the plaintiff; therefore, evidence tending to show that the first grantee was not so indebted, or that he had paid out on account of the indebtedness of the firm, in pursuance of his agreement, more money than he had or could realize from the property received by him under the contract, was immaterial. *Kaiser v. Waggoner*, 59 Iowa, 40, 12 N. W. 754.

In an action by a creditor of an intestate

received the property without any consideration, and having full notice of the existence of the indebtedness and judgment against Peter H. Dahl. Amelia Dahl interposed a separate answer, admitting the execution of the notes, and, as a defense, alleged that the notes were without consideration, having been obtained by false representations as to the character and value of the land, all of which facts were known to the judgment creditor, Hahl. The court found that the notes had been obtained by fraudulent representation, and that Hahl had notice thereof; that the conveyance by Peter H. Dahl to Amelia Dahl was made without consideration, for the purpose of defrauding the creditors of Peter H. Dahl; and that Amelia Dahl had

knowledge of the fact. Judgment was entered in favor of Amelia Dahl and against the plaintiff, to the effect that he was not entitled to the relief demanded, and from this judgment the plaintiff appealed.

The most important question presented on this hearing is whether the fraudulent grantee may, in a collateral proceeding, defend upon the same ground that was open to the judgment debtor in the previous action, in the absence of proof that such judgment was procured by fraud, collusion, through mistake, or that the court did not possess jurisdiction. It is assumed by respondent that the question was settled by this court in the case of *Bruggerman v. Hoerr*, 7 Minn. 337, 82 Am. Dec. 97, Gil. 264, and subsequent cases, and it will be

against voluntary grantees of his property in his lifetime, a judgment against the administrator is not evidence, except in order to show that the creditor had pursued his legal remedy and had failed; and the grantee may contest the validity of the judgment and the justice of the plaintiff's demand against the estate. *Alexander v. Quigley*, 2 Duv. 399. (*Vide infra*, V.)

2. Statute of Limitations.

In Louisiana, an objection by a judgment creditor, plaintiff, to the plea of prescription set up by the grantee, that it had been set up by the original debtor himself and overruled, did not avail, since the grantee, not being a party to the original judgment, might avail himself of every defense which might have been pleaded by his grantor. *Lopez v. Bergel*, 12 La. 197.

And the defendant grantee may, by demurrer, set up that the statute of limitations barred the debt against his grantor before the beginning of the action on which the judgment was rendered, if the fact appears on the face of the pleadings. *Davis v. Davis*, 20 Or. 78, 25 Pac. 140.

The voluntary confession of judgments by a debtor long after the conveyances in question would not prevent the grantee from denying the existence of the claims, or relying upon the fact that they were barred by limitations before the judgments were confessed. *Warner v. Dove*, 33 Md. 579.

The opposite view is expressed in *Jones v. Read*, 1 Humph. 335, where it was held that the court could not in this collateral way inquire into the regularity of the judgments, and whether they might not have been defeated by the introduction of other evidence than that which was before the court, or by inserting other defenses, or whether the facts the court assumed as existing were sufficiently proved by the testimony before it. The only inquiry is, Are they valid, or are they void? And, although they may be irregular, and liable to be reversed on a writ of error to a superior court, or upon the introduction of new proof or different defenses on a writ of error coram nobis in the same court in which they were rendered, still they may be executed either by process issuing directly upon them or by a bill in equity auxiliary to them.

When it affirmatively appears upon the face 67 L. R. A.

of the pleadings that the debt was barred by the statute of limitations, and that the suit should have been brought in the name of an administrator instead of that of a legatee, as was done, neither of these objections reached the validity of the judgment; the first being matter in bar, the second, in abatement,—defenses which the defendant might have interposed, but, when waived by him at the trial, could not be made by him or anyone else. *Clark v. Anthony*, 31 Ark. 546.

And it is held in *McMannomy v. Chicago, D. & V. R. Co.* 187 Ill. 497, 47 N. E. 712, that the defense of the statute is personal to the debtor, so that it cannot later be interposed as a defense to a creditor's bill.

3. Minority.

The grantee of land from a person who has just attained his majority, although the conveyance is attacked as fraudulent, may successfully attack the title of persons who have purchased the land under execution sale upon judgments obtained against the grantor after the conveyance, for indebtedness for goods, not necessities, sold to the grantor during his minority, although the grantor had ratified the purchases, and when sued failed to plead his minority and allowed judgments to go against him without defense. Before the rendition of the judgments the claims of the creditors against him were not valid debts, and before the judgments he had made the conveyance alleged to be fraudulent, and it was not possible for him, by then making the debts valid, to affect the title previously conveyed. It is well settled that suffering judgment to go upon a debt barred by the statute of limitations will not affect the title to property sold before judgment and after the bar was complete; and a *fortiori* must this be true as to minority debts which have no binding force until judgment. *Edmunds v. Mister*, 58 Miss. 765.

4. Set-off.

When the defendant grantee sets up as a defense that the plaintiff is indebted upon simple contract to the judgment debtor in an amount equal to the judgment on which the action in equity is based, the general rule that such a debt cannot be set off in equity against the judgment does not apply; the defendant is not seeking to set off the debt against the judgment, and,

necessary to examine the decisions with some particularity. In *Bruggerman v. Hoerr* the plaintiff had entered into a contract with one Keck, by which he advanced certain moneys to him for the purchase of a pre-emption claim, and judgment was recovered against Keck for the amount so advanced; Keck having failed to make the defense that the contract to advance money for such purposes was void, and that there was actually no indebtedness. Prior to the entry of the judgment, Keck had transferred property to Hoerr, and the action was brought to reach the property upon the ground that the transfer was fraudulent and without consideration. After stating that it was necessary for the plaintiff to show he was a creditor of Keck at the time of

the transfer of the real estate, the court said: "If he had a claim or demand which could then, or when it became due, be legally enforced against Keck, he was a creditor. But if his claim or demand was not of a character to be legally or equitably enforced, he was not a creditor, . . . and therefore, could not be prejudiced by any disposition which Keck might choose to make of his property. And if the conveyances were not invalid at the time they were executed, as a fraud upon the rights of the plaintiff, . . . it seems clear that they could not be vitiated by the subsequent act or omission of the grantor to which the grantee was not a party." And the court held that, since in fact there was no indebtedness owing by Keck which could at any

if the defense is upheld, the judgment and whatever legal processes are provided for its enforcement would remain unimpaired. The plaintiff invokes the aid of a court of equity to assist him in the collection of his demand, because he says he is without remedy at law; but if in fact he is indebted to the judgment debtor in a sum equal to or greater than the amount of the judgment, the legal obstacles which he asks to remove are afflicting him with no injustice, and it is immaterial by what instrument his obligation to the debtor is evidenced. The case would be wholly different if the judgment debtor were seeking the aid of a court of equity to restrain the collection of a judgment by execution, or if, by like means, he were seeking to procure a discharge or satisfaction of the judgment. The plaintiff, prosecuting a suit in equity, must submit to any equitable defense. *Lashmett v. Prall*, 2 *Herdman* (Neb.) 284, 96 N. W. 152.

In an action of ejectment by a grantee by warranty deed against one holding under an execution sale upon a judgment against the plaintiff's grantor it was perfectly competent for the plaintiff, after the defendant had proved that the grantor was indebted to the judgment creditor at the time of the plaintiff's conveyance, the inference being that plaintiff's conveyance was therefore fraudulent, to offer evidence tending to prove that at the time of the conveyance in question the grantor had claims to a considerable amount against the judgment creditor; such evidence having a decided tendency to rebut any presumption of fraud affecting the rights of the creditor. The court said that the plaintiff was not concluded by the judgment against her grantor,—especially as it was subsequent to her deed. The judgment was conclusive as between the grantor and his creditor, but, so far as the plaintiff was concerned, the questions how far back the indebtedness extended, and what was the relative state of the mutual claims of the parties to the judgment, must be open to inquiry. *Warner v. Percy*, 22 *Vt.* 155.

When, however, the defense set up in the second action was upon notes given by the plaintiff to the debtor which it was claimed ought to have been set off or recouped against the demand on which the judgment was rendered, and the consideration of these notes was money furnished to pre-empt land, making an illegal and void transaction, this was no defense. *Ferguson v. Kumler*, 11 *Minn.* 104, 6 *Ill.* 62. 67 *L. R. A.*

5. Bankruptcy.

As to bankruptcy after the judgment, see *infra*, III., § 5.

In an action to set aside as fraudulent judgments in favor of the defendant, based upon judgments recovered in 1870 upon claims accruing before 1858, the defendant pleaded that the judgment debtor was discharged in bankruptcy before the rendition of the plaintiff's judgments, which were by confession, and insisted that the debts owing to the plaintiff were discharged by the proceedings in bankruptcy. It was held that it was for the debtor to insist upon that discharge when the judgments in favor of the plaintiff were taken against him, and, if he chose to waive his discharge, he was at liberty to do so, and, since he did waive it by confessing judgment the defendant could not dispute the validity of the judgments. It is not dishonest for the debtor who has been discharged in bankruptcy to waive the discharge and allow a judgment to be recovered against him for the original debt, and, if he permits a judgment to be thus recovered against him, the creditor has a right to enforce the judgment against any property of the debtor; and one who is in possession of property of the debtor, transferred with intent to defraud creditors, cannot defend on the ground that the debtor might have had a defense against the judgment if he had chosen to assert it. *Dewey v. Moyer*, 9 *Hun*, 473.

6. Estoppel.

Matters which, if available at all, might have been urged in defense to an application for a deficiency judgment, as the estoppel of the plaintiff on account of his assent to the removal of a house from the land in question, cannot be set up in defense to a creditor's suit to enforce a judgment by subjecting to the payment of it land alleged to have been fraudulently conveyed. *Millard v. Parsell*, 57 *Neb.* 178, 77 *N. W.* 390.

7. Payment.

This is to be distinguished from the defense of satisfaction, treated *infra*, III., § 8.

When, in an action to set aside as fraudulent a transfer of stock in a corporation, the defendant asked leave to file an additional defense to the effect that certain persons, as agents of the plaintiff, sold the debtor property for which

time have been legally enforced against him, the conveyances were not executed in fraud of the judgment creditor; that Keck could easily have defeated the action, and that his failure to make the proper defense, whether by collusion with the plaintiff, or through indifference as to the result of the action, would be a fraud upon the grantee; that the holder of a title perfect in its inception should not be devastated at the will of another over whom he can exercise no control. And reference was made to the statute prohibiting fraudulent conveyances, which then read: "Every conveyance . . . of any estate or interest in lands . . . made with the intent to hinder, delay, or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts,

or demands, . . . shall be void." Gen. Stat. 1894, chap. 41, § 4222. It will be seen that the court placed its decision upon several grounds: (1) That there may have been collusion or fraud, from the fact that Keck did not make the proper defense; (2) that it was incumbent upon plaintiff to show that the indebtedness upon which the judgment was founded existed prior to the time of the conveyance which he attacked, and consequently that he was required to prove the actual existence of such debt, without regard to the judgment subsequently entered; (3) that the statute avoided conveyances only in favor of persons having lawful claims, and that, the claim in that case being void under the statute, the grantee might show the fact.

the note on which the judgment was taken was given, that the plaintiff refused to receive the note, and that they had paid the plaintiff the amount by a draft on a third person, there was no error in refusing leave to file the supposed defense, which did not arise after the rendition of the judgment; the transferee could not set up defenses to the action on the note which the debtor had failed to set up when sued. The only question in which he was interested was whether the stock which stood in his name should be subjected to the payment of the judgment or not. *Scott v. Indianapolis Wagon Works*, 48 Ind. 75.

8. *Fraud in the transaction.*

In a proper case a court of equity may look behind a judgment at law in order to do justice between the parties; but, where a judgment creditor who has established his claim at law seeks, in equity, to reach his debtor's property which has been fraudulently conveyed away, by having the conveyance set aside, the debtor and his grantee are in no position to contest the complainant's right to his judgment by setting up that the bond upon which judgment was rendered was obtained from the obligee by "overreaching" and fraud. *Conover v. Jeffrey*, 26 N. J. Eq. 36.

And evidence that the debtor was overreached in the transaction from which the indebtedness arose, and that he was induced to contract the indebtedness by false representations made by some of the complainants, so that the judgments were not equitably due to the complainants, was not proper; if any such defense existed it should have been made in the action at law. *Sawyer v. Moyer*, 109 Ill. 461.

To the contrary effect, however, is *Faris v. Durham*, 5 T. B. Mon. 397, 17 Am. Dec. 77. It was competent for an alleged fraudulent grantee to attack the plaintiff's judgment upon the ground that it was obtained upon a bond which was, by fraud, procured to be signed by the debtor in the belief that it was another instrument, that the debtor afterwards, and before judgment, denied the validity of the bond, and when sued upon it pleaded fraud, but was induced by the plaintiff, and by further fraud and artifice, to withdraw his plea and suffer judgment to be rendered against him. The court said that, since fraud undoubtedly vitiated the bond, this fraud, if insisted on by the obligor, 67 L. R. A.

would have formed a good ground in equity for relief against the judgment. It could not be a violation of any principle of equity or law to allow the defendant grantee, though he did not occupy the favored attitude of bona fide purchaser, to avail himself, in defense of the property, of that equity which originated before he obtained the deed, and which would have been an effectual shield in the hands of the grantor against the complainant's demand for relief.

In a similar case the complainant loaned \$2,700, taking as security a chattel mortgage on furniture worth more than the loan, and also the borrower's note with an accommodation indorser, bearing 5 per cent a month interest, which, also, was secured by trust deed on several hundred acres of land; and he accepted, also, a note made by the borrower for \$300, nominally for services as agent; and at the maturity of the principal note foreclosed his mortgage, under which the furniture was sold at a great sacrifice, and enforced the trust deed, thus realizing almost the whole amount of the loan, and later recovered judgment against the indorser, owing to the intoxication of his counsel, for almost the full amount of the note; and, having, by garnishment, obtained possession of a note for \$1,350, belonging to the indorser, secured by deed of trust on land worth more than the note, bid in the note for \$80, which was advertised for sale without notice of the security, foreclosed the trust deed, and so obtained title to land worth many thousand dollars; then issued execution on his judgment upon the lands in question in this action as the property of the same accommodation indorser, bought them in, and then brought this action to set aside as a cloud upon his title a warranty deed of the lands from that indorser to the defendant, his brother, who had bought in the land at a sale under a judgment rendered before the indorsement on the note was made, the allegation of the complaint being that the purchase by the brother was in pursuance of a conspiracy to defraud creditors. It was held that the judgment of the complainant against the accommodation indorser, the defendant's brother, was conclusive between the complainant and the latter as to the indebtedness, but it was not conclusive upon the defendant, a grantee before the judgment, either as to the amount of the debt, or as to the circumstances and character of the transaction out of which the indebtedness arose (the court saying that

The court was correct in so far as it was held that the judgment creditor was compelled to prove that the claim upon which the judgment was founded existed prior to the time of the conveyance, and also that, if a proper defense was not made by Keck, by reason of collusion, or in pursuance of some fraudulent purpose, then the grantee would not be estopped from setting up the real defense which might have been interposed in the original action; but in so far as the court intimated that the judgment creditor was required to establish, not only the fact of the existence of his claim prior to the conveyance, but also a legal or real indebtedness, we are of the opinion that the court was mistaken, and that the subse-

quent decisions referring to this case are not in conflict with this view.

In the case of *Stone v. Myers*, 9 Minn. 303, 86 Am. Dec. 104, Gil. 287, it was held that a creditor seeking to subject to his claim real estate paid for by the debtor, but conveyed to another, must have been a creditor at the time of the conveyance, but the case did not involve the question now raised; that is, the validity of claim of indebtedness. In *Ferguson v. Kumler*, 11 Minn. 104, Gil. 63, Joseph Kumler had conveyed certain property to his brother, and Ferguson, who, subsequent to the conveyance, had procured judgment against the grantor, brought an action to subject the property to the judgment upon the ground that it had been fraudulently conveyed.

"the authorities upon this question are uniform and clear"); also, that it was the duty of the court, as a court of equity, to inquire into the circumstances out of which the indebtedness was claimed to have arisen, and, if those circumstances did not show that the claim was one which, in equity and good conscience, ought to be enforced, the court would not inquire into the transaction between the judgment debtor and the defendant, but leave the parties where their legal titles had placed them; and, as the land, when sold, went to pay a prior debt of the judgment debtor, the complainant must have a very clear case for equitable interposition, before it shall be taken from the defendant and applied to the payment of another debt of his grantor. Here the complainant, exacting enormous interest and a large bonus, causing the sacrifice of several thousand dollars on the foreclosure of the mortgage, which realized only one fourth of the value of the chattels, received about one third of his money back, appropriated several hundred acres of the debtor's land, and then, by a suspicious omission in the advertisement, obtained title to a fully secured note, and afterwards, enforcing the trust deed, became the owner of very valuable property and had been paid more than in full with reasonable interest, and a court of equity should now refuse him more. *Gottlieb v. Thatcher*, 34 Fed. 435.

9. Forgery.

Where defendants set up that the notes on which judgment had been entered had been forged by one of the two joint makers, and that the judgment debtor was not indebted on account of the notes at the time of the conveyance, it was held (adopting the statement in *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527, *supra*, III., c. 1, limiting the rule allowing collateral attack by the defendant in a creditor's bill to cases where the court had no jurisdiction, or a judgment had been obtained by fraud or collusion, or was erroneous and unlawfully entered up) that the judgment on the notes, being obtained upon due notice to both the debtor and the forger, the apparent joint makers, was conclusive against all of the defendants as to both the fact and the amount of indebtedness when the conveyance was executed. *Strong v. Lawrence*, 58 Iowa, 55, 12 N. W. 74.

So where the defendant insisted that the 67 L. R. A.

complainant's judgment was obtained in a suit upon a forged indorsement, but did not allege that it was not obtained in good faith, merely maintaining that there was error in the litigation, he was in privity with the debtor, and so concluded by the judgment. *Candee v. Lord*, 2 N. Y. 269, 51 Am. Dec. 294, *supra*, III., a.

10. Illegal transaction.

(a) Usury.

Where fraudulent grantees attempted to impeach the judgment on which the claim was founded on the ground that the original transaction was usurious, it was held that, upon the question whether one is or is not a debtor, an adverse judgment is evidence *prima facie* that he is, even against strangers who claim under him property affected by the judgment. If they attempt to impeach the judgment it must be done on the ground of fraud, or by showing that a full defense was not made, and producing new proof showing that the debt is not due. So, if a court of equity could pronounce such transaction usurious upon the very same facts on which the court of law, the defense of usury being made, has pronounced it not to be usurious, then it would be virtually an appeal from the court of law to the court of equity, and the court of equity would re-examine the judgment of the court of law and virtually reverse it. This is not within the jurisdiction of a court of equity, which relieves against judgments at law, not because they were wrong, but because of some new matter which the court of law did not, or could not, pronounce a judgment upon, or which, for some just cause, the party could not bring to the consideration of the court of law. *Garland v. Rives*, 4 Rand. (Va.) 282, 15 Am. Dec. 756.

To admit such evidence was palpable error; it was irrelevant and could not avoid the creditor's judgment. *Hislop v. Hoover*, 68 N. C. 141. To the same effect is *Bank of Wooster v. Stevens*, 1 Ohio St. 233, 59 Am. Dec. 619.

But in Kentucky one claiming a debt under a usurious contract void in law, though he has obtained a judgment upon it, is not such a creditor as can avail himself of any objection to a gift as being in fraud of creditors; and the donee may introduce evidence tending to prove that the debt on which the judgment was obtained, being upon a note bearing 10 per cent

The grantee defended, and attempted to set off two promissory notes which had been given by Ferguson to the grantor, and which it was claimed ought to have been set off by the grantor in the action which terminated in the judgment. It was insisted in that action that the grantee was not concluded by the judgment, because the conveyance was not made with intent to hinder or delay the judgment creditor of any lawful claims, and the notes attempted to be set off were void for the reason that they had been given in pursuance of a contract to advance money to pre-empt government land; and the court said: "The judgment ought to be held good, not only against the judgment debtor, but all the world, if it was duly rendered on a sufficient cause of action.

Of course, we have no reference to a case where judgment was obtained by fraud on the part of the court or referee, or by a fraudulent collusion between the judgment creditor and debtor." The court held that the notes were void, having been given in pursuance of a contract to pre-empt government land, and for that reason they could not be set off in the original action, if that defense had been made therein, and, conceding that the grantee was not estopped by the original judgment against the grantor, his defense was not available. It will thus be seen that the court did not consider—much less, determine—whether or not the grantee would be estopped from asserting the same defense which might have been made by his grantor in the original action.

Interest, is void. *Taylor v. Eubanks*, 3 A. K. Marsh. 289.

(b) *Sunday law.*

The judgment upon a note obtained against the grantor of an alleged fraudulent grantee cannot be impeached by showing that the note was made on Sunday, since that fact did not show that the debt did not exist or that the suit was fraudulent. If the note was made on Sunday contrary to statute the maker might allege that he was not bound by it; but, if he did not see fit to make that defense, no one could make it for him, and after the judgment he could no longer take that objection himself. *Jeanness v. Berry*, 17 N. H. 549.

(c) *Immoral consideration.*

An alleged fraudulent grantee is concluded by judgments in favor of plaintiff against her husband, rendered in actions brought for nonperformance of an agreement for separation between the plaintiff and her husband by which he agreed to pay her, regularly during her life, certain sums which the plaintiff covenanted to accept in discharge of all claims upon him. Such judgments, in the absence of proof of fraud, could not be attacked upon the ground of the invalidity of the contract when that question was litigated between the parties. *Carpenter v. Osborn*, 102 N. Y. 552, 7 N. E. 823.

So the grantee could not go into the basis of the judgment creditor's claim upon which he obtained his judgment, and show that it was for damages for breach of promise of marriage, and that the marriage contract was based upon an immoral consideration. *Salomonson v. Thompson* (N. D.) 101 N. W. 320.

But in an early Massachusetts decision in an action for land the demandant relied upon a judgment against the grantor upon which an execution had been levied upon the land, contending that the deed to the defendant was fraudulent against creditors; and the defendant, having proved that the note upon which the judgment was recovered was made before the deed, was allowed to show that the note had been given upon a corrupt agreement in regard to false testimony, upon which the court declared that in such a case it was of no consequence whether the deed be fraudulent or not, that the demandant ought to come into court with clean hands, but, coming as he did, it was 67 L. R. A.

Impossible for him to maintain the action. *Alexander v. Gould*, 1 Mass. 165.

In *Bruggerman v. Hoerr*, 7 Minn. 387, 82 Am. Dec. 97, Gil. 264, which is discussed and partly overruled in the opinion in *SCHMITT v. DAHL*, the debt on which the judgment was granted was upon a contract to sell the debtor's pre-emption claim, and void,—a defense which was not made by the debtor. It is said that the creditor must prove a valid indebtedness when the conveyance was made, which was not possible there.

In *McCanless v. Smith*, 51 N. J. Eq. 505, 25 Atl. 211, the vice chancellor declared that the fraudulent grantee might defend against the fraudulent grantor, or anyone who claimed openly or secretly in his interest (as in *Anderson v. Tuttle*, 26 N. J. Eq. 144, *infra*, III., d, 2), but not against his actual creditor, no matter what might be the foundation of his debt, so long as it be a debt established by judgment *in invitum*; that the doctrine of merger precluded all inquiry into, or notice of, the character of the original debt, although in order to show the date of its origin such character were incidentally exposed; and the original debt with all its inequities was merged in the judgment. This was applied in a case where the wife of a judgment debtor, who had conveyed to him in fraud of creditors, was precluded from setting up the fact that the judgment on which the creditor's bill was based was itself based upon a foreign judgment of foreclosure of a mortgage which was given to secure debts incurred in stockbroking transactions on margin, alleged by the grantee to be gambling transactions.

Later, however, it was held by the court of errors and appeals, without any mention of *McCanless v. Smith*, that equity would not assist judgment creditors to set aside conveyances by their judgment debtor as fraudulent, in order to enforce a judgment in an action commenced after the conveyances and based upon wagering contracts made in another state for the sale and purchase of cotton upon margin, even although the defendant grantee entirely failed to set up such a defense based upon the illegal nature of the contracts; and the opinion says: "No failure on the part of the defendant to claim her personal rights can blind the court to the intrinsic impropriety, for the court's sake, of the step which it is asked to take." *Minzhelmer v. Doollittle*, 60 N. J. Eq. 394, 45 Atl. 611.

In *Hartman v. Weiland*, 36 Minn. 223, 30 N. W. 815, it was held that a fraudulent grantee of a farm has, as against the creditors of his grantor, title to the crops that he raises on the farm while the conveyance is unimpeached, and that, as against a stranger to it, a judgment is no evidence of the prior existence of the debt for which it was rendered; and the court referred to the case of *Olmsted County v. Barber*, 31 Minn. 256, 17 N. W. 473, 944; but the question of what was meant by the previous existence of the debt was not there considered. The next case is that of *Bloom v. Moy*, 43 Minn. 397, 19 Am. St. Rep. 243, 45 N. W. 715, where it is stated that the plaintiff did not prove that the debt existed at the time of the conveyance, but the court did

And a recent case covers the whole question. Stockbrokers had obtained a judgment in New York for a balance alleged to be due them from a customer on an account involving the purchase and sale of stock, the agreement between the brokers and the customer being nominally for bona fide contracts for purchase and sale, including the delivery of the stock, but with the further understanding that the agreement as to deliveries of the stock bought and sold should be abrogated, in which action the defendant put in a defense, but not upon the ground that the claim was based on a gambling transaction; and the plaintiffs having also obtained a judgment in New Jersey upon the first judgment, brought this bill in equity to set aside the conveyance of the original defendants, joining as defendant the grantee of the property through a third person. The defendant set up as a defense the allegation that the judgment in New York was founded on transactions which are, in New Jersey, held to be gambling transactions, and it was held that, as far as the judgment debtor himself was concerned, the defense was not available; but, as to the defendants who were grantees of the judgment debtor, and who were not parties to the suit in which the judgment for the defendant was recovered, the rule was settled in New Jersey that they were not concluded by the judgment from setting up that the recovery was upon gambling transactions, and therefore could not be enforced against them. In *Minzesheimer v. Doolittle*, 60 N. J. Eq. 394, 45 Atl. 611, *supra*, this defense was sustained in behalf of the wife of the debtor, and the bill seeking to set aside as fraudulent a conveyance of the debtor's property to her was dismissed without inquiring into the consideration. In that case the conveyance was made, not only before the institution of the suit and recovery of the judgment, but before the incurring of the debt on which the judgment was obtained, and in this respect differed from this case. Here the debt existed and the suit was instituted before the conveyance, but this circumstance bears only upon the character of the proof of fraud required, and in view of the ground on which the decision is based,—that is, the right of the grantee to a day in court to defend the title against all acts or judgments of the grantor after the date of the deed,—the court considered the decision as controlling this case, and also as overruling on this point *McCanless v. Smith*, 51 N. J. Eq. 505, 25 Atl. 211, 67 L. R. A.

not consider what is meant by the previous existence of the debt. In *Pabst Brewing Co. v. Jensen*, 68 Minn. 293, 71 N. W. 384, one Wagner had executed a chattel mortgage upon certain property to the plaintiff, and subsequent thereto a creditor had obtained judgment against Wagner; and the defendant, as an officer, had seized the property under execution issued upon the judgment, claiming the mortgage to be fraudulent. The mortgagee brought the action to recover possession of the property, and the officer justified under the judgment. It was there held that the judgment (the same having been entered by a court having jurisdiction) was admissible, and was competent evidence of its own existence, as against the mortgagee. The point having been made

supra, in which it was held that the wife of a judgment debtor, claiming under a voluntary settlement of her husband's lands, could not question the validity of the judgment as based on an illegal gambling transaction. *Thompson v. Williamson* (N. J. Eq.) 58 Atl. 602.

11. Failure of consideration.

Although there may have been error or irregularity in the rendering of the judgment, or laches in making a defense against it, these matters are determined by the judgment, and cannot be retried in a collateral proceeding; and this rule includes a case where the grantee sets up as a defense the fact that the consideration of the contract on which the indebtedness was founded failed owing to the worthlessness of the property sold, of which the plaintiff knew. *Minnesota Thresher Mfg. Co. v. Schaack*, 10 S. D. 511, 74 N. W. 445.

So there was no error in refusing to permit the grantee to introduce testimony tending to show simply a want of valid consideration upon that judgment; the judgment could be impeached by the grantee only for fraud, notwithstanding that she was not a party to the judgment. *Reid v. Brown, Wilson, Super. Ct. (Ind.)* 312, following *Burgess v. Simonson*, 45 N. Y. 225.

Kimbro v. Clark, 17 Neb. 403, 22 N. W. 788, declares that the question of the consideration of the note on which the original judgment was based must be eliminated as immaterial.

But in Oregon, contrary to law elsewhere, the grantee may go behind the judgment and inquire into the consideration of the note on which it was rendered. *Davis v. Davis*, 20 Or. 78, 25 Pac. 140.

12. Lack of jurisdiction.

As was mentioned above (I.), lack of jurisdiction is always sufficient ground for impeaching a judgment.

In a proceeding to set aside a voluntary conveyance by a supposed judgment creditor, it is a sufficient defense that the justice rendering the judgment was incompetent by relationship, making the judgment absolutely void. *Pierce v. Bowers* (Tenn.) 3 Leg. Rep. 139.

When the right of a third person may be affected collaterally by a judgment which was procured by fraud or collusion of the parties, or which for any reason is erroneous and void,

that it was necessary for the defendant to prove the existence of the debt prior to the rendition of the judgment, the court referred to the case of *Bloom v. Moy*, 43 Minn. 397, 19 Am. St. Rep. 243, 45 N. W. 715, and others, and stated that those cases were in line with the authorities which hold that a judgment creditor suing to set aside, as fraudulent, a conveyance by the judgment debtor, must prove the existence of the debt on which it was rendered at the time of the conveyance, and that the judgment does not prove such fact, and, after stating that the cause under consideration was not such an action, held that the judgment in that case was evidence of its own existence, and of its legal effects, as against the mortgagee. In *Hoerr v. Meikofer*, 77 Minn. 228, 77 Am.

St. Rep. 674, 79 N. W. 964, an action was brought by the assignee of a judgment creditor to test the validity of a fraudulent grant of certain real estate, and the point was made on the part of the defense that there was no evidence of the indebtedness prior to the entry of judgment. The point was sustained upon the ground that the proof as to the prior indebtedness was indefinite and insufficient; and, while the court referred to the cases of *Bloom v. Moy*, 43 Minn. 397, 19 Am. St. Rep. 243, 45 N. W. 715, and *Hartman v. Weiland*, 36 Minn. 223, 30 N. W. 815, the question of the nature of the indebtedness and its legal sufficiency was neither involved nor discussed. These cases are the only ones to which our attention has been called in

and he cannot bring a writ of error to reverse it, he may allege and prove its invalidity in any proceeding in which it is sought to be used to his prejudice. So an alleged fraudulent grantee can attack a judgment on which an action to set aside his conveyance is based on the ground that the judgment was void for lack of jurisdiction in the court pronouncing it. *Collinson v. Jackson*, 8 Sawy. 357, 14 Fed. 305.

In an action by a receiver of a corporation to set aside fraudulent transfers made by it, the receiver had been appointed such in an action by a creditor to sequester its property, and based upon a judgment recovered against the corporation in a city court, which was stated in the complaint, and it was held that the defendants in this action could not attack collaterally the judgment in the sequestration action upon the ground that, the corporation not being a resident of, or doing business in, the city, the city court in the first action had no jurisdiction; the allegations of the complaint were sufficient, and, although the court might have erred in regarding the original judgment as valid, that was a question of law for the court in the sequestration action to decide, and its error, if there were such, was a judicial one to be corrected by an appeal in it. *Jones v. Blun*, 145 N. Y. 333, 39 N. E. 954.

And an alleged fraudulent grantee may set up that the court, in the action in which the judgment on which the creditor's bill is based was entered, lost jurisdiction of the case when the plaintiff in his attachment proceedings failed to publish notice of the proceedings within thirty days after the return day of the writ, as required by the statute; the attachment lien acquired by service of the writ on property is preserved for that time awaiting notice, but, if this next step in the proceedings fails to be taken within the time, the lien is not retained, and, as the plaintiff in attachment never obtained a valid judgment, he was never in a position as a judgment creditor to question the conveyance by the defendant. *Millar v. Babcock*, 29 Mich. 526.

But when the judgment upon which a creditor's suit to set aside a conveyance as fraudulent is based, has been obtained by a substituted service upon the defendant, even though the proof upon which the order for substituted service is made is sufficient to give the court jurisdiction to make the order, in the action against the defendant's grantee such proof is

not conclusive as bearing upon the validity of the judgment, and the defendant grantee may prove that his grantor, the defendant in the first action, was a nonresident at the time of the service, and so not a person upon whom substituted service could legally be made. *Buswell v. Lincks*, 8 Daly, 518.

In a case where the plaintiff in a bill in equity had recovered judgment, actually contrary to the statute, against the defendant who was out of the commonwealth and had no notice of the suit, it was held that the alleged fraudulent grantee was entitled to impeach the plaintiff's judgment in the same manner as if it had been recovered by collusion with the debtor, on the ground that, not being either party or privy to the judgment, he was not entitled to reverse it by a writ of error. *Downs v. Fuller*, 2 Met. 135, 35 Am. Dec. 393.

Under the rule that a grantee from a person who died after making the conveyance may, as an executor *de son tort*, make any defense against the demand of a creditor of his grantor which his decedent or his rival representative could make, he can avail himself of the fact that his grantor was not a party to a probate court decree, under which the complainant in the creditor's bill to set aside his conveyance, and the grantor, were liable as co-sureties; the decree as to strangers was *res inter alios acta*. *Means v. Hicks*, 65 Ala. 241.

And it has been held that a creditor's action to set aside a fraudulent conveyance cannot be predicated upon a judgment by default when the service of process was not shown in the judgment to have been personal, the return merely stating that the summons was "executed." *Heirman v. Stricklin*, 60 Miss. 234.

When the judgment upon which a complainant in a bill in equity to set aside a conveyance as fraudulent was rendered jointly in favor of the complainant against two persons, one of whom was the grantor in the conveyance sought to be set aside, and the other was a nonresident of the state; and no legal service was made upon him,—the grantee might impeach the original judgment as void, since, as to the nonresident defendant, the court had no jurisdiction, and as against him the judgment was therefore void; but the judgment, being an entirety, if void in part was void in all, and the grantee, not being a party or privy to the judgment, might avail himself of any ille-

which this court has, either directly or indirectly, referred to the question now under consideration. It will be observed that in no case since *Bruggerman v. Hoerr* was there involved the proposition that the claim upon which the judgment was predicated must be shown to have had a legal existence prior to the time of the conveyance sought to be set aside. In the case before us the question is squarely presented, and, in our opinion, must be decided contrary to respondents' contention, and to some of the views expressed in *Bruggerman v. Hoerr*.

It is elementary that, where the court has jurisdiction of the parties and the subject-matter of a particular case, its judgment, unless reversed or annulled in some proper

proceeding, is not open to attack or impeachment by parties or privies in any collateral action or proceeding whatever. The rule is thus stated by Mr. Black in his work on Judgments, and it is firmly established by all the courts of this country and of England. It is unnecessary to refer to the Minnesota decisions in support of this doctrine. They are many, and cover nearly every phase of the question. The exceptions to the rule are also well defined, and are set forth in detail in *Bump on Fraudulent Conveyances*, p. 576, and there is an elaborate discussion of the subject in 1 Black, Judgments, 2d ed., commencing at § 245. Our own court, in numerous decisions, has recognized the exceptions, but we will not review them; and it is enough to state

gality in *It. Buffum v. Ramsdell*, 55 Me. 252, 92 Am. Dec. 589.

Directly contrary to this is an old Vermont case, *Tappan v. Nutting*, *Brayton* (Vt.) 137, on stronger facts. In an action of ejectment based upon a sale upon execution which was extended upon the land as fraudulently conveyed by the judgment debtor, the defendant could not impeach the judgment against his grantors upon the ground that the files in the original action did not show that service had been made upon all of the grantors; the court saying that this was a collateral attack, and that "the judgment must be considered valid until set aside by proceedings brought directly on the judgment and for that purpose."

Where the grantor has admitted service the case would seem to be clear. The court properly sustained the plaintiff's demurrer to an amendment to the answer of an alleged fraudulent grantee, that in the action on which the present action was based the only evidence of the service of the original summons was an acceptance of service, indorsed upon it and signed by the grantor defendant; but that such acceptance was made outside the state, and that he made no appearance in the action; when in the judgment the fact that the acceptance of service was made without the state was not shown, and it was regular upon its face. The question as to the validity of the judgment was one in which the defendant grantee had no concern, and the law would not permit him to assert a claim in which he had no concern merely for the protection of the interest of another; so long as the judgment debtor is content to permit the judgment to be enforced against his property, the grantee cannot be heard to assert that the court rendering it had no jurisdiction of the person of the debtor. *Wright v. Mahaffey*, 76 Iowa, 96, 40 N. W. 112. See also, in connection with these cases, *King v. Baer*, 31 Misc. 308, 64 N. Y. Supp. 228; *Johnson v. Parrotte*, 46 Neb. 51, 64 N. W. 363; *Parmenter v. Lomax*, 68 Kan. 61, 74 Pac. 635; *Denman v. McGuire*, 101 N. Y. 161, 4 N. E. 278; *Anderson v. Hawhe*, 115 Ill. 33, 3 N. E. 566,—*infra*, VI., a.

d. Attack for fraud or collusion.

1. Fraud.

The fraud for which a judgment can usually
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be impeached by the fraudulent grantee is not fraud in the transaction which formed the basis of the judgment (as to this, see *supra*, III., C, 8); but it is fraud in the taking or entering of the judgment, or in inducing the defendant in that action to submit to the judgment.

Collusion, in this connection, is a fraud primarily against the grantee from the judgment debtor, and a conspiracy against his rights; fraud in the judgment, on the other hand, may be only against the judgment debtor, but such, nevertheless, that his grantee is entitled, by a collateral attack upon the judgment, to set up the fraud as a defense, when his conveyance is attacked, and when the grantor, from negligence or by reason of estoppel or insolvency, or any one of various circumstances, fails to make a direct attack upon the judgment as fraudulently rendered, and to have it vacated.

So the defendant grantee is not precluded by the judgment from showing that the plaintiff had not in fact any subsisting claim against the defendant grantor, but that the judgment was founded wholly upon fraud and injustice. *Thrasher v. Haines*, 2 N. H. 443.

Fraud in procuring the execution of the bond on which judgment was taken, and further fraud in persuading the obligor to suffer judgment to be taken against him, together formed a sufficient defense to an alleged fraudulent grantee. *Faris v. Durham*, 5 T. B. Mon. 397, 17 Am. Dec. 77. And *Gottlieb v. Thatcher*, 34 Fed. 435, *supra*, III., c. 8, upon similar facts, reaches the same conclusion.

When the defendants, in an action to set aside as fraudulent a conveyance between them, allege that the grantor, the defendant in the judgment on which the plaintiff's action is based, was induced by the persuasions and fraud of the plaintiff's husband acting for her to permit judgment to go against him by default, as an accommodation to the plaintiff, to enable her to protect her rights in another action, although the debt for which judgment was taken had already been discharged and paid, all these facts are proper evidence for the consideration of the court, and, when established, constitute a valid defense. *Richardson v. Trimble*, 38 Hun, 409.

In ejectment for lands upon which an execution was levied upon a judgment in favor of the plaintiffs, where it appeared that the defendant's grantor had conveyed to the defend

that it is generally held that judgments cannot be impeached in a collateral proceeding except for fraud, collusion, or want of jurisdiction.

The decisions above reviewed establish the rule that a judgment is not proof of the prior existence of the claims upon which it is based, in a case where the judgment creditor seeks to reach the property which was conveyed prior to the entry of the judgment. The reason of the rule is plain. It is of no consequence to the judgment creditor what the judgment debtor may have done with his property prior to the time he became a creditor. As to him, the judgment debtor may give away his property, or convey it with a fraudulent purpose. Only those creditors who became such prior to the time of the fraudulent conveyance have a right to complain; hence the necessity of showing the existence of the claim prior to the conveyance. But there is no reason

why the judgment finally entered in pursuance of the litigation between the original parties should not be binding upon the grantee in all other respects the same as between the parties to the judgment. The doctrine that judgments will not be disturbed has its foundation in the necessity of bringing to an end, within reasonable limits, all questions that have arisen, or might have arisen, with respect to the controversy; and if the judgment debtor himself is cut off from again litigating or from introducing new defenses which might have been introduced in the original action, for the same reason those who take under him should be subject to the same limitation. These two thoroughly established rules of law are not inconsistent, and may be construed together, giving each equal force.

Of the authorities directly in point where the judgment was entered subsequent to the

ant all his land, including that in question, in consideration of the defendant's promise to pay all his debts, including that to the plaintiffs; and that the defendant, claiming to have an offset against the plaintiff's claim, had paid half of it and released his set-off to them, the compromise being intended as a full satisfaction of the plaintiff's claim; but that later the plaintiffs sued the grantor for the unpaid half of their claim, and took judgment against him by consent, but without the knowledge of the defendant in the ejectment action, upon execution following which judgment they claimed the land,—it was held, assuming that the conveyance was fraudulent, that the judgment, being altogether *inter alios* and in express violation of the understanding of the compromise in agreed satisfaction of the whole, could have no effect upon the defendant, and that he was entitled to show that the defendant was paid before it was sued upon, or that the judgment was for other reasons fraudulent as to him. *Ingalls v. Brooks*, 29 Vt. 398.

The fact that the complainants in a creditor's bill to set aside fraudulent conveyances are the assignees in bankruptcy of the assignee of the judgments does not put them in any better situation in regard to defenses of fraud or collusion than the assignee of the judgments would have been in, since they have simply succeeded by operation of law to his rights. *Anderson v. Tuttle*, 26 N. J. Eq. 144.

If any part of a judgment upon which a bill in equity to set aside a conveyance of the judgment debtor as fraudulent is based, is fraudulent, the whole judgment is fraudulent, and the voluntary grantee must prevail. *Curry v. Curry* (Fa.) 11 Atl. 198.

But it was held in *Peterson v. Farnum*, 121 Mass. 476, that, under the right which a Massachusetts statute gives a judgment creditor to levy his execution upon lands "purchased, or directly or indirectly paid for, by him (the judgment debtor), the record title to which is retained by the vendor or is conveyed to a third person with intent to defeat, delay, or defraud the creditors of the debtor, or on a trust for him, express or implied, whereby he is entitled to a present conveyance,"—no such per-

son, in whom the record title to land happens to be, has any right, as against the judgment creditor, to be heard upon the question whether the relation of debtor and creditor exists, or to what extent, other than such as the debtor himself has, and cannot, therefore, in any collateral proceeding, contest the validity or amount of the debt; and the trial judge properly refused to charge that, if the judgment was for a materially larger sum than the amount actually due, owing to false testimony, the levy was void as against the defendant.

And again, in an early New York case, upon a bill to discover property of judgment debtors and alleging fraud in assignments made by such debtors to other defendants, the vice chancellor declared that it was not necessary that he should examine the objections raised against the validity of the complainant's judgment, which now properly belonged to the court of law, where any irregularity in the manner of obtaining the judgment, or any fraudulent and collusive means resorted to for the purpose, can be examined; the court rendering the judgment was best able to determine what was irregular and how far its process had been abused. This, however, probably was regarded as merely a matter of irregularity. *Hone v. Woolsey*, 2 Edw. Ch. 289.

In some special cases similar decisions have been made.

A voluntary grantee was held not entitled to set up as a defense to a bill in equity that the complainant and the grantor had agreed that, in consideration of the payment by the grantor, which was done, of one half of the amount of the note, for the whole of which judgment was later taken, and which was a joint note by the grantor and his brother, the complainants would dismiss their action as to the grantor and probate their claim for the remainder against the estate of the brother, which last they had fraudulently failed to do; even if this would have been a valid defense to the action on the note, not having been made by the defendant in that action it could not be set up by his grantee; the judgment at law settled the fact of the continued existence of the debt, and also the amount of the indebtedness. *Davidson*

date of the conveyance, see *Candee v. Lord*, 2 N. Y. 269, 51 Am. Dec. 294; *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527; *Scott v. Indianapolis Wagon Works*, 48 Ind. 75; *Strong v. Lawrence*, 58 Iowa, 55, 12 N. W. 74; *Minnesota Thresher Mfg. Co. v. Schaaok*, 10 S. D. 511, 74 N. W. 445.

The point is made that appellant cannot maintain this action for the reason that the Hahl claim was never proved in the bankruptcy proceedings, and that the trustee does not represent the creditor. It was found by the court that the claim was filed, and allowed by the referee. The claim necessarily included the notes and judgment, although not specifically mentioned. We think this is sufficient, and respondent is not in position to take advantage of any irregularity, if any there was, in the filing of the claim. The trustee in bankruptcy is authorized by the bankrupt act to take such proceedings as may be necessary to protect

the creditors of the estate; and the claim having been allowed, and the trustee having assumed jurisdiction by the commencement of this action, it is immaterial in what particular form the claim may have been proved up. This action is based upon the judgment. It is admitted in the answer that the notes were executed and the judgment rendered. The court so found, and the respondent is not permitted to raise any question in reference to the manner or method of entry of the judgment,—whether upon confession or by stipulation. In the absence of evidence to show that it was fraudulently entered, he is bound by it as a claim in bankruptcy, the same as in all other cases.

Judgment reversed, with directions to enter judgment for appellant for the relief demanded in his complaint.

v. Burke, 143 Ill. 149, 36 Am. St. Rep. 367, 32 N. E. 514.

And where a creditor under a judgment in a state court acquired two other judgments rendered in the same court against the same judgment debtor, and all of the judgments were for sums less than \$2,000, but the aggregate of them was for more than \$3,000; and the judgment creditor sued in the same court on all three judgments and recovered judgments in his own name, on which executions sued out were returned *nulla bona*; and he then filed a bill in a Federal district court to vacate alleged fraudulent conveyances from the debtor to his wife and son,—It was held that the defendant grantee's plea to the jurisdiction on the ground that the complainant held the judgments which it had bought only colorably and fraudulently, but sued and secured judgment on them together in order to raise the amount so as to give the United States court jurisdiction, was invalid, since the judgment of the state court was conclusive as to the judgment debtor, and because, in the absence of allegations of lack of jurisdiction in the state court as to either the parties or the subject matter, and of any collusion or fraud in the obtaining of the judgments, it is also conclusive upon the judgment debtor's grantees in a creditor's bill to set aside their conveyances. *Alkire Grocery Co. v. Richesin*, 91 Fed. 79.

2. Collusion.

An alleged fraudulent grantee may attack the judgment on which his grantor's judgment creditor seeks to have the conveyance set aside, on the ground that the judgment was obtained by covin or collusion. *Carter v. Bennett*, 4 Fla. 283; *King v. Tharp*, 26 Iowa, 288. The same thing is intimated in *Hafner v. Irwin*, 26 N. C. (4 Ired. L.) 529; *Minnesota Thresher Mfg. Co. v. Schaaok*, 10 S. D. 511, 74 N. W. 445; and *Pabst Brewing Co. v. Jensen*, 68 Minn. 293, 71 N. W. 384.

Upon trustee process it was held that the trustee and the claimant, who had joined with the principal defendant in a fraudulent arrangement, void as to bona fide creditors of the defendant, might show before the commissioner 67 L. R. A.

that the plaintiff was not a bona fide creditor of the defendant, but had prosecuted his action and obtained his judgment for the sole benefit of the defendant, and to enable him by the trustee process to reach the funds claimed to be in the trustee's hands. *Boutwell v. McClure*, 30 Vt. 674.

Although equity will not ordinarily look behind the judgments and assignments of judgments on which creditors' bills are based, nevertheless, where the bill is filed in order to have property to which other persons have title declared to be the property of the judgment debtor, to be held in trust for him and to be sold to pay the amount due the complainant; and where it appears from the evidence that the judgments against the debtor were assigned to the complainant to the judgment debtor's knowledge and connivance, and that he is the real complainant,—the court will not aid the fraudulent debtor to do by indirection what it would not assist him to do directly, namely, to set aside his own conveyances; and the assignee in such case stands in no better position than the judgment debtor himself. *Anderson v. Tuttle*, 26 N. J. Eq. 144.

In an action of ejectment by one holding under a voluntary deed against a purchaser on an execution sale on a judgment against the voluntary grantor, the judgment under which the defendant holds is not conclusive upon the plaintiff, but he may be allowed to go into evidence that there was no debt existing from the defendant to the plaintiff in that action at the time the judgment was taken. In such a case if this were not so the plaintiff's land might be sold under a judgment confessed subsequently to his deed for a debt alleged to be prior, although he could prove that the debt was feigned, and the judgment covinous and fraudulent as to him. This is certainly not the rule of law, nor of justice. If a judgment between other persons be given in evidence to affect the rights of the third person, neither party nor privy to the judgment, he may show that it was set on foot by covin, and thus avoid it. The plaintiff here was neither party nor privy in respect of land which he held by a previous deed. *Posten v. Posten*, 4 Whart. 27.

But in a creditor's bill to set aside a fraudulent conveyance, when the plaintiff offered in evidence in support of the justice of his claim at law no evidence other than the record and judgment in the suit at law, although the defendants maintained that the demand upon their grantor was not just, and that the judgment at law was obtained by the collusion and fraud of the plaintiff and of the administrator of the grantor, judgment was for the plaintiff. *Chamberlayne v. Temple*, 2 Rand. (Va.) 384, 14 Am. Dec. 786.

A defense setting up that, owing to the negligence of the debtor, judgment was recovered for a larger amount than was due the creditor, was immaterial except in so far as the matter thus set up tended to show collusion or fraud; and the conclusiveness of this evidence is not affected by the fact that the judgment was recovered after the making of the conveyance. *Swihart v. Shaum*, 24 Ohio St. 432.

e. Attack for irregularity.

In a very few cases a successful attack has been made upon the judgment upon the ground of irregularity; but for the most part mere irregularity will not avail the grantee.

So, on a creditor's bill to subject to a judgment property fraudulently transferred, an objection made to the regularity of the judgment cannot be decided by a court of equity. *Suydam v. Beals*, 4 McLean, 12, Fed. Cas. No. 13, 653; *Barnard v. Darling*, 1 Barb. Ch. 218; *Williams v. Hubbard*, 1 Mich. 446.

And the defendant cannot attack the judgment on which the bill is brought as for lack of jurisdiction in the court, when the ground of the attack is not that the tribunal had no power to enter upon the inquiry, but merely that its methods were not regular, its findings right, or its conclusion in accordance with the law. *Johnson v. Miller*, 50 Ill. App. 60; *Moore & H. Hardware Co. v. Curry*, 106 Ala. 284, 18 So. 46.

The grantee cannot impeach the judgment because it appears by the record that there was one special count in the declaration upon the note sued upon, and the common counts, and that on the default the court ordered the clerk to assess the damages upon the count on the note without any withdrawal of the common counts. *Newman v. Willits*, 60 Ill. 519.

The complaint is sufficient as to the debt upon which the judgment was recovered, although it has not the definiteness required in a complaint to recover the debt, if it alleges that the judgment was rendered in an action pending; the statement that the judgment was rendered "duly" need not be used, for the regularity of the judgment, or its freedom from error, cannot be collaterally called in question. *Scanlan v. Murphy*, 51 Minn. 536, 53 N. W. 799.

So the grantee cannot effectually object to the judgment because no affidavit of the authority of the attorney is annexed to the offer of judgment, this being a mere irregularity of which third parties cannot take advantage. *St. John Woodworking Co. v. Smith*, 82 App. Div. 348, 82 N. Y. Supp. 1025.

And it cannot be impeached because, although it purports to be by default, the defendant in the action has in fact duly answered and tendered material issues for trial. *Dreyfuss v.* 67 L. R. A.

Charles Seale & Co. 18 Misc. 551, 41 N. Y. Supp. 875.

The grantee cannot avail himself of the defense that the judgment is void for being irregularly entered upon a warrant signed in blank and afterwards filled up after the signature by the magistrate; and, even if a party to the judgment could directly avail himself of this as an error, he could not, and much less can third persons, question the sufficiency of the judgment incidentally. *Hafner v. Irwin*, 26 N. C. (4 Ired. L.) 529.

The objection to a judgment that it is against two persons named, "partners doing business as," etc., and is against the firm, and not against the individual defendants, will not avail. *First Nat. Bank v. Sloman*, 42 Neb. 350, 47 Am. St. Rep. 707, 60 N. W. 589.

The defendant grantee cannot object that the record of the original judgment did not show that the case had been redocketed in the trial court. *Quinn v. People*, 146 Ill. 275, 34 N. E. 148.

But in a case where a judgment of an Iowa district court was not properly recorded in the index of liens, as was required by law in order to make it an effective lien upon the judgment debtor's real estate, the defendant, in an action to set aside as fraudulent a conveyance of land to him from the judgment debtor was entitled to judgment. *State Ins. Co. v. Prestage*, 116 Iowa. 466, 90 N. W. 62.

In accord with this is *National Bank v. Levy*, 17 N. Y. S. R. 529, 2 N. Y. Supp. 162, deciding that, where the original judgment in an action to set aside a fraudulent conveyance of land is not shown by the complaint to have been entered or docketed in the county where the real estate was situated, the complaint must be dismissed.

But in a later case of equal authority the contrary is upheld, and it is said to be enough that the plaintiff has recovered judgment, that execution has issued upon it, and that it has been returned unsatisfied. *Lanahan v. Caffrey*, 40 App. Div. 124, 57 N. Y. Supp. 724.

Although it is generally true that an erroneous judgment is to be avoided only by a writ of error, this rule does not apply to cases where a party has a right to impeach a judgment illegally rendered, and yet has no right to reverse it by a writ of error; if the judgment has not been obtained by collusion with the debtor, or with any fraudulent design, yet, if it was unlawfully recovered, to the injury of a third person, who cannot reverse it for error, not being a party thereto, he can avoid it in the same manner. Thus, where the basis of the plaintiff's claim was a judgment, the execution on which was presented as evidence to commissioners in insolvency in support of the claim, which was thereupon allowed and reported, an order of distribution being made; but the defendant grantee was a party neither to the judgment nor to the proceedings before the commissioners,—the grantee, if he could successfully impeach the judgment, might also impeach the allowance of the plaintiff's claim based upon it; and since in the original action, one of the defendants having died, the other one having obtained his certificate in discharge in bankruptcy directed counsel to appear no further in the action, in which an appeal had been taken, and the appeal was dismissed, damages being entered without direction of the court or notice to the surviving

defendant or the administrator of the deceased,—it was held that, the judgment not having been obtained on a verdict or default, and there being nothing to show that the plaintiff was entitled to a verdict, nor any adjudication by the court, when it was agreed that the defendant's plea should be recorded bad, the defendant grantee could not be bound by the agreement on which the judgment was rendered; for "persons injuriously affected by a judgment, though not recovered by collusion of the parties, have a right to avoid it." *Caswell v. Caswell*, 28 Me. 232.

So in *Sargent v. Salmond*, 27 Me. 539, it is held that the grantee is entitled to impeach the judgment in the creditor's action upon the ground that it appears from the whole record of the judgment that the plaintiff took judgment for a sum larger than that to which he had a just claim.

See also, in connection with these cases, *Epstein v. Ferst*, 35 Fla. 498, 17 So. 414, and *Wilhelm v. Locklar* (Fla.) 35 So. 6, *infra*, VI., a.

f. Unintentional default in the original action.

A judgment for money against one making a voluntary settlement is conclusive in respect to the parties to it, and it cannot be impeached collaterally or questioned upon a creditor's bill, upon the ground, merely, that the judgment was rendered by default, and that the settlor, the defendant in the judgment, had intended to defend, and could have done so successfully, but was prevented by extreme illness. *Mattingly v. Nye*, 8 Wall. 370, 19 L. ed. 380.

g. Attack for matters arising since the judgment.

1. Dormancy.

This defense should be distinguished from that of the statute of limitations, which was a defense to the original action, and is treated *supra*, III., c. 2.

A petition which alleges that the plaintiff has recovered a judgment against one of the defendants, which is unsatisfied, and that a sale from that defendant to another defendant was in fraud of the right of the plaintiff, and asking that that other defendant be declared to be the creditor of the first defendant, and to compel the other defendant to render an accounting for the goods conveyed to him, and that the property be subjected to the payment of the plaintiff's judgment, is a creditor's bill, and the plaintiff's right to the relief sought depends entirely upon the existence of the judgment. Such a proceeding is entirely ancillary to the judgment and in aid of the execution upon it, and if, during the pendency of the action, the plaintiff's judgment becomes dormant by statutory limitation so that execution can no longer be issued upon it, the action must entirely fail. *Miller v. Melone*, 11 Okla. 241, 56 L. R. A. 620, 67 Pac. 479.

And when the plaintiff, instead of reviving his judgment in the way pointed out by the statute, merely obtains a written consent of the original defendant, this will not help him. *Ibid.*

The owner of a dormant judgment, on which, under the statute, after ten years, no scire facias can issue to revive it, and no execution

can be issued, has no status as a judgment creditor to set aside a fraudulent conveyance of the debtor. Moreover, he cannot be said to have exhausted his legal remedies until he has sued on the judgment, renewed it, taken out his execution, and levied upon any legal or equitable interest of the judgment debtor. *Mullen v. Hewitt*, 103 Mo. 639, 15 S. W. 924.

Since the statutory lien of the judgment on the real estate in question is the predicate on which a court of equity will intervene in aid of the judgment as by removing clouds upon the title or setting aside a fraudulent conveyance of the land, so it will altogether refrain from intermeddling if the lien has expired and no longer binds the property; accordingly, a demurrer is sustained, upon the ground that seven years had passed since the rendition of the judgment on which the creditor's action is based before the second action was brought. *Partee v. Mathews*, 53 Miss. 140.

The principle of *Partee v. Mathews*, 53 Miss. 140, was later followed, and it was declared that in the case of a fraudulent conveyance which is recorded the doctrine of concealed fraud will not apply so as to prevent the running of the statute against the creditor. *Fleming v. Grafton*, 54 Miss. 79.

But in *Postlewait v. Howes*, 3 Iowa, 365, it is held that an alleged fraudulent grantee cannot attack the plaintiff's judgment upon the ground that it is dormant, in that execution is not issued upon it within five years of the date of its rendition, when the judgment remains a lien on the real estate of the judgment debtor for ten years, and the statute of limitations cannot be successfully pleaded to an action brought upon it until after the lapse of twenty years. This is true although the judgment creditor could not after the lapse of the five years, even after obtaining his judgment in the creditor's suit, obtain execution upon his first judgment without reviving it by a scire facias.

In Texas, where a judgment lien is not necessary to the action (see *Arbuckle Bros. Coffee Co. v. Werner*, 77 Tex. 45, 13 S. W. 963), the filing of a creditor's bill to set aside a fraudulent conveyance, after the return *nulla bona* of the execution on the original judgment, fixes a claim in the nature of an equitable lien upon the property sought to be subjected to the judgment, so that the judgment cannot become dormant, and it is not necessary to proceed further in the original action by keeping up the issuance of the executions; the action to avoid the conveyance and subject the land to the debt affords a basis for full relief. *Cole v. Terrell*, 71 Tex. 549, 9 S. W. 668.

So the objection that the lien of the judgment on which a creditor's bill was based had expired by limitation of the statute before the entering of the decree on the creditor's bill does not avail, for the reason that the filing of the bill itself created a lien in equity upon the effects of the judgment debtor, amounting to an equitable levy. *Davidson v. Burke*, 143 Ill. 149, 36 Am. St. Rep. 367, 32 N. E. 514.

2. Waiver or estoppel.

The case of a judgment creditor suing to set aside a conveyance as fraudulent cannot be attacked upon the ground that, from his forbearance for a long time to enforce his rights, he must be held to have waived, or is estopped to

set up his claim. *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527, Distinguishing *Sargent v. Salmond*, 27 Me. 541, *infra*, VI., 1, 2.

3. Satisfaction.

A demurrer was sustained to a complaint, in an action to set aside a conveyance as fraudulent, alleging that the judgment upon which it is brought has been fully paid by an execution sale of personal property taken by the sheriff as the property of the judgment debtor, although it also alleges that the fraudulent grantee has obtained a judgment against the sheriff who enforced the writ of execution for the value of the property levied upon, and that, the sheriff having obtained a stay of proceedings, if the judgment against him is not set aside, but entered against him, the plaintiff in this action will move the court for an order setting aside the sheriff's return of the writ of execution. The foundation of the plaintiff's case is destroyed by the allegation that the property has been sold under execution, and that the execution is satisfied in full; and the further allegation that, if the litigation between the sheriff and the fraudulent grantee is finally determined in favor of the latter, it is the plaintiff's intention to move to set aside the sheriff's return and to reinstate the judgment, is not a statement of any fact, but a mere assertion of intent. *Minneapolis Threshing Mach. Co. v. Jones*, 89 Minn. 184, 94 N. W. 551.

Where two judgments were entered against the grantor as maker upon two notes, one of which was collateral to the other, and one had an indorser, the judgment upon the collateral note was satisfied by the satisfaction of the judgment on the principal note; and, an execution and sale after the satisfaction of the principal judgment being unauthorized, this fact would avail the grantee. *Lynch v. Burt*, 132 Fed. 417. And see the case of *Gottlieb v. Thatcher*, 34 Fed. 435, *supra*, III., c. 8.

But, on a petition to set aside a voluntary conveyance of land as made to defeat a personal deficiency judgment on foreclosure. It is no objection to the petitioner's right to a decree that he bought the premises on foreclosure at a figure much below their actual value. *Bohde v. Lawless*, 33 N. J. Eq. 412.

4. Intervening judgment in favor of a stranger.

In an action to determine the adverse claims of the parties to real estate the plaintiff claimed under a statutory foreclosure sale, the defendant alleging the assignment to him of a judgment against the defendant in foreclosure in favor of a third person, and that under that judgment the defendant redeemed the land from the foreclosure sale, receiving a sheriff's certificate of redemption; alleging, also, that a stranger had obtained a judgment against the plaintiff setting aside the foreclosure sale under which he claimed, and adjudging the title to be in the stranger. The plaintiff, in reply, denied the validity of the judgment which had been assigned to the defendant and under which the alleged redemption was made, and alleged collusion between the original defendant and the person obtaining the judgment against him. It was held that the judgment in favor of the stranger against the plaintiff, declaring the foreclosure and the sale to the plaintiff under it void, did not affect this defendant, who was 67 L. R. A.

not a party to that action; that he acquired no rights through that judgment, and stood in no relation of privity with the prevailing party in that action; the judgment could no more operate as an estoppel in his favor and against the plaintiff than it could have prejudiced him if the judgment had declared the foreclosure valid; and that the title to the land was in the plaintiff. *Maloney v. Finnegan*, 40 Minn. 281, 41 N. W. 979.

So the defendant in an action to set aside his conveyance as in fraud of the grantor's creditors cannot defend upon the ground that the plaintiff's deed to the property, for the rent of which she had recovered her judgment against the grantor, had been set aside as fraudulent, for the reason that the defendant was not a party to the action in which the plaintiff's deed was set aside, nor a creditor of the plaintiff's grantor, and he cannot be heard to complain of the deed to the plaintiff. *Yetzer v. Yetzer*, 112 Iowa, 162, 83 N. W. 889.

5. Intervening bankruptcy.

A discharge in bankruptcy of a judgment debtor does not affect a lien of judgments against him, so as to be a bar to a bill to set aside his voluntary conveyance. The bankrupt is discharged personally from judgments; but the lien of a judgment against him, which had attached to property before the adjudication in bankruptcy, is still a lien. The appointment of an assignee, and the assignment to him in pursuance of the law, vest in him the property of the bankrupt, but in the precise condition it was in at the time of the adjudication. He stands in the shoes of the bankrupt, and takes property subject to all liens and equities which could have been enforced against it if bankruptcy had not occurred. *Davis v. Lumpkin*, 57 Miss. 506.

A discharge in bankruptcy, obtained during the pendency of an action begun after a fraudulent conveyance by the insolvent, is no bar to a bill in equity based upon the judgment obtained after the discharge and seeking to set aside the fraudulent conveyance. This is true although it was the duty of the assignee in bankruptcy to bring an action to set aside the fraudulent conveyance on behalf of creditors. *State v. Williams*, 9 Baxt. 64.

A creditor who has obtained a valid judgment, after the discharge of his debtor in bankruptcy, upon a pre-existing claim, may proceed against any property rightfully subject to his debt; the bankrupt cannot object to the bill, having lost all his property, and the fraudulent vendee is in no danger of two recoveries for the same cause of action, since the property is the subject of the litigation, and cannot be recovered from him a second time. *Ibid.*

6. Pendency of other proceedings.

The defendant grantee in an action to set aside a conveyance fraudulent as against creditors cannot set up as a bar to the action the fact that proceedings supplementary to execution have been instituted on the original judgment. *Faber v. Matz*, 86 Wis. 370, 57 N. W. 39.

IV. Status of the grantee as affecting his right to attack the judgment.

In order to entitle a creditor to impeach a conveyance of his debtor for want of considera-

tion where there is no fraud, it must appear that he was a creditor, and a judgment in his favor against the grantor is not conclusive against the grantee who is no party to it, and he may, as a general rule, show that the judgment was collusive and not founded on actual indebtedness or liability; but where the grantee defended the action on which the creditor's bill is based, not only as agent of his grantor, but also in his own behalf to protect the property conveyed to him by the defendant in that suit, he cannot be permitted to try again the question of indebtedness, and to prove that at the time of the conveyance to him no actual indebtedness existed from his grantor to the plaintiff in the later action. *Church v. Chapin*, 35 Vt. 223.

But where two persons submitted a controversy as to an account to arbitrators, who made a report, upon which a judgment was entered, and the successful party sought to subject to this judgment land which the other party had in the meantime conveyed to a third person, who had been present at the arbitration and had managed the case for his grantor, it was held that the grantee, as defendant in equity, was not precluded from attempting to show that at the time of the recovery by the plaintiff he had not in fact any subsisting debt against the grantor, but that the judgment was founded altogether upon fraud and injustice. The grantee was not in the proper sense of the terms either a party or privy to the judgment, and it had never been decided that he was to be precluded merely because he was the agent for the unsuccessful party; although he was the agent, his principal might have neglected to furnish him the means and to give him proper instructions for resisting the claim, and the reference or arbitration might have been entered into, not only without consulting him, but even against his will. *Thrasher v. Haines*, 2 N. H. 443.

The parties to an action and the persons in privity with them cannot collaterally attack or impeach a judgment for fraud, and any attack must be regarded as collateral which is made in any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying the judgment or decree. Thus, where a corporation, for the purpose of defrauding judgment creditors, made a conveyance to the president of the corporation, the latter cannot set up fraud in the procurement of the judgment, which the defendant corporation negligently failed to have reversed; the corporation could not now set up the invalidity of the judgment, and the defendant grantee, being in privity with it, can occupy no better position than it does. *Johnson v. Stebbins-Thompson Realty Co.* 167 Mo. 325, 66 S. W. 933.

Grantees from a decedent in his lifetime, who are also his heirs, are not concluded from attacking an allowance of the plaintiff's claim against the administrator, to which he only was a party defendant, for the reason that they took counsel and considered the advisability of employing attorneys to aid the administrator in resisting the claim. *Willett v. Malli*, 65 Iowa, 675, 22 N. W. 922.

According to a special rule, a plaintiff in a creditor's action against the fraudulent grantee of a person since dead, to have the conveyance set aside, must proceed as if the grantee were an executor *de son tort*, and the grantee, as such executor, can make any defense against the de-

mand with which he is sought to be charged which the decedent or his rival representative could make. *Means v. Hicks*, 65 Ala. 241.

Where a bill to set aside as fraudulent a conveyance of a person since dead was dismissed as to certain of the complainants and some other creditors who had come in by petition, upon the ground that their claims had been barred by the statute of limitations, but an appeal by some of the complainants who had been brought in by petition was allowed, and the cause remanded, it was held that the fact that the administrator of the deceased grantor had in the meantime confessed judgments in favor of those creditors as to whom the bill had been dismissed on the plea of the statute did not change the condition of these claims in any way; the administrator had no power to waive the grantee's defense of limitations, nor could he, by such waiver, establish the claims of the complainants. *McDowell v. Goldsmith*, 24 Md. 214.

Voluntary grantees of an intestate may contest the validity of a judgment taken against their grantor's administrator, and the justice of the plaintiff's demand against the estate. *Alexander v. Quigley*, 2 Duv. 399.

In *Chamberlayne v. Temple*, 2 Rand. (Va.) 384, 14 Am. Dec. 786, *supra*, III., d, 2, however, grantees from a deceased person were not allowed to impeach on the ground of collusion a judgment against the administrator of their grantor.

V. *How the objection to the judgment must be made.*

The defendant grantee may set up that the statute of limitations barred the debt against his grantor before the beginning of the action on which the judgment of the complainant in a creditor's bill was rendered; but this objection, unless made by demurrer or answer, is waived, it being necessary to take the objection by a demurrer if the fact of the bar appears upon the face of the proceeding, otherwise it must be taken by answer. *Davis v. Davis*, 20 Or. 78, 25 Pac. 140.

But in *Clark v. Anthony*, 31 Ark. 546, it is held that the objection of the statute, or as to the parties to the original action, cannot be made by demurrer.

VI. *The sufficiency of the judgment pleaded, to support the action.*

a. *Generally.*

The question what judgments, as pleaded, may be made the basis of an action to set aside a fraudulent conveyance, is necessarily involved with that of the sufficiency of judgments as a foundation for creditors' bills, generally, which is a subject not intended to be covered by this note. It is believed, however, that all the cases involving judgments used as foundation for the action to set aside fraudulent conveyances are considered in this note, although it is not suggested that in most of the cases treated the principles involved are peculiar to that particular action or distinct from those governing creditor's bills generally.

The basis of every creditor's bill is an unimpeachable judgment, and the plaintiff is required to plead and prove his ownership of a valid and unsatisfied judgment; but this condition is not satisfied by a petition showing the

rendering of a verdict in plaintiff's favor and the granting of an order setting it aside, and the appeal from that order to the supreme court, which reversed it and rendered in favor of the plaintiff a personal judgment, which he now owns and which is unsatisfied, since, under the Nebraska statute, the supreme court acquired no jurisdiction of an appeal from the order of the lower court granting a new trial, that order not being a final order; and hence the judgment was void for lack of jurisdiction. *Johnson v. Parrotte*, 46 Neb. 51, 64 N. W. 363.

A judgment entered by confession, which did not especially authorize the clerk to enter it, made without service of process when no suit was pending, and without any appearance by the defendant or any proof that he executed such a confession, when entered merely by the clerk, is invalid; and a creditor's bill to set aside as fraudulent a conveyance from the apparent judgment debtor cannot be maintained upon it. *Epstein v. Ferst*, 35 Fla. 498, 17 So. 414; *Wilhelm v. Locklar* (Fla.) 35 So. 6.

Naturally, a decree setting aside a fraudulent conveyance must be reversed, and the action dismissed, when based upon a judgment which, pending an appeal from the creditor's bill, was reversed. *Kudrna v. Ainsworth*, 65 Neb. 711, 91 N. W. 711.

When a creditor recovers judgment against the administrators of his debtor only for the amount of the assets found to be in the hands of the administrators, which are less than his claim, and for the rest of the claim judgment is entered for the administrators, he is not entitled, on the basis of his judgment, to proceed in equity against donees of his deceased debtor to have their conveyances set aside as fraudulent, since the judgment on which he bases his suit in equity is in favor of the administrators. *Bridges v. Moye*, 45 N. C. (Busbee, Eq.) 170.

And such a creditor's bill cannot be maintained upon a judgment void because the creditor had no jurisdiction, there being no personal service on the debt, although the action was commenced by an attachment, and an appearance was made by an attorney, who had no authority. *Anderson v. Hawhe*, 115 Ill. 33, 3 N. E. 566.

But upon a judgment obtained for a money demand on service by publication against the defendant, who was a nonresident and absent from the state, and by attachment of the defendant's land, which had been before conveyed to third persons, it was held that an action in the nature of a creditor's bill could be maintained to set aside the conveyances made by the debtor. The judgment obtained on service by publication was valid in all respects so far as the property seized was concerned. If this remedy were denied to the plaintiff he could get no relief against the alleged fraudulent conveyance made by his debtor so long as the latter and his grantees avoided personal service of process. *Parmenter v. Lomax*, 68 Kan. 61, 74 Pac. 635.

In a collateral attack by the defendant grantee, in an action to set aside his conveyance as fraudulent, upon the attachment and judgment in the original action against the grantor, in which jurisdiction was obtained by service of summons by publication, these proceedings should be upheld unless absolutely void for jurisdictional defects,—especially when the merits of the controversy have been decided
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against the fraudulent grantee, and even though there was unusual carelessness in the conduct of the proceedings, so that a court considering a motion made by the original defendant to set them aside might well hesitate to uphold them. This principle was applied in a case where it was objected that the affidavits upon which the order of publication was granted did not show that any effort had been made to serve the summons within the state, or that the plaintiff had used reasonable diligence to ascertain where the defendant would receive matter transmitted through the postoffice; and where the notice attached to the summons published did not state where the summons was filed as required by the Code. *Denman v. McGuire*, 101 N. Y. 161, 4 N. E. 278, Affirming 17 N. Y. Week. Dig. 504.

So the objection that the judgment on which the action is based was recovered upon service of the summons on only one of two partners is without merit, the return unsatisfied of the execution against the firm property under the judgment so obtained being sufficient to support an action by the judgment creditors to set aside the firm assignment and to reach firm assets. *King v. Baer*, 31 Misc. 308, 64 N. Y. Supp. 228. As to impeaching for lack of jurisdiction, *vide supra*, Ill., c. 12.

A judgment creditor's action to set aside a conveyance as fraudulent is permissible when based upon a judgment obtained by the same plaintiff against the alleged fraudulent grantor and his son, to set aside as fraudulent another conveyance from the son to the father, although the only basis of the second action is a judgment for the costs and disbursements in the first action, and although the second conveyance was made while the first action was pending and before the defendant's liability was fixed. *McLaggan v. Smith*, 35 Misc. 564, 71 N. Y. Supp. 1121.

Although the doctrine is well settled that, until he has exhausted his remedy at law, a court of equity will not assist a creditor to the satisfaction of his debt out of property fraudulently conveyed by the debtor, yet, when creditors are shut out by any reason from pursuing their remedy in a court of law, as when the debtor is dead and his estate is insolvent; and the law forbids a suit by a creditor against the personal representative; and they have established their claims by proof and registration in the chancery court as required by the statute, but have no judgment lien upon the property fraudulently conveyed,—they have a sufficient standing to maintain the action in equity. *Hamilton v. Mississippi College*, 52 Miss. 65.

But the allowance of a claim by commissioners of insolvency, and the report upon it and the order of distribution, can have no greater validity to the prejudice of a stranger than the judgment of another court; he has an equal right to impeach their proceedings by the same kind of evidence and in the same mode. *Caswell v. Caswell*, 28 Me. 232.

In an action to subject to the payment of the debt of a deceased person real estate which it is alleged the decedent conveyed to his heirs in his lifetime to defraud creditors, an allowance of the plaintiff's claim against the estate in the probate court in a proceeding in which only the administrator was actually before the court as a defendant is not even *prima facie* evidence of the correctness of the claim as

against the heirs. Willett v. Malli, 65 Iowa, 675, 22 N. W. 922.

A creditor's bill may be maintained in a Federal court in New York to set aside a fraudulent transfer of a life-insurance policy assigned while the owner was insolvent, and based merely upon a decree in equity against the assignor and the grantee in the Florida Federal court, by which decree the amount of the complainant's debt was determined and the debtor adjudged to be entirely insolvent. Etna Nat. Bank v. Manhattan L. Ins. Co. 24 Fed. 769.

The judgment of another state cannot be the basis of a creditor's bill to set aside a fraudulent conveyance, but the judgment must be sued upon in the state in which the bill is brought before it becomes a judgment for any purpose. Before that is done it ranks as a simple contract debt, and equity will not assist the owner of such a judgment until he has exacted his remedy at law. Claflin v. McDermott, 20 Blatchf. 522, 12 Fed. 375, Following Tarbell v. Griggs, 3 Paige, 207, 23 Am. Dec. 790, and Davis v. Bruns, 23 Hun, 648. And in this respect judgments of Federal courts are in the same case as those of courts of sister states. Tarbell v. Griggs, 3 Paige, 207, 23 Am. Dec. 790.

So in an action in South Carolina to set aside as fraudulent a gift of an intestate, a judgment rendered in Georgia against the ancillary administrator there is not evidence of the indebtedness of the intestate's estate. King v. Clarke, 2 Hill, Eq. 611.

Under Mo. Rev. Stat. § 376, one who has not obtained a judgment in a court of law, but has received from the assignee of his debtor a certificate showing that the assignee has adjusted his claim,—ascertained and allowed the amount due,—has obtained an adjudication which is as final as if rendered by a court, having all the force, effect, and attributes of a judgment, and entitles him to maintain a suit to set aside a fraudulent conveyance of the assignor. Roan v. Wiun, 93 Mo. 503, 4 S. W. 736.

As to the question of the sufficiency, as a basis for a bill to set aside a fraudulent conveyance, of a judgment upon claims part of which are subsequent to the conveyance, *vide supra*, III., b.

b. Tort claims.

SCHMITT v. DAHL, by making recovery depend upon a "claim" existing before the con-

veyance, very properly includes tort claims; and this is in harmony with the cases, where there is a particular intent to defeat recovery on the claim.

So a deed made with intent to defeat a recovery by a third person of damages in an action of tort, and before trial and judgment, is fraudulent and void to the same extent as a conveyance to hinder and delay existing creditors. Johnson v. Wagner, 76 Va. 587, Following Jackson *ex dem.* Van Buren v. Myers, 18 Johns. 425; Greer v. Wright, 6 Gratt. 154, 52 Am. Dec. 111, and in accord with Mountford v. Randle, 2 Keble, 499.

The objection of an alleged fraudulent grantee that the claim upon which the plaintiff's suit is founded was one in tort, and so could not be regarded as a debt of the grantor, and the judgment was not taken upon it until after the date of the conveyance alleged to be fraudulent, will not avail when the deed in question was made in pursuance of an express intention on the part of both grantor and grantee to defeat the collection of the claim which the plaintiff at the time was prosecuting. Had the fraud no other object than to defeat existing creditors, defendant's position might be reasonable. But when its purpose is specific to defeat a claim for damages on account of tort, chancery will not permit it to triumph upon the ground that the claim was not regarded as a debt at the time the fraud was consummated. It has been held that a deed cannot be impeached for fraud if made before the debt sought to be enforced was contracted; but, if the conveyance was executed with a view to defraud one who would become a creditor in a transaction contemplated at the time, it will be set aside, and the claim will be enforced against the property. Miller v. Dayton, 47 Iowa, 312.

And especially one accepting a conveyance from another, who expressly avows his intention of defeating any recovery under a pending action for tort, cannot attack the judgment as rendered subsequent to the conveyance. Lillard v. McGee, 4 Bibb, 165.

But in Hill v. Bowman, 35 Mich. 191, and Hall v. Sands, 52 Me. 355, a disputed claim for damages in tort before it has been reduced to judgment, not being liquidated and a debt, is held not to make its owner a creditor so as to allow him to attack a voluntary conveyance as fraudulent. But here there is no mention of a particular intent to defeat the claim.

L. B. B.

INDIANA SUPREME COURT.

Fred L. JOURDAN, *Appt.*,

v.

City of EVANSVILLE.

(.....Ind.....)

Conferring power upon a municipal

NOTE.—As to discretion of municipal officers in granting liquor license, see Sherlock v. Stuart, 21 L. R. A. 580, and *note*; also State *ex rel.* Noble v. Cheyenne, 40 L. R. A. 710.

As to power of municipal corporations to regulate sales of intoxicating liquors generally, see *note* to State v. Karstendiek, 39 L. R. A. 525.

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corporation to require licenses for the sale of intoxicating liquors, within 4 miles of its corporate limits, does not deprive citizens of their constitutional property rights, or of the privileges and immunities protected by the Federal Constitution.

(November 20, 1904.)

As to power of municipal corporations to prohibit screens or inclosures in saloon, or to require curtains to be raised, or prescribe hours when saloon shall be closed, etc., see Paul v. Washington, 65 L. R. A. 903, and *footnote* thereto.

A PPEAL by defendant from a judgment of the Circuit Court for Vanderburgh County convicting him of violation of a municipal ordinance requiring a license for the sale of intoxicating liquors. *Affirmed.*

The facts are stated in the opinion.

Mr. E. J. Greshaw for appellant.

Mr. Albert W. Funkhouser, for appellee:

A license to retail intoxicating liquor is a mere revocable, personal permit to carry on an odious business, subject to police regulations and restraints; a license fee paid for this privilege is not a compulsory tax, and its exaction is not a violation of any of the constitutional rights or privileges of the licensee as a citizen.

McKinney v. Salem, 77 Ind. 214; *Shea v. Muncie*, 148 Ind. 14, 46 N. E. 138; *Haggart v. Stehlin*, 137 Ind. 54, 22 L. R. A. 577, 35 N. E. 997; *Moore v. Indianapolis*, 120 Ind. 483, 22 N. E. 424; *State v. Gerhardt*, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469; *Nelson v. State*, 17 Ind. App. 403, 46 N. E. 941; *Farmville v. Walker*, 101 Va. 323, 61 L. R. A. 125, 99 Am. St. Rep. 870, 43 S. E. 558; *Danville v. Hatcher*, 101 Va. 523, 44 S. E. 723; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Hucless v. Childrey*, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Schuchow v. Chicago*, 68 Ill. 444; *Hoboken v. Goodman*, 68 N. J. L. 217, 51 Atl. 1092.

Liquor sellers are subjected to the payment of a special license tax, because the object of this class of legislation is to restrict the business, and not because its object is to secure to the liquor seller the benefit or protection of the municipal government.

Emerich v. Indianapolis, 118 Ind. 279, 20 N. E. 795; *Hedderich v. State*, 101 Ind. 584, 51 Am. Rep. 768, 1 N. E. 47; *McAlister v. Howell*, 42 Ind. 15; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Indianapolis v. Bieler*, 138 Ind. 30, 36 N. E. 857; *Bright v. McCullough*, 27 Ind. 223; *State ex rel. Kelley v. Bonnell*, 119 Ind. 494, 21 N. E. 1101; *Flack v. Fry*, 32 W. Va. 364, 9 S. E. 240.

The legislature has power to designate the limits over which the jurisdiction of municipal corporations shall extend.

Lutz v. Crawfordsville, 109 Ind. 466, 10 N. E. 411; *Emerich v. Indianapolis*, 118 Ind. 279, 20 N. E. 795; *Indianapolis v. 67 L. R. A.*

Bieler, 138 Ind. 30, 36 N. E. 857; 1 Dill. Mun. Corp. § 54; 15 Am. & Eng. Enc. Law, pp. 1001, 1006, 1007; *Chicago Packing & Provision Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545; *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601; *Gould v. Rochester*, 105 N. Y. 46, 12 N. E. 275; *State ex rel. Humphrey v. Franklin*, 40 Kan. 410, 19 Pac. 801; *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Flack v. Fry*, 32 W. Va. 364, 9 S. E. 240; *Kaufe v. Delaney*, 25 W. Va. 410; *Robb v. Indianapolis*, 38 Ind. 49; *Strauss v. Pontiac*, 40 Ill. 301; 17 Am. & Eng. Enc. Law, 2d ed. p. 286; *Falmouth v. Watson*, 5 Bush, 660.

The legislature may delegate to municipal corporations the right to exercise police power outside the corporate limits of such municipality.

Lutz v. Crawfordsville, 109 Ind. 466, 10 N. E. 411; *Emerich v. Indianapolis*, 118 Ind. 279, 20 N. E. 795; *Indianapolis v. Bieler*, 138 Ind. 30, 36 N. E. 857; Dill. Mun. Corp. § 54; *Falmouth v. Watson*, 5 Bush, 660; *Flack v. Fry*, 32 W. Va. 364, 9 S. E. 240; *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601; *State ex rel. Humphrey v. Franklin*, 40 Kan. 410, 19 Pac. 801; *Chicago Packing & Provision Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545; *Robb v. Indianapolis*, 38 Ind. 49; *State ex rel. Kelley v. Bonnell*, 119 Ind. 494, 21 N. E. 1101.

The legislature may delegate its police power to municipal corporations to lay a special tax upon persons engaged in selling intoxicating liquor.

Lutz v. Crawfordsville, 109 Ind. 466, 10 N. E. 411; *Smith v. Madison*, 7 Ind. 86; *Huntington v. Cheesbro*, 57 Ind. 74; *Laurenceburg v. Wuest*, 16 Ind. 337; *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471; *State v. DeBar*, 58 Mo. 395; *Frankfort v. Aughe*, 114 Ind. 77, 15 N. E. 802; *Vinson v. Monticello*, 118 Ind. 103, 19 N. E. 734; *Wagner v. Garrett*, 118 Ind. 114, 20 N. E. 706; *McKinney v. Salem*, 77 Ind. 213; *Indianapolis v. Bieler*, 138 Ind. 30, 36 N. E. 857; *Shea v. Muncie*, 148 Ind. 14, 46 N. E. 138; *Bush v. Indianapolis*, 120 Ind. 476, 22 N. E. 422; *Wiley v. Owens*, 39 Ind. 429; *Siceet v. Wabash*, 41 Ind. 7; *Moore v. Indianapolis*, 120 Ind. 483, 22 N. E. 424; *Copeland v. Sheridan*, 152 Ind. 107, 51 N. E. 474; *Schuchow v. Chicago*, 68 Ill. 444; *Purdue v. Ellis*, 18 Ga. 586; *St. Paul v. Troyer*, 3 Minn. 291, Gil. 200; *Bronson v. Oberlin*, 41 Ohio St. 476, 52 Am. Dec. 90; *Wolf v. Lansing*, 53 Mich. 367, 19 N. W. 38; 17 Am. & Eng. Enc. Law, 2d ed. pp. 280, 282.

The statute giving the city of Evansville jurisdiction 4 miles from its corporate limits to license, tax, and regulate the sale of intoxicating liquors does not contravene or conflict with any right guaranteed appel-

lant by the Constitution of the United States or of the state of Indiana.

Lutz v. Crawfordsville, 109 Ind. 466, 10 N. E. 411; *Emerich v. Indianapolis*, 118 Ind. 279, 20 N. E. 795; *Indianapolis v. Bieler*, 138 Ind. 30, 36 N. E. 857; *Falmouth v. Watson*, 5 Bush, 660; *Flack v. Fry*, 32 W. Va. 364, 9 S. E. 240.

Whether the legislature should or should not empower the city of Evansville to exact a license from liquor dealers within its limits, or within 4 miles thereof, involves the exercise of legislative discretion, and is not subject to review by the courts.

Hedderich v. State, 101 Ind. 564, 51 Am. Rep. 768, 1 N. E. 47; *Pittsburgh, C. & St. L. R. Co. v. Brown*, 67 Ind. 45, 33 Am. Rep. 73; *Welling v. Merrill*, 52 Ind. 350; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Barton v. McWhinney*, 85 Ind. 481; *Doe ex dem. Chandler v. Douglass*, 8 Blackf. 10; *Maize v. State*, 4 Ind. 342; *Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185; *Fry v. State*, 63 Ind. 552, 30 Am. Rep. 238; *McComas v. Krug*, 81 Ind. 327, 42 Am. Rep. 135; *Campbell v. Dwiggins*, 83 Ind. 473; *Mount v. State*, 90 Ind. 29, 46 Am. Rep. 192; *Eastman v. State*, 109 Ind. 278, 58 Am. Rep. 400, 10 N. E. 97; *Cooley, Const. Lim.* 120; *Danville v. Hatcher*, 101 Va. 523, 44 S. E. 723; *Beach, Pub. Corp.* § 512g; *Hoboken v. Goodman*, 68 N. J. L. 217, 51 Atl. 1092; *Metropolitan Bd. of Excise v. Barrie*, 34 N. Y. 657; *Valverde v. Shattuck*, 19 Colo. 104, 41 Am. St. Rep. 28, 34 Pac. 947.

Monks, J., delivered the opinion of the court:

This action was commenced in the police court of the city of Evansville against appellant to recover a penalty for the violation of an ordinance of the city requiring a license to retail intoxicating liquors within 4 miles of the corporate limits. A trial of said cause resulted in a finding and judgment in favor of appellee. From this judgment appellant appealed to the court below, where he was again convicted.

The statute authorizing appellee to pass the ordinance under which appellant was convicted reads as follows: "3927. General Power of Council. The common council shall have power to enact ordinances for the following purposes: . . . To license, tax, and regulate the selling or giving away of any spirituous, vinous, or malt liquors, and to tax, license, and regulate places . . . where such liquors, or either of them, are to be used on the premises when given away, sold, stored, or manufactured; but such license shall not exceed the amount provided for by the laws of this state for other interests thereof. For the purposes 47 L. R. A.

of this section, jurisdiction is given such city for 4 miles from its corporate limits." Section 3927, Burns's Anno. Stat. 1901. Appellant insists that said section is in conflict with the 14th Amendment to the Constitution of the United States, and with §§ 21 and 23 of article 1 of the Constitution of this state. These are the only questions presented by this appeal. The validity of such a statute is not an open question in this state. In *Lutz v. Crawfordsville*, 109 Ind. 466, 10 N. E. 411, the appellant was convicted on a charge of violating an ordinance requiring a license to retail intoxicating liquors within 2 miles of the limits of the city of Crawfordsville, and it was held that the legislature had the power to designate the limits over which the jurisdiction of the municipal corporations shall extend, and that its judgment upon the question is conclusive on the courts. The court said (pp. 470, 471, 109 Ind., pp. 413, 414, 10 N. E.): "The legislature has power to determine what the territorial jurisdiction of the political subdivisions of the state shall be. Judge Dillon says: 'With the exception of certain constitutional limitations presently to be noticed, the power of the legislature over such corporations is supreme and transcendent. It may erect, change, divide, and even abolish them at pleasure, as it deems the public good to require.' 1 Dill. Mun. Corp. 3d ed. § 54. It is certainly within the power of the legislature to declare that no unlicensed dramshop shall be kept within a designated number of feet of the corporate limits; otherwise all that need be done to evade the law would be to keep a foot or two beyond the corporate boundaries. If the legislature has any power at all to designate limits over which the jurisdiction of a municipal corporation shall extend, then, necessarily, the subject must be within its discretion, and, if this be so, its judgment upon the question must be conclusive." "Limitations upon the legislative power are to be sought for in the Constitution, and, if not found there, they do not exist. *Eastman v. State*, 109 Ind. 278, 58 Am. Rep. 400, 10 N. E. 97; *Robinson v. Schenck*, 102 Ind. 307, 1 N. E. 698; *Hedderich v. State*, 101 Ind. 564, 51 Am. Rep. 768, 1 N. E. 47. There is nothing in the Constitution prohibiting the legislature from fixing the jurisdiction of municipal corporations, and the judiciary cannot supplant the judgment of the legislature with its own. . . . The power to exact a license is a police power vested in the sovereign, and may be delegated to instrumentalities of government, such as municipal corporations are. The purpose of exacting license is to limit and regulate the business, for, if licenses were not required, all persons

might, under the rules of the common law, freely engage in the business; but by imposing a restriction in the form of a license the traffic is regulated and limited. The principle upon which the power rests is a very ancient one, and is the same as that which for hundreds of years has sustained the right to restrict the business of hawking and peddling by exacting licenses." In *Emerich v. Indianapolis*, 118 Ind. 279, 20 N. E. 795, the same question was involved, and the court said (p. 280, 118 Ind., p. 795, 20 N. E.): "The legislature has the power, as was demonstrated in *Lutz v. Crawfordsville*, 109 Ind. 466, 10 N. E. 411, to determine over what territory the jurisdiction of a municipal corporation shall extend. . . . The law in exacting a license fee does not grant a privilege that did not before exist, but, on the contrary, lays a special tax upon a pursuit which, but for the statute, might be followed without paying any special tax. There is therefore no just reason for affirming that a person who can secure no benefit from the municipal government should be exempt from the special tax imposed upon those who engage in the business of selling liquor." See also *Robb v. Indianapolis*, 38 Ind. 49. It has been held in other states that the legislatures thereof have the power to delegate to municipal corporations the right to exercise police power beyond and within a prescribed distance of the municipal limits. 20 Am. & Eng. Enc. Law, 2d ed. p. 1148; *Falmouth v. Watson*, 5 Bush, 660; *Flack v. Fry*, 32 W. Va. 364, 9 S. E. 240; *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Chicago Packing & Provision Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545; *State ex rel. Humphrey v. Franklin*, 40 Kan. 410, 19 Pac. 801. The power to regulate the liquor traffic is found in the police power of the state, and it should be remembered, in considering all statutes on that subject, that no one possesses an inalienable or constitutional right to keep a saloon for the sale of intoxicating liquors. "To sell intoxicating liquors at retail is not a natural right to pursue an ordinary calling." Black, *Intoxicating Liquors*, § 48; *Bloomershire v. Ulne*, 159 Ind. 500, 503, 65 N. E. 513; *State v. Gerhardt*, 145 Ind. 439, 462, 33 L. R. A. 313, 44 N. E. 469; *Sherlock v. Stuart*, 96 Mich. 193, 21 L. R. A. 580, 55 N. W. 845; Cooley, Const. Lim. 7th ed. pp. 845-851. Neither is the right to sell intoxicating liquors one of the privileges and immunities of citizens of the United States which the 14th Amendment of the Constitution of the United States forbids the states to abridge. *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Crowley v. Christensen*, 137 U. S. 86, 67 L. R. A.

34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Farmville v. Walker*, 101 Va. 323, 61 L. R. A. 125, 43 S. E. 558, 99 Am. St. Rep. 870; *Danville v. Hatcher*, 101 Va. 523, 526-531, 44 S. E. 723, and cases cited; Cooley, Const. Lim. 7th ed. pp. 845-851. In the case of *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721, involving the constitutionality of the laws regulating the sale of liquors in Texas, Mr. Chief Justice Fuller (p. 661, 148 U. S., p. 601, 37 L. ed., p. 723, 13 Sup. Ct. Rep.) said: "But it is contended that the act conflicts with the provisions of the 14th Amendment that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States, and the right to sell intoxicating liquors is not one of the rights growing out of such citizenship. *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929. The amendment [14] does not take from the states those powers of police that were reserved at the time the original Constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; but it was not designed to interfere with the power of the state to protect the lives, liberty, and property of its citizens, and to promote their health, morals, education, and good order." In *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13, the Supreme Court of the United States, by Mr. Justice Field (p. 91, 137 U. S., p. 623, 34 L. ed., p. 15, 11 Sup. Ct. Rep.) said: "The sale of such liquors in this way has heretofore been at all times, by the courts of every state, considered as the proper subject of legislative regulation. . . . It is a question of public expediency and public morality, and not of Federal law. The police power of the state is fully competent to regulate the business, —to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States. . . . The manner and extent of regulation rest in the discretion of the governing authority. . . . It is a matter of legislative will only. As in many other

cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the state, nor is it one which can be brought under the cognizance of the courts of the United States." In *Danville v. Hatcher*, 101 Va. 523, 526-531, 44 S. E. 723, the court (p. 527, 101 Va., p. 724, 44 S. E.) said: "It is there said: 'That the regulation of the sale of intoxicating liquors is within the police power of the state is established, if not literally, by all the cases where the subject has been considered; certainly by an overwhelming array of authority.' It has been repeatedly decided that the subject is wholly within the power of the legislature, and that the traffic is not one of the privileges or immunities of citizenship guaranteed and protected by the United States Constitution or the 14th Amendment thereto. It may be entirely prohibited; and its regulation, when per-

mitted, is absolutely within the discretion of the several states. These principles are sustained by the Supreme Court of the United States in a long line of decisions, rendered both before and after the adoption of the 14th Amendment. *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Hucless v. Childrey*, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721." It is evident that the statute involved in this case is not in conflict with either the state or Federal Constitution.

The judgment of the court below is therefore affirmed.

INDIAN TERRITORY COURT OF APPEALS.

L. H. LOVE, *Appt.*
v.

ARDMORE STOCK EXCHANGE *et al.*

(.....Ind. Terr.....)

A check on an open bank account does not constitute an assignment of the fund, or take precedence of a subsequent attachment levied on the fund before the check is presented for payment or brought to the notice of the bank. If such presentment is not made, or notice given, within a reasonable time.

(October 19, 1904.)

A PPEAL by plaintiff from a judgment of the District Court for the Southern District in favor of interpleader in an attachment proceeding to reach the deposit account of the defendant Stock Exchange in the First National Bank of Ardmore. *Reversed.*

Statement by **Gill, J.:**

January 23, 1899, appellant, L. H. Love, began his action for debt, and filed in the office of the United States commissioner,

NOTE.—For a check as assignment of deposit, see also, in this series, *Fonner v. Smith*, 11 L. R. A. 528, and *note*; *First Nat. Bank v. Clark*, 17 L. R. A. 580; *Bernard v. Whitney Nat. Bank*, 12 L. R. A. 302; *Bank of Antigo v. Union Trust Co.* 23 L. R. A. 611; *Akin v. Jones*, 25 L. R. A. 523; *Niblack v. Park Nat. Bank*, 39 L. R. A. 159; and *Raesser v. National Exch. Bank*, 56 L. R. A. 174.

southern district. at Ardmore, complaint and affidavit for attachment against the Ardmore Stock Exchange, without alleging whether defendant was a corporation or a partnership. Attachment bond, in due form on same day, was also filed and approved. February 2, 1899, the commissioner allowed plaintiff, by interlineation, to amend the affidavit showing that defendant is composed of W. D. Peak and John S. O'Mealy. Judgment before the commissioner was obtained February 8, 1899, in favor of plaintiff, Love, against defendants Peak and O'Mealy, composing the Ardmore Stock Exchange, for \$300, besides interest upon the demand, sustaining the attachment, and fixing the liability of the First National Bank of Ardmore, Indian Territory, as garnishee, at \$346.46, and directing the garnishee to pay amount of judgment and costs against defendants into court, and judgment that W. P. Poland recover nothing by reason of his interplea. From this judgment, Poland appealed to the United States court, southern district, at Ardmore, where and before whom on the 16th day of February, 1901, a trial *de novo* was had, resulting in a judgment in favor of L. H. Love, appellant, against Ardmore Stock Exchange and W. D. Peak for \$300, principal, and interest from January 23, 1899, at the rate of 6 per cent per annum, and all costs except the cost of prosecuting and defending the interplea of W. P. Poland, which was adjudged against plaintiff; and judgment in

favor of Poland, interpleader, that he is entitled to the money in hands of the garnishee to credit of John S. O'Mealy, manager, and directing the garnishee to pay the money to the interpleader, to which judgment appellant duly excepted. The court below found his conclusions of fact separately from his conclusions of law, and, as there is no controversy as to the evidence, the conclusions of fact only need be considered. They are, in substance, as follows:

"(1) That on January 23, 1899, plaintiff filed suit in commissioner's court against the Ardmore Stock Exchange for \$300, due upon open account, and at same time filed proper affidavits and bond, and caused order of attachment to issue against defendant, and writ of garnishment to issue, which was served upon the garnishee January 23, 1899; that the affidavit for attachment and garnishment, as originally filed, did not disclose the individual names of the Ardmore Stock Exchange, but on February 2, 1899, said affidavits were amended in the court below, alleging defendant is composed of W. D. Peak and John S. O'Mealy; and that, on the day the judgment was rendered in the United States court, plaintiff dismissed the cause as to John S. O'Mealy, and amended the affidavits so as to show W. D. Peak alone composed the Ardmore Stock Exchange.

"(2) I find from the evidence that at and prior to the filing of this suit the said W. D. Peak resided in Ft. Worth, Texas, and owned and run a business in Ardmore, known as the Ardmore Stock Exchange, with John S. O'Mealy as manager; that all dealings had with plaintiff were in the name of Ardmore Stock Exchange, with John S. O'Mealy as manager; and that plaintiff had no notice that Peak run said business in any other name.

"(3) That defendant was indebted to the plaintiff upon open account on January 23, 1899, in the sum of \$300, exclusive of interest, and is entitled to judgment against defendant Ardmore Stock Exchange and W. D. Peak in the sum of \$300, with interest thereon from January 23, 1899, at the rate of 6 per cent per annum, and that the attachment herein as against defendant must be sustained on the ground that W. D. Peak is a nonresident of the Indian territory.

"(4) I find that the money deposited in the bank in the name of John S. O'Mealy, manager, was deposited by W. D. Peak, by O'Mealy as manager, and that O'Mealy made all deposits for Peak in said bank in his (O'Mealy's) name, as manager.

"(5) I find that the check which John S. O'Mealy, manager, gave to interpleader on the said bank, coupled with the agreement between the said O'Mealy and interpleader 47 L. R. A.

that the money in bank, and to be deposited therein, was for the benefit of the interpleader, together with all the circumstances attending the creation and delivery of said check, constituted an equitable assignment of the fund in bank as between the interpleader and O'Mealy and defendant, and as against the claim of L. H. Love as plaintiff in garnishment."

The check drawn by O'Mealy, as manager, upon the bank in favor of Poland, is as follows:

No. 5.

Ardmore, I. T., Jany. 9, 1899.

First National Bank,
Ardmore, I. T.

Pay to W. P. Poland or order Three hundred sixty-four 41/100 Dollars, \$364.41.

J. S. O'Mealy, Mgr.

[2-cent revenue stamp canceled.]

1-11-19.

J. S. O'M.

Indorsed. "W. P. Poland," and in lead pencil, "1-25-1899."

The court pronounced judgment upon its findings of fact as follows: "It is therefore considered, adjudged, and decreed by the court that the plaintiff, L. H. Love, do have and recover of the defendant Ardmore Stock Exchange and W. D. Peak the sum of \$300, principal, with interest thereon from January 23, 1899, at the rate of 6 per cent per annum, together with all costs herein expended or incurred, except the cost of prosecuting and defending the interplea herein, for which plaintiff may have his execution, and that the attachment herein, as against said Ardmore Stock Exchange and W. D. Peak, be, and the same is hereby, sustained, but that the attachment as to John S. O'Mealy be, and the same is hereby, dissolved. It is further considered, adjudged, and decreed by the court that the interpleader, W. P. Poland, is entitled to the money on deposit in the First National Bank of Ardmore, Indian territory (garnishee), to the credit of J. S. O'Mealy, manager, and said bank is directed to pay said money to said interpleader, and that the plaintiff, L. H. Love, recover nothing of the garnishee and interpleader by reason of this action, and that said garnishee and interpleader recover of the plaintiff all costs by them in their behalf expended or incurred, for which they may have their execution, to which judgment of the court the plaintiff, at the time of the rendition thereof, in open court, duly excepted, and still excepts."

Plaintiff filed his motion for a new trial, which was overruled by the court, exception duly taken, and the cause stands before this court upon appeal. The motion for new trial is as follows (caption omitted):

"Now comes the plaintiff, and moves the court to set aside, vacate, and hold for naught the judgment rendered herein, and grant him a new trial and as ground therefor he alleges: (1) The judgment of the court is contrary to law. (2) The judgment of the court is not supported by sufficient evidence, and is contrary to the evidence. (3) The court erred in holding that the giving of the check by John S. O'Mealy, manager, upon the First National Bank, in favor of W. P. Poland, the interpleader, with a secret agreement between O'Mealy and Poland that the money in, or to be deposited in, said bank to the credit of John S. O'Mealy, manager, without notice to plaintiff or the garnishee of such secret agreement, constituted an equitable assignment of said funds, binding in law upon plaintiff and garnishee."

Messrs. C. L. Herbert and H. M. Cannon for appellant.

Messrs. Potter & Potter, for appellees:

The giving of the check and the agreement of the parties at the time constituted an assignment.

Fourth Street Nat. Bank v. Yardley, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439.

The plaintiff in a writ of garnishment can only acquire such rights in the funds as his debtor had at the time of the service of the writ.

14 Am. & Eng. Enc. Law, 2d ed. p. 857.

It is not necessary to the validity of the assignment of a chose in action, as between the assignor and assignee, that notice of the assignment should be given to the person from whom the debt is owing.

14 Am. & Eng. Enc. Law, 2d ed. p. 861; *Drake, Attachm.* 7th ed. § 527; *Rood, Garnishment*, § 66; *Cross v. Haldeman*, 15 Ark. 200; *Bergman v. Sells*, 39 Ark. 97.

Gill, J., delivered the opinion of the court:

Appellant makes the third and last assignment of error in his motion for new trial as his specification of error relied on in this court. The case was tried in the court below without the intervention of a jury, and the court made its certain specified findings of fact from the testimony, and, among them, it found that the check which John S. O'Mealy gave to the interpleader on the garnishee bank was coupled with an agreement between said O'Mealy and the interpleader that the money in bank, and to be deposited therein, was for the benefit of the interpleader, and that, taken with all the circumstances attending the creation and delivery of said check, this constituted an equitable assignment of the

fund in bank as between the interpleader and O'Mealy and defendant, and as against the claim of L. H. Love as plaintiff in the garnishment. In the case at bar the intervener, Poland, had had transactions with the Ardmore Stock Exchange, composed, as the evidence showed, of one W. D. Peak, who resided in Ft. Worth, Texas, and that one J. S. O'Mealy managed the business of said firm at Ardmore in his own name as manager; that the intervener and sundry persons were dealing through said stock exchange in buying and selling futures of cotton and other products; that said W. D. Peak was indebted to plaintiff on account in the sum of \$300; that said Peak was a nonresident of the Indian territory; that, being so indebted to the plaintiff, he had said transactions with the intervener, and, in settlement of a certain transaction between Peak and intervener, Peak deposited to his general bank account, in the ordinary way of closing such transactions, certain moneys in bank, and, through his manager, had advised the intervener that he had so deposited such money, and gave to the intervener, through his said manager, a check to the amount of \$364.40 on the 9th day of January, 1899; that the intervener, instead of presenting said check for payment, and without notifying the bank, held it for two weeks before presenting it for payment, presenting it first on the 25th day of January, 1899, and two days after the attachment had been run and the bank garnished: that the amount in said bank to the credit of Peak stood in the name of O'Mealy as manager, and did not equal the sum named in the check given at the time of its presentment, but that intervener offered to accept same in full payment of the check.

We have examined with care the opinion in *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439. In the *Yardley Case* the Fourth Street National Bank advanced \$25,000 to the Keystone National Bank to enable it to meet its debtor balance in a Philadelphia clearing house. The president of the latter bank represented to the officials of the Fourth Street Bank that his bank owed a balance at the clearing house, which it could not meet, because its funds were in the city of New York, and exhibited a memorandum showing a balance to the credit of the Keystone National Bank in the Tradesman's National Bank of New York, of about \$27,000, stating that his bank wished to draw against it and get clearing house certificates, and asked the Fourth Street Bank to accept the draft of the Keystone Bank for \$25,000 against this reserve account in the New York bank. Relying upon these representations and statements, supported by the

memorandum that the Keystone Bank had in the New York bank the specified fund against which it proposed to draw, the Fourth Street Bank gave to the president of the Keystone Bank, for its present use, clearing house gold certificates to the amount of \$25,000, and took its draft. The books of the Keystone Bank show that on March 19, 1891, it had to its credit in the Tradesman's Bank of New York the sum of \$26,907.32, and on that day an entry was made in said books charging against that credit the said draft of \$25,000 it had given to the Fourth Street National Bank. This draft for \$25,000 was forwarded to New York for collection, and presented for payment to the Tradesman's National Bank on the morning of March 20, 1891. Payment thereof was refused upon the ground that the drawee had not in hand funds of the drawer sufficient to pay the same. In fact, the Tradesman's Bank had in cash the collection items for the Keystone Bank the sum of \$26,907.32. On March 20, 1891, by order of the Comptroller of Currency of the United States, the Keystone National Bank was closed, and thereafter Robert M. Yardley was appointed receiver thereof. After this the money in the Tradesman's National Bank of New York to the credit of the Keystone National Bank was paid over to Robert M. Yardley, who received out of the cash and collection items the sum of \$25,825.62. The case at bar is altogether different from the *Yardley Case*, in this: That the transaction between the Ardmore Stock Exchange and W. P. Poland, the interpleader, at the time the check was given, and for which it was given, was wholly past, and the check was not given for an inducing, present consideration passing between the parties. Interpleader took the check, and held it for many days without presentation, and without notifying the bank on whom the check was drawn, in any way, that he had such check. No sufficient amount of funds to meet the check was on deposit in the bank at the time the check was given. Interpleader accepted such check, relying upon representations of its maker that he would have funds on hand in bank sufficient to meet it when the same should be presented. The check was given against the general account of its maker, which account was at sundry times after giving said check, and before its presentation to the bank, checked against by its maker; and the fund in the hands of the bank had been attached, and the bank garnished, prior to its presentation. In the *Yardley Case* the assignee of the drawing bank sought to claim the fund checked upon as general assets of the drawing bank, and the Supreme Court held that the funds on deposit by the checking bank

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belonged to the payee bank by virtue of an equitable assignment.

It may be well, in this connection, to examine the circumstances of the giving of the check.

John O'Mealy testified in the case as follows:

Q. Do you recollect of giving a check to W. P. Poland on the 9th day of January, 1890, for about \$364?

A. I do.

Q. For what was that check given?

A. For the balance due him at the time from W. D. Peak & Company.

Q. At the time the check was given, did W. D. Peak & Company have the money in the bank to pay the check?

A. Yes, sir.

Q. How long had it been there?

A. About an hour.

Q. Had you placed the money in the bank about an hour before the check was given, or had you merely given a call for the money to the bank on the Ft. Worth Bank, or Peak's bank?

A. I made a call on W. D. Peak & Company. They had the money wired to this bank at Ardmore—the First National Bank—by the First National Bank of Ft. Worth.

Q. Did you call for all the money necessary to pay the Poland check, or did W. D. Peak & Company have any part of it with the bank at the time?

A. A hundred dollars of this amount was deposited that day as margin on a trade. The balance of \$265 was wired to the bank here at my request.

Q. For what purpose did you have that money sent to the bank at Ardmore?

A. For the purpose of paying W. P. Poland the amount due him.

Q. Did you intend, when that money was placed in the bank at Ardmore, to use it, or to draw against it for another purpose than the payment of the Poland check?

A. I did not.

Q. Did W. D. Peak & Company know, when they sent the money from Ft. Worth, for what purpose it was to be used?

A. I stated to them, in my call for the money, that it was to be paid to the party who had closed out his trade the day before, which is, I believe, the day that Poland closed out the trade.

Q. Did you inform them of what customer had closed out his deal, or just a customer had closed out his deal?

A. Mr. Poland's name was not mentioned to W. D. Peak & Company. I referred only to the trade which had just been closed out.

Q. Did W. D. Peak & Company afterwards use the money which you say that was placed in the bank to pay the Poland

check for any purpose, or did it remain there until the failure of W. D. Peak & Company?

A. It was not used by W. D. Peak & Company for any purpose.

Q. Can you explain how it is that your check to Poland was for \$365 and the amount of money remaining in the bank to meet the check was less than the amount of the check?

A. The account was overdrawn before the money to pay this check was deposited.

Cross-examination:

Q. You issued this check to W. P. Poland?

A. I did.

Q. You have said that this deposit in the bank which is now in controversy was placed there for the special purpose of paying this check which was held by Mr. Poland?

A. I did.

Q. Wasn't \$100 of that amount the identical money paid to you on the 9th day of January, 1899, by T. A. Thurmond?

A. It was.

Q. What was that \$100 paid you by Mr. Thurmond for?

A. As margin on a trade executed for him that day.

Q. What was the consideration for the check given you as manager to W. P. Poland?

A. For balance due Mr. Poland from W. D. Peak & Company.

Q. What was that balance for?

A. It was margin which he had deposited to W. D. Peak & Company and the profits accruing from a trade made through them.

Q. Mr. Poland, you are the interpleader in this case, are you?

A. Yes, sir.

Q. Did you have any business transactions with W. D. Peak & Company during the fall and winter of 1898 and 1899?

A. Yes, sir.

Q. Do you recollect at what time you closed out with that concern?

A. I think it was on the 10th day of January.

Q. 1899?

A. Yes, sir.

Q. At the time you closed out with them, what amount did they owe you, if anything?

A. They owed me \$364.41.

Q. Well, now, did you get a check on that day or the next day?

A. I got it on the 11th day,—banking day. All the banks here, I understand,

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closed on the 11th. That is the way I understand the stamp was canceled the 11th and my deal closed on the 10th. I closed it just prior to 12 o'clock, and this check was given in the afternoon, so I suppose he canceled it on the banking day, as I understand they close their banking hours at 12 o'clock here.

Q. Well, what is the reason he didn't give you the check at the time you closed out your business,—that he gave you that statement?

A. He told me he didn't have any money here, and that Peak & Company kept no money here, and that when the deal was closed out they had the bank here wire the bank, or rather wire Peak, to forward the money here, and I told him that was all right, and he told me he would give it to me in the afternoon. I was sick at the time, and went to my dinner, and remained there all that afternoon until about 5 o'clock, and I came up to the office, and there I found O'Mealy, and he said, "I have got your money for you; it has been sent to the bank." And so I left on that afternoon train,—I think it left here then about 6 o'clock,—and I went down to Texas, where my family was, and was sick as I told you, and I was in bed down there for a week or ten days, and I wasn't thinking about the check, and I put the check in my pocket and kept it.

Q. What day did you ever present it, if you did present it, to the First National Bank of Ardmore for payment?

A. On the 25th day of January, 1899.

Q. Why wasn't it paid?

A. Because Mr. Love had garnished the money as the Ardmore Stock Exchange, and they couldn't pay it.

Q. Was there then in the bank a sufficient amount to pay your check?

A. No, sir; not quite. Three hundred and forty-seven dollars in there, I think.

Q. Did you offer to surrender the check for that amount of money?

A. I did.

Q. When you got back to Ardmore, had the stock exchange, or had W. D. Peak & Company failed?

A. Yes, sir; they had failed. I suppose they had failed.

Q. Was this check given on the day before or the day it was written?

A. This check was given the day after it was written. I mean by that, he must have been mistaken.

Q. He must have antedated the check?

A. He must have done it.

Q. I want to read the check. (Reading check heretofore referred to as exhibit A.)

You didn't present that check to the First National Bank until after you had held it several weeks, did you?

A. No, it wasn't two weeks.

Q. Two weeks.

A. It wasn't two weeks. I got it on the 11th or 10th day, and I presented it on the 25th. Well, just two weeks; yes.

Q. How long after this attachment suit with Mr. Love, before you presented the check for payment?

A. I think it was the next day or two days afterwards, I am not sure. I came right up here when I found that Peak had failed. I think I got here the next day.

Q. Did you ever notify the bank or any of its officials that you held this check, until after Peak & Brother failed?

A. Yes, sir; I wired them from Marshall, where I was, that I held the check.

Q. What day did you wire them?

A. I don't recollect, but it must have been on the 23d, but it may have been on the 22d. Whatever day they failed on, then is when I notified them.

Q. That was after you were apprised of the failure?

A. Yes, sir.

Q. That was after this attachment and garnishment was rendered?

A. I couldn't say.

Q. The garnishment and attachment was rendered on the 23d of January, 1899. Can you state to the court that you advised them that you held this check on that bank before this garnishee was served upon the bank?

A. That I held the check?

Q. Can you state that you advised the bank that you held a check upon the bank prior to the service of the writ of garnishment upon the bank?

A. Yes, sir; I held the check before then.

Q. That isn't the question; but did you advise the bank that you held it prior to the time that this garnishment was rendered?

A. I couldn't say. I don't know whether I did or not.

Q. Don't you know as a fact that you didn't, Mr. Poland?

A. I got an answer from the bank. I didn't know when I advised them, though, but they wired me back that Mr. Love had garnished the money,—the Ardmore Stock Exchange.

Q. In reply to your telegrams?

A. Yes, sir.

The bank's statement of the account of John S. O'Mealy, manager, is as follows:
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Account Current.

J. S. O'Mealy, Mgr., with the First National Bank of Ardmore, I. T.

Report promptly on your monthly account, in order that errors, if any, may be rectified.

1899.		1899.
Jan. 9	Bal. overdraft \$ 21 22	Jan. 12 375 00
14	5	14 200
14	200	20 100
16	5	21 135
17	17 80	
21	134 10	
23	79 42	
27	Bal. (red ink) 347 46	
	\$10	\$10

This statement shows that on the 12th day of January, 1899, there was a credit to the depositor of the difference between \$375 and \$21.22, an overdraft existing on January 9, 1899. It shows that on the 14th day of January, 1899, there was a further deposit of \$200 and two checks paid to the amount of one of \$200 and the other of \$5; that on the 16th of January another check of \$5 was paid; that on the 17th day of January another check of \$17.80 was given and paid; that on the 20th of January a deposit of \$100 was made; that on the 21st of January a deposit of \$135 was made, and on that day two checks were given,—one for \$134.10, and the second for \$79.42; and that on the 27th day of January a balance was due the depositor of \$347.46, which had so remained from the 23d day of January. It would seem from the evidence that the check given to the interpleader by the Ardmore Stock Exchange, or by J. S. O'Mealy, manager of W. D. Peak & Company, was upon a general account on deposit in the First National Bank of Ardmore; that between the time of the giving of the check to the interpleader and the presentation of the check some fourteen days had elapsed, during which period the money on deposit in the bank had varied from day to day as the business demands of the concern represented by O'Mealy had made deposits and drawn checks thereon; and that on January 23d—the date of the garnishment of the bank by the plaintiff—the general balance in favor of the depositor was \$347.46. The funds in the bank garnished on January 23d were not the funds in bank on January 12th at all. If there was an equitable assignment of the balance in bank on January 12th, the funds in bank January 23d were not the funds assigned at all, because on January 12th the balance in favor of the depositor was only \$343.78, and this was all that could possibly have been assigned. The depositor checked out of bank by January 23d the sum of \$410.32, being all of this fund

claimed to have been assigned, as well as other funds.

It is our opinion that the case at bar presents an altogether different question from the question so ably decided in *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439, or any of the cases cited in the opinion of said court. It is certainly true that at any time during the two weeks intervening between the delivery of the check to the intervener and its presentment that O'Mealy could have checked against this fund, and his check been honored; and in fact the testimony shows that he did check against his account in said bank during this time. It is a general rule of law that a check is not intended for acceptance, but for prompt presentment and payment; and it is the further rule that the check must be presented within a reasonable time after receiving it. Benjamin's Chalmers's Dig. arts. 256, 257. In the *Yardley Case* the payee bank forwarded the check made immediately upon its receipt for payment. In the case at bar the intervener, by his own statement, allowed fourteen days to elapse before presenting his check for payment, and only presented said check for payment upon learning of the impending failure of the maker thereof, and after an attachment had been run against the general funds of the maker on deposit in the bank. Mr. Justice White, in his opinion in the *Yardley Case*, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439, says: "As between a check holder and the bank upon which such check is drawn, it is settled that, unless the check be accepted by the bank, an action cannot be maintained by the holder against the bank;" citing *National Bank v. Millard*, 10 Wall. 152, 19 L. ed. 897; *First Nat. Bank v. Whitman*, 94 U. S. 347, 24 L. ed. 232. And he further says: "It is also settled that a check drawn in the ordinary form does not, as between the maker and payee, constitute an equitable assignment *pro tanto* of an indebtedness owing by the bank upon which the check has been drawn, and that the mere giving and receipt of the check does not entitle the holder to priority over general creditors in a fund received from such bank by an assignee under a general assignment made by the debtor for the benefit of his creditors;" citing *Florence Min. Co. v. Brown*, 124 U. S. 385, 31 L. ed. 424, 8 Sup. Ct. Rep. 531, and *Laclede Bank v. Schuler*, 120 U. S. 511, 30 L. ed. 704, 7 Sup. Ct. Rep. 644. And he further says that, "whilst an equitable assignment or lien will not arise against a deposit account solely by reason of a check drawn against the same, yet the authorities establish that if, in the transaction connected with the delivery of the check, it was the

understanding and agreement of the parties that an advance about to be made should be a charge on and be satisfied out of a specified sum, a court of equity will lend its aid to carry such agreement into effect as against the drawer of the check, mere volunteers, and parties charged with notice." By the expression "mere volunteers," used by the court, can only be meant one who has received something from the debtor without consideration therefor. It cannot certainly be successfully contended that an attaching creditor undertaking to secure a valid subsisting indebtedness is a volunteer in the sense used by the learned judge.

An examination of the authorities shows that there is considerable conflict in the decisions, even where no attaching creditor has intervened, as to whether a check drawn in the ordinary form would constitute an equitable assignment or not; and, except in one case,—that of the *National Bank v. Indiana Bkg. Co.* 114 Ill. 483, 2 N. E. 401,—which has been called to the attention of the court, where an attaching creditor has intervened, is it held that a prior unaccepted check acts as an equitable assignment upon a general account of a depositor in bank. The general rule is, and the consensus of authorities holds, that checks drawn in the ordinary form, not describing any particular fund, or using any words of transfer of the whole or any part of the account standing to the credit of the drawer, but containing only the request directed to the bank to pay to the order of a payee a certain sum of money, are not, in the absence of acceptance, an assignment of the funds of the drawer. *National Bank v. Millard*, 10 Wall. 152, 19 L. ed. 897; *Florence Min. Co. v. Brown*, 124 U. S. 385, 31 L. ed. 424, 8 Sup. Ct. Rep. 531, and a long line of cases cited in the American Digest, Century ed. vol. 4, cols. 1247, 1248. The Federal courts hold that a check operates as an equitable assignment *pro tanto* as between the holder and the assignee in insolvency of the drawer, where it is made and delivered prior to the assignment, and not presented for payment until after the drawee is notified of the assignment by the assignee. *German Sav. Inst. v. Adee*, 1 McCrary, 501, 8 Fed. 106. But where some particular creditor attached funds in the general bank account of such maker the consensus of authorities seems to hold that the attachment lien takes priority over a check given against such general fund. In Pennsylvania it is held: On an attachment against B, A issued execution against C Bank, as garnishee of a fund on deposit belonging to B. Previously to this B had given to D a check upon the bank, of which the bank had no notice at the time the attachment was served on it, and which

was not presented until after the attachment. The court held that the check did not operate as an assignment of the fund in the hands of the bank, and that D, the payee, had no claim or lien upon said funds. *Kuhn v. Warren Sav. Bank*, 20 W. N. C. 230, 11 Atl. 440. And to like effect it was held in New York: Where the balance due a depositor in a bank is levied upon under an attachment against the depositor the bank is not authorized to deduct an outstanding check given by the depositor to a third person, and which had not, prior to the levy of the attachment, been presented and accepted, since without such acceptance the check did not operate as an equitable assignment of the fund against which it was drawn. *Duncan v. Berlin*, 60 N. Y. 151. In Massachusetts it is held: A bank check for more than the amount of the drawer's deposit does not operate as an assignment of the actual balance until the bank has agreed to pay the check *pro tanto*. *Dana v. Third Nat. Bank*, 13 Allen, 445, 90 Am. Dec. 216. And to like effect is *Bullard v. Randall*, 1 Gray, 605, 61 Am. Dec. 433.

Upon the whole, a careful examination of the various decisions of the different courts upon this question of what constitutes an equitable assignment of the funds of a depositor in a bank, where the depositor has given a check on such fund, we are forced to the conclusion that before a check on such funds would become an equitable assignment thereof, in a case where attaching creditors have reached such funds, one of three things must appear: First, the check must, on its face, show the intention to ap-

propriate the fund on deposit; or, second, the depository bank must have had notice in some way of the drawing of such check; or, third, the check must have been made against a particular fund on deposit, and for the whole of such fund,—neither of which conditions appears in the evidence or in the findings of fact by the court in the case at bar. We are of the opinion that, where a party has a check in ordinary form on general funds in bank, it is his duty to present such check within a reasonable time, and if, before presentation of his check, a third party has attached or garnished the moneys in proper legal action, that the payee of the check must stand the consequences of his failure to get his claim in in time for payment. 2 Shinn, Attachment & Garnishment, § 582, and cases cited thereunder.

The judgment of the court was erroneous in adjudging that the intervener was entitled to the money on deposit in the garnishee bank, and in directing said bank to pay said money to the intervener, and that the plaintiff (appellant) recover nothing of the garnishee and interpleader, and awarding judgment for costs against appellant in the garnishment proceedings.

The judgment of the court below is reversed and remanded, with directions to proceed in a regular manner with the case in accordance with the views herein expressed.

Raymond, Ch. J., and Clayton, J., concur.

IOWA SUPREME COURT.

R. E. HODGE *et al.*, *Appts.*,
v.

MUSCATINE COUNTY *et al.*

(121 Iowa, 482.)

1. Provisions of a mulct tax law relating to the remission of the tax as well as the provisions for its enforcement are incorporated in a statute imposing a tax upon property devoted to a business different from that to which the law is primarily applicable, by a provision that the new tax shall be assessed and collected in the same manner as in the former law, although the sections relating to the remission are not specifically mentioned in the later statute.

2. No notice of the assessment or levy

need be given to the one engaged in the business in case of the imposition of a specific tax upon the business of selling cigarettes.

3. Opportunity for contesting in the ordinary courts of justice a charge imposed upon property where cigarettes are sold is sufficient to uphold the tax as against the owner of the property without notice to him of its assessment, although he may not be directly engaged in the business.

4. Taxes imposed as a deterrent against the transaction of a certain business need not be collected through judicial proceedings, but may be enforced by distraint or tax sale.

(October 22, 1903.)

NOTE.—As to necessity and sufficiency of notice of assessment, see, in this series, *Cleveland, C. C. & St. L. R. Co. v. Backus*, 18 L. R. A. 729; *Adams v. Tonella*, 22 L. R. A. 346; *McTwiggau v. Hunter*, 29 L. R. A. 526; *Myers* 67 L. R. A.

v. Baltimore County, 34 L. R. A. 309; *Buck v. Miller*, 37 L. R. A. 384; *Sandford v. Poe*, 60 L. R. A. 641; *Nathan v. Spokane County*, 65 L. R. A. 336.

A PPEAL by plaintiffs from a judgment of the District Court for Muscatine County in favor of defendants in a suit to enjoin the collection of a tax. *Affirmed.*

Statement by **Deemer, J.:**

Suit in equity to enjoin defendants from assessing, levying, or collecting a cigarette mulct tax, upon the property of plaintiff Tabor, which was used by plaintiff Hodge for the purpose of retailing tobacco and cigars, on the ground that the provisions of the "mulct law" authorizing such tax is unconstitutional and void as applied to the owner of property which has been leased to another. The trial court dismissed plaintiffs' petition, and they appeal.

Mr. Junius Parker, with Messrs. Dunshoe & Dorn, for appellants:

This term, "law of the land," does not mean merely an act of the general assembly.

Cooley, Const. Lim. p. 432; *Hoke v. Henderson*, 15 N. C. (4 Dev. L.) 15, 25 Am. Dec. 677.

The legislative branch of the government is subject to the "due process" provision of the Constitution, and must observe such due forms and processes as are a part of the law of the land applicable to that department of the government.

Gatch v. Des Moines, 63 Iowa, 718, 18 N. W. 310; *Ferry v. Campbell*, 110 Iowa, 290, 50 L. R. A. 92, 81 N. W. 604; *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372; *Davidson v. New Orleans*, 96 U. S. 107, 24 L. ed. 62.

The legislature is bound to use such safeguards as may have been used from time immemorial for the protection of the rights of the individual taxpayer.

Cooley, Taxn. p. 266; *Ferry v. Campbell*, 110 Iowa, 293, 50 L. R. A. 92, 81 N. W. 604; *Gatch v. Des Moines*, 63 Iowa, 718, 18 N. W. 310.

Two elements are necessary to the validity of a tax law,—notice and an opportunity for a hearing.

It is only by a strained construction of the law that the appellate proceedings provided by the liquor mulct law, defective as they are, can be held applicable at all to proceedings against cigarette dealers.

25 Am. & Eng. Enc. Law, p. 199.

Section 5007 of the Code is a police regulation.

Cooley, Taxn. p. 396.

The traffic in cigarettes, a misdemeanor but little short of a felony, cannot lawfully be suppressed by taxation.

Chauvin v. Valton, 8 Mont. 451, 3 L. R. A. 196, 20 Pac. 658; Cooley, Taxn. pp. 3 et 67 L. R. A.

seq.; *McBride v. State Revenue Agent*, 70 Miss. 716, 12 So. 699.

When a statute does not prescribe notice, the fact of actual notice will not cure the defect.

Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; *Com. v. Albro*, 1 Gray, 49, 61 Am. Dec. 381.

Deemer, J., delivered the opinion of the court:

As the case involves the constitutionality of certain statutes, it seems necessary, although they are familiar to the profession, to set some of them out *in extenso*. Section 5006 of the Code forbids in general terms the manufacture, sale, exchange, or disposition of cigarettes or cigarette paper. Section 5007 reads as follows:

"Tax on Sale. There shall be assessed a tax of \$300 per annum against every person, partnership, or corporation, and upon the real property, and the owner thereof, within or whereon any cigarettes, cigarette paper, or cigarette wrapper, or any paper made or prepared for use in making cigarettes, or for the purpose of being filled with tobacco for smoking, are sold or given away, or kept with intent to be sold, bartered, or given away under any pretext whatever. Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected, and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property, both personal and real, used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes, or cigarette paper, or selling, bartering, or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside the state."

The sections referred to in § 5007, relating to the "assessment, collection, and distribution" of the taxes provided for therein, are, in substance (before amendment by the 29th general assembly), as follows:

"Sec. 2433. In the months of December, March, June, and September of each year and before the 20th day of each of said months the assessor shall return to the auditor a list of persons liable to the tax and a description of the real property whereon the business has been carried on."

"Sec. 2436. On the 1st day of January, April, July, and October of each year there shall be due and payable from each person so returned to the county auditor a quarterly instalment of the mulct tax herein provided for, which shall be a lien upon the real property wherein such business is re-

turned as being carried on, whether the person carrying on such a business, or maintaining such place, is correctly described or not. If such instalment is not paid within one month after it becomes due and payable, a penalty of 20 per cent attaches together with 1 per cent per month thereafter until it is paid. The person so assessed is liable for at least one quarterly instalment whether he quits the business or not.

"Sec. 2437. On the last day of December, March, June, and September of each year the county auditor shall certify to the county treasurer a complete list of the names returned to him by the assessor, with a description of the real estate and the names of the occupant, and the owner or agent of such property.

"Sec. 2438. The county treasurer shall thereupon enter upon the book known as the mulct tax book a quarterly instalment of the mulct tax as due and payable by the person carrying on such business, as a lien and charge upon and against the real property wherein or whereon such business is carried on.

"Sec. 2439. After the expiration of one month from the date of when such tax becomes due, if not paid it shall be delinquent and collectable by the treasurer in the same method as that in which other delinquent taxes are collectable and all the provisions as to collection of other delinquent taxes shall apply. Tax sales for said delinquent taxes shall also be made on the first Monday in June of each year.

"Sec. 2440. At any time after a quarterly instalment of such taxes becomes delinquent, the treasurer may collect the same by seizing and selling any personal property used in connection with the business or in maintaining the place."

These are all the provisions of the mulct liquor law with reference to the assessment and collection of the liquor mulct tax. The following provisions of the liquor law with reference to the remission of taxes assessed erroneously are claimed to be applicable to the cigarette business, and in view of such claim we give an abstract of such provisions:

"Sec. 2441. At the meeting of the board of supervisors next following the listing as aforesaid, application may be made to the board to remit the tax by petition duly verified and filed with the county auditor at least eight days before the time set for the consideration of the case, and notice for the same length of time must be served on the county attorney in writing. The averments of the petition shall be deemed denied, and witnesses may be examined, oath being administered by the chairman of the board
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with the same effect as to penalties for testifying falsely as if administered in court.

"Sec. 2442. The owner of the property may be heard in support of his application and evidence of the general reputation of the place shall be admissible. If it be found by a majority vote of the board that the tax is proper it shall stand; otherwise it shall be remitted. Either the petitioner or the county attorney may appeal to the district court and, if the petitioner appeals, he shall be required to give bond for costs accrued and to accrue, whereupon the auditor shall file a transcript in the office of the clerk."

"Sec. 2444. On appeal the trial shall be conducted as an equitable cause."

Appellants contend that § 5007 is void, because it deprives, or may deprive, citizens of their property without due process of law, in that: (1) The law contains no provision for notice to either dealer or real-estate owner. (2) The charge imposed by § 5007 is in the nature of a criminal penalty, and the measures provided for its enforcement and collection are not adapted to the ends sought. (3) The attempt to enforce a criminal penalty through the taxing machinery of the state is revolutionary, and contrary to the established principles of justice. (4) The principles embodied in the law in question are arbitrary, unusual, and unknown to "the law of the land," as that term is used and intended in all constitutions. The petition also challenged the act because it was an attempt to regulate interstate commerce, and therefore void. This point is not insisted upon, for the reason, we suppose, that, under a substantially similar state of facts, it was held in *Cook v. Marshall County*, 119 Iowa, 384, 93 N. W. 372, that there was no merit in the contention. That case also holds the act in question was properly entitled, and that it is uniform in its operation. The objections now made to the enactment, as stated by counsel in the quotation made from their brief, nearly all revolve around the central thought that it amounts to taking of plaintiff's property without due process of law, and is contrary to the law of the land. Incidental to this is the claim that §§ 2441-2442 and 2444 do not apply to the case. This is bottomed on the notion that § 5007 does not refer to these sections either in express terms or by necessary implication. The reference to the mulct liquor tax law is as follows: "Such tax . . . shall be assessed, collected, and distributed in the same manner as the mulct liquor tax." Sections 2441 *et seq.* are found in this mulct liquor tax law, and it seems to us they refer to the assessment and collection of that tax. They are a part of the proceedings with reference to the assessment and col-

lection of the mulct tax, and are as much a part of the proceedings as if written out at length in § 5007, before quoted. A section which relates to the remission or revocation of the tax when embodied in the act authorizing its assessment, and evidently forming one of the inducements to the passage of the act, is as much a part of the law relating to the assessment and collection of the tax as that part expressly authorizing the levy and collection thereof. And in determining the constitutionality of a statute imposing a tax it would be unjust and unreasonable to divorce it from other provisions of the same law which gave to the person against whom the tax is to be assessed, and from whom the tax is to be collected, a remedy for avoiding that tax. The whole act relating to this subject and germane to the purposes and objects thereof should be considered in arriving at its constitutionality. These sections of the mulct liquor tax law relating to what may be called the remission of the tax really relate to its enforcement or assessment, and should be considered in determining the constitutionality of § 5007. With this conclusion in mind, we now go to the points made by counsel against the validity of the law.

It differs from the liquor mulct tax in that the payment thereof does not constitute a bar to prosecutions under § 5006, which absolutely prohibits the sale of cigarettes. In this it is peculiar, and this peculiarity constitutes the basis of the attack made upon it. The tax imposed by the mulct liquor law has been held to be a charge or license exacted for the privilege of carrying on the business of vending liquors. *Smith v. Skow*, 97 Iowa, 640, 66 N. W. 893. And in *Re Smith*, 104 Iowa, 199, 73 N. W. 605, it is held that, as the tax is assessed and levied by virtue of a general law upon all premises and persons which come within the provisions of the act, the persons liable to the same must appear and pay the same without notice. In the opinion it is said: "No notice to the lot owner of the assessment and levy was necessary. . . . There was no more necessity for notice to the property owner than in case of taxes generally." In *Ferry v. Deneen* (Iowa) 82 N. W. 424, it is said: "It is apparent, taking all the provisions of this act together, that the amount imposed, while called a 'tax,' is at the same time a penalty. We do not think all the rules governing ordinary taxes should control here. . . . The levy is made by law, . . . [and], as used in the act, means scarcely anything more than a formal approval." As to the vender of either cigarettes or liquors, no notice of the assessments or

levy of the tax is necessary. The tax is specific, and operates alike upon all who engage in the business. The amount is fixed, and there is nothing left to inquire into and determine. *Ferry v. Campbell*, 110 Iowa, 294, 50 L. R. A. 92, 81 N. W. 604; *Gatch v. Des Moines*, 63 Iowa, 718, 18 N. W. 310. But it is contended that the owner of property, who is not directly engaged in the unlawful business, is entitled to notice, and an opportunity to be heard, before a tax may be legally levied against his property; and that, as the law does not require such notice, it is invalid. In order to solve this question, it is necessary to investigate a little more closely into the nature of the tax imposed by § 5007. It is clearly not a license, for it does not grant permission to do an act which, without such permission, would be invalid. *State v. Hipp*, 38 Ohio St. 206; *Chilvers v. People*, 11 Mich. 43. It is manifestly a tax upon the traffic which the legislature saw fit to impose, not for the purpose of giving countenance to the business, but as a deterrent against engaging therein. It confers no right, but imposes an impediment to the transaction of the business. It is clearly a tax on that business, levied to meet the burdens imposed upon the general public by what is thought to be the result upon the human race, and particularly upon children, of the use of cigarettes. Indemnity and protection to the public against evils resulting from the nature and character of the business is the central thought. It also partakes of the nature of a police regulation, but it is not to be wholly so regarded. Indeed, we think it may be fairly said to be a tax upon the business. That a tax is imposed for the double purpose of regulation and revenue is no reason for declaiming it invalid. 2 *Desty*, Taxn. 1384. Being a tax, it was competent for the legislature to prescribe the proceedings and processes for its collection. From the beginning the people of this country have collected taxes through administrative officers, and there has been no suggestion that ordinary judicial processes were necessary to meet the constitutional guaranty of "due process of law." *Cooley*, Taxn. 49. Power of taxation is inherent in sovereignty, and this power, it has been said, "in its nature acknowledges no boundary." As said by the great chief justice in *McCulloch v. Maryland*, 4 Wheat. 428, 4 L. ed. 607: "The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." The term "due process of law" is often misapprehended or mis-

applied. Indeed, it seems impossible to give a definition which is at once perspicuous and satisfactory. When applied to taxation, regard must be had of the nature of the power. As said in *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663: "The power of taxation possessed by the state may be exercised upon any subject within its jurisdiction, and to any extent not prohibited by the Constitution of the United States. . . . 'It may touch property in every shape, . . . and the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, . . . unless restrained by provisions of the Federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.'" Following this principle, it has been held that a statute of the state of Michigan, authorizing the treasurer to levy by distress, and sell any goods or chattels found in the possession of the tax debtor, and that no claim of property made thereto by any other person should be available to prevent the sale, was valid. *Sears v. Cottrell*, 5 Mich. 251. See also *Sheldon v. Van Buskirk*, 2 N. Y. 473. We need not go to this extent in the case now before us, although we have recognized the principle as applied to innkeepers' liens in *Brown Shoe Co. v. Hunt*, 103 Iowa, 586, 39 L. R. A. 291, 64 Am. St. Rep. 198, 72 N. W. 705. On the authority of the Supreme Court of the United States, we do hold that, as to the person actually engaged in the business, it is not necessary that he be present, or that he have an opportunity to be present, when the assessment is made. *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335; *State Railroad Tax Cases* (*Taylor v. Secor*) 92 U. S. 575, 23 L. ed. 663. As to the owner of the property, if any notice or opportunity to be heard be necessary, it is sufficient if he be given an opportunity for contesting the charge in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616.

The Supreme Court of the United States has uniformly adhered to the doctrine that a tax law which provides for a board of revision authorized to hear complaints respecting the justice of an assessment, and prescribes the time during which and the place where such complaints may be made, meets all constitutional requirements. *Palmer v. McMahon*, 133 U. S. 660, 33 L. ed. 67 L. R. A.

772, 10 Sup. Ct. Rep. 324, and cases cited; *Glidden v. Harrington*, 189 U. S. 255, 47 L. ed. 798, 23 Sup. Ct. Rep. 574 (which sustains a similar provision to the act in question). See also *Towns v. Klamath County*, 33 Or. 225, 53 Pac. 604; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750. We have heretofore given our adherence to this doctrine. In *Griswold College v. Davenport*, 65 Iowa, 634, 22 N. W. 904, we said: "It seems to be agreed, therefore, that property taken for the nonpayment of taxes is not taken without due process of law if the taxpayer is afforded an opportunity to be heard in relation to the tax, though it be only before the officers clothed with power to assess." See also *Yeomans v. Riddle*, 84 Iowa, 147, 50 N. W. 886. Indeed, the rule seems to be elementary. *State Assessors v. Central R. Co.* 48 N. J. L. 146, 4 Atl. 578; *Lent v. Tillson*. 72 Cal. 404, 14 Pac. 71; *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682. An act very similar to the one in question was sustained by the supreme court of Ohio in *Adler v. Whitbeck*, 44 Ohio St. 539, 9 N. E. 672. We are constrained to hold that §§ 2441 et seq. save the act from the claim of unconstitutionality because of want of notice and opportunity to be heard. The regular meetings of the board are fixed by law, and of these all persons must take notice.

What we have said, and the authorities already cited, answer most of the other contentions made by appellants. There is no requirement of law that such taxes must be collected through judicial proceedings. They may be enforced through summary processes, such as distraint or tax sale. This is well established by the cases already cited. The two cases relied upon by appellant—*McBride v. State Revenue Agent*, 70 Miss. 716, 12 So. 699, and *Chaurin v. Valiton*, 8 Mont. 451, 3 L. R. A. 196, 20 Pac. 658—are not in point. The first involved a law imposing a fine or penalty for doing an illegal act, which was to be assessed and collected as a tax. This was held invalid because not due process of law. In the second the legislature of Montana undertook to make a license a lien on property, and to provide for the collection thereof by summary process. This was held invalid because of want of notice or opportunity to be heard. In that case the owner of the property was not given an opportunity to contest the charge.

The unreasonableness of the act is not a matter for our consideration. There is nothing arbitrary in a statute which provides for the collection of a tax by summary process. Such proceedings are necessary to secure prompt payment. They existed long

before the Constitution was formed, and are in accord with the law of the land. The trial court was right in sustaining the demurrer to the petition, and its judgment is affirmed.'

Affirmed by Supreme Court of United States January 16, 1905.

E. F. BROWN *et al.*, Appts.,

v.

Eugene BROWN *et al.*

(.....Iowa.....)

A fee in the first taker is not created by the rule in *Shelley's Case* by a conveyance to one for her natural life with provisions for forfeiture in case of attempt to encumber, or nonpayment of taxes, "and at her death to her children or to their lineal descendants;" and it is immaterial that, under the forfeiture clause, in case of compliance with the conditions the land was to pass to the lineal descendants of the life tenant.

(October 19, 1904.)

A PPEAL by plaintiffs from a decree of the District Court for Wayne County sustaining a demurrer to the complaint in a suit to quiet title to certain real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Will B. Barger and Miles & Steele for appellants.

Messrs. Livingston & Son, for appellees:

The rule in *Shelley's Case* has never been held to be the law in this state, and, if ever applied, it was in exact accordance with the evident intent of the party as shown by the context of the instrument in question.

Wescott v. Binford, 104 Iowa, 648, 65 Am. St. Rep. 530, 74 N. W. 18.

In arriving at the intention, the modern rule requires the consideration of the deed as a whole, rather than any particular clause or part thereof, the theory being that the parties had the same general purpose in view throughout the whole instrument.

Beedy v. Finney, 118 Iowa, 276, 91 N. W. 1069; 17 Am. & Eng. Enc. Law, 2d ed. p. 4.

It was the plain intention of Sarah Ann Campbell in the deed in controversy to vest a life estate only in Angelina Brown with a remainder in fee to her children living at her death.

Beedy v. Finney, 118 Iowa, 276, 91 N. W. 1069.

Messrs. Freeland & Evans also for appellees.

NOTE.—As to rule in *Shelley's Case*, see, in this series, *Wood v. Fleetwood*, ante, 444, and cases in footnote thereto.
67 L. R. A.

Deemer, Ch. J., delivered the opinion of the court:

Plaintiffs and the defendants are the children and heirs at law of one Angelina Brown, who died testate in November of the year 1902. By the terms of her will she devised her real estate to the plaintiffs, and gave to the defendants each a small legacy, as and for their full share of her estate. Plaintiffs contend that at the time of testatrix's decease she was the owner in fee of the real estate in question, in virtue of a deed therefor from her mother, Sarah Ann Campbell, of date September 23, 1886, the material parts of which read as follows: "I, Sarah Ann Campbell, widow, of Morton, Tazewell county, state of Illinois, for love and affection do hereby convey to as a free gift, said gift being in value \$5,000.00, to Angelina Brown, my daughter, during her natural life, and at her death to her children, or to their lineal descendants [the land in controversy]. This conveyance is made upon the condition that the said Angelina Brown shall not lease except annually, or otherwise encumber said land and premises, or any part thereof during her natural lifetime; that the said Angelina Brown personally or by agent, shall annually pay the taxes on said land as they accrue and send the receipts thereto [the said receipts being in the name of the said Angelina Brown] to the grantor or to her appointee, said receipts to be forwarded to the grantor Sarah Ann Campbell or her appointed agent, at least four weeks prior to the tax sale in the said county of Wayne, for the year such receipts cover, during the life of said Angelina Brown. Upon a breach of all or any one of either of the foregoing conditions, this conveyance shall be absolutely void, and the grantor or her heirs, executors, or administrators, shall have the right to take possession of said land without being liable for any improvement that may be put thereon in the meantime, but if the said grantee Angelina Brown shall fully keep and perform each and all of the above-expressed conditions during her lifetime, then at her death the title to said land shall hereby vest absolutely in the lineal descendants of said Angelina Brown."

Plaintiffs contend that under the rule in *Shelley's Case* this deed vested a fee-simple title in their mother, and that they took the same title under her will; while defendants argue that the rule in *Shelley's Case* is not in force in this state, and that, if it is in force, the facts do not bring it within that rule; and that they, as children of Angelina Brown, are entitled to a share of the estate under and by virtue of the terms of Sarah Ann Campbell's deed.

The issues of law thus defined are sharp

and clear and the case must be solved by interpreting the deed to Angelina Brown which we have just set forth. The conveyance on its face is of a life estate to Mrs. Brown, and at her death to her children, or to their lineal descendants; and in the clause referring to conditions subsequent it is provided that, if kept and performed by the said Angelina Brown during her lifetime, at her death the property should vest absolutely in her lineal descendants. It was also provided that she should not lease except annually or otherwise encumber the lands, and that she should pay the taxes thereon.

It is apparent that the grantor did not intend to vest a fee in Angelina Brown, and that her object and purpose were to convey a life estate to her, and to so protect the lands that Mrs. Brown's children or their lineal descendants should take the remainder after the life estate in fee.

Whether or not the rule in *Shelley's Case* is in force in this state is a question upon which the members of this court are not agreed; but, conceding, *arguendo*, that it is, the point remains, Is the language used in the deed from Mrs. Campbell such as to bring the case within that rule? The conveyance is plainly of a life estate to Mrs. Brown, and at her death the land was to go to her children, or to their, and not her, lineal descendants. True, in the last clause of the deed it is said that if she should not fail to comply with the conditions that the land should pass to her (Mrs. Brown's) lineal descendants. The modern rule requires a consideration of the whole deed, and a finding of repugnancy will be avoided whenever all the provisions of the instrument may, without ignoring accepted canons of construction, be given force and effect. *Beedy v. Finney*, 118 Iowa. 276, 91 N. W. 1069.

Applying this rule, it is apparent that there was no intention on the part of the grantor to enlarge the estate granted by the words used in the habendum clause. That the granting clause may be controlled by the habendum we freely concede; but the intent of the maker to do so must be clear, especially where, as in this case, the effect would be to enlarge the estate granted to the first taker.

These clauses may all be easily harmonized, and when read together it is apparent that the grantor did not intend to convey the fee to Mrs. Brown. So that we are brought down to this precise inquiry: Does a grant to one for life, and at her death to her children, or to their lineal descendants, convey a fee to the first taker?

The rule announced in *Shelley's Case* is a technical one, and generally, or at least 67 L. R. A.

often, thwarts the grantor's intent, and for this reason is almost everywhere strictly construed. Under that rule, if the first taker is given a life estate, and the inheritance passes to his heirs, or to the heirs of his body, either mediately or immediately, the first taker receives the whole estate. In such cases the words "heirs" or "heirs of the body" are regarded as words of limitation, and not of purchase. But the word "heirs" is essential to justify the application of the rule, just as it was at common law to create an estate in fee simple.

The rule does not apply when the limitation is to "children," for such word is one of purchase. *Re Utz*, 43 Cal. 200; *Cannon v. Barry*, 59 Miss. 289; *Gourdin v. Deas*, 27 S. C. 479, 4 S. E. 64; *Myers v. Anderson*, 1 Strobb. Eq. 344, 47 Am. Dec. 537; *Wilson v. McJunkin*, 11 Rich. Eq. 527; *Carrigan v. Drake*, 36 S. C. 354, 15 S. E. 339; *Gernet v. Lynn*, 31 Pa. 94; *Tyler v. Moore*, 42 Pa. 374, 1 Monaghan (Pa.) 529, 17 Atl. 216; *Jackson v. Jackson*, 127 Ind. 346, 26 N. E. 897.

Nor does it apply when the limitation is to the heirs or issue of the first taker and to their heirs; for in such cases there is evinced a purpose to create in the heirs of the first taker an estate in fee simple. *Smith v. Collins*, 90 Ga. 411, 17 S. E. 1013; *McIntyre v. McIntyre*, 16 S. C. 290; *Myers v. Anderson*, 1 Strobb. Eq. 344, 47 Am. Dec. 537; *Dott v. Cunningham*, 1 Bay, 453, 1 Am. Dec. 624. It is almost universally held that the word "children" is a word of purchase, and not of limitation. *May v. Ritchie*, 65 Ala. 602; *Burns v. Weesner*, 134 Ind. 442, 34 N. E. 10; *Chapin v. Crow*, 147 Ill. 219, 37 Am. St. Rep. 213, 35 N. E. 536; *Baskett v. Sellars*, 93 Ky. 2, 19 S. W. 9; *Adams v. Ross*, 30 N. J. L. 505, 82 Am. Dec. 237; *Rogers v. Rogers*, 3 Wend. 503, 20 Am. Dec. 716; *Hague v. Hague*, 161 Pa. 643, 41 Am. St. Rep. 900, 29 Atl. 261; *Ford v. Flint*, 40 Vt. 382; *Riggin v. Love*, 72 Ill. 553; *Rupert v. Penner*, 35 Neb. 587, 17 L. R. A. 824, 53 N. W. 598; *Bodine v. Arthur*, 91 Ky. 53, 34 Am. St. Rep. 162, 14 S. W. 904. Indeed, the word "issue" has been held one of purchase. *Jones*, Real Prop. § 578. Occasionally the word "children" has been held the equivalent of the word "heirs," but only where it was the manifest intent of the grantor that it should be so construed. *Chapin v. Crow*, 147 Ill. 219, 37 Am. St. Rep. 213, 35 N. E. 536. *Prima facie* the word is one of purchase. *Chrystie v. Phyfe*, 19 N. Y. 344; *Guthrie's Appeal*, 37 Pa. 9; *Anderson v. Anderson*, 164 Pa. 338, 30 Atl. 304; *Williams v. Knight*, 18 R. I. 333, 27 Atl. 210. The instrument in this case does not indicate that the grantor used them in any other sense. As used in the deed ir

question, it is descriptive of a class who is to take the fee, or who in fact do take either a contingent or vested remainder by purchase. These rules are settled by the great weight of authority, both ancient and modern, and are in accord with sound principles of construction. Under them Mrs. Brown did not take an estate in fee, but a life estate; and this she could not dispose of by will. The defendants as her children took a share of the property under the deed from Mrs. Campbell, and it is not material now whether that share was a vested or contingent one; hence we do not pass upon that proposition. There are a few cases which lend support to plaintiffs' theory, but they seem to turn upon peculiar facts, or to be ruled by a too strict construction of the rule in *Shelley's Case*. The statement as to the consideration for the deed, and as to the valuation put upon the property has no significance. Of course, if Mrs. Brown took a fee any restraints upon its alienation would be void; but these restraints are strongly indicative of the grantor's intent, and lend support to the conclusion that she did not use the word "children" as the equivalent of "heirs."

The ruling on the demurrer was correct, and the judgment is affirmed.

Malcolm PETERSON
v.

MODERN BROTHERHOOD OF AMERICAN
ICA, Appt.

(.....Iowa.....)

A Pott's fracture, consisting of the breaking of one bone of the lower leg between the knee and ankle joint, and a severance of the malleolus process of the other one so as to effect a complete solution of the continuity of both bones, is not covered by a policy providing indemnity in case of the breaking of the shafts of both bones between the knee and ankle joints.

(*Wcaver and Bishop, JJ., dissent.*)

(November 16, 1904.)

NOTE.—On the somewhat similar question as to what constitutes the loss of a foot or hand, see also, in this series, *Sheanon v. Pacific Mut. L. Ins. Co.* 9 L. R. A. 685; *Stever v. People's Mut. Accl. Ins. Asso.* 10 L. R. A. 446; *Lord v. American Mut. Accl. Asso.* 26 L. R. A. 741; *Fuller v. Locomotive Engineers' Mut. Life & Accl. Asso.* 48 L. R. A. 86.

As to what constitutes total loss of sight of both eyes, see *Humphreys v. National Ben. Asso.* 11 L. R. A. 564.

As to what constitutes total disability of insured, see *Turner v. Fidelity & C. Co.* 38 L. R. A. 529, and note; also *Lobdill v. Laboring Men's Mut. Aid Asso.* 38 L. R. A. 537.
-67 L. R. A.

APPEAL by defendant from a judgment of the District Court for Calhoun County in favor of plaintiff in an action brought to recover the amount alleged to be due on a certificate of membership in a fraternal insurance company as specific indemnity for the breaking of a leg. *Reversed.*

The facts are stated in the opinion.

Messrs. Blythe, Markley, & Rule for appellant.

Mr. C. O. Longley, for appellee:

The terms of an insurance contract "are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense, distinct from the popular sense."

May, Ins. § 173.

An agreement ought to receive that construction which will best carry out the intention of the parties, this intention being gathered from the whole agreement, and not from detached portions thereof.

Wilkinson v. Connecticut Mut. L. Ins. Co. 30 Iowa, 119, 6 Am. Rep. 657; *Meyer v. Fidelity & C. Co.* 96 Iowa, 378, 59 Am. St. Rep. 374, 65 N. W. 328; *Goodwin v. Provident Sav. Life Assur. Asso.* 97 Iowa, 233, 32 L. R. A. 473, 59 Am. St. Rep. 411, 66 N. W. 157; *Wadsworth v. Jewelers' & Tradesmen's Co.* 132 N. Y. 540, 29 N. E. 1104; *Garretson v. Equitable Mut. Life & Endowment Asso.* 74 Iowa, 419, 38 N. W. 127; *Collins v. Merchants' & B. Mut. Ins. Co.* 95 Iowa, 540, 58 Am. St. Rep. 438, 64 N. W. 602.

If the defendant desires to limit its liability to the breaking defined, and no other, such limitation should be made specific and without doubt or question.

Goodwin v. Provident Sav. Life Assur. Asso. 97 Iowa, 234, 32 L. R. A. 473, 59 Am. St. Rep. 411, 66 N. W. 157; 1 Am. & Eng. Enc. Law, 2d ed. p. 301; *Meyer v. Fidelity & C. Co.* 96 Iowa, 385, 59 Am. St. Rep. 374, 65 N. W. 328.

Deemer, Ch. J., delivered the opinion of the court:

As the case involves less than \$100, a certificate of appeal was allowed by the trial judge, and the case comes to us in virtue of this certificate. The certificate or policy issued by the defendant company provides that, should the member, while in good standing, accidentally break his leg or arm, he should receive one tenth of the amount his beneficiary would be entitled to recover in case of the death of such member. It also provided: "The breaking of a leg is defined to be the breaking of the shaft of the thigh bone between the hip and knee

joints, or the breaking of the shafts of both bones between the knee and ankle joints." The plaintiff sustained what is known to the medical profession as a "Pott's fracture" of the right leg, which, as usually defined, is the breaking of one bone between the knee and ankle joints, and the dislocation of the other, or, as described in this particular case by the physicians who gave testimony, as the breaking of the fibula $1\frac{1}{2}$ to 2 inches above the joint, and of what is known as the "malleolus process." The physicians further said that there was "complete solution of the continuity of both bones." The contention of appellant is that the language of the certificate limits the breaking of a leg, for which an indemnity is to be paid, to such breaking as is described in the language of the certificate, and that there was not in this case a breaking of the shafts of both bones, within the definition set forth in the contract, because the term "shaft" or "shafts" excludes the extremities of the bones and the malleolus process, which is in reality a protuberance from the head of the bone. That there is a manifest distinction between the shaft of a bone and its extremities is too clear for argument. But appellee insists that the language used in the certificate should be so construed as to cover the injury above described; relying upon the proposition that it is the duty of the court to construe the terms of every policy of insurance or benefit certificate most strongly against the insurer, and to resolve every doubt or ambiguity in favor of the insured. There is no doubt about the rule for which he contends, but the difficulty is in its application. If the language used in the certificate is ambiguous, or is reasonably capable of two or more constructions, that construction should be given which will afford the insured protection under his certificate. But the parties have the right to make contracts for themselves, and there is no authority for the court to change such contracts. To take away from parties or from persons or corporations this undeniable right of contract, or to make contracts for parties, is not within the province of courts of justice. In the instant case, had there been no attempt at definition of what was meant by the breaking of a leg, there would be no doubt that plaintiff's injury was covered by his certificate; but here there is a definition given which is clear and unambiguous, and there is no reason why the parties may not define any term they see fit to use in their engagements one with the other. The certificate plainly says that the breaking of the shaft of both bones between the knee and ankle joint is what is meant by the term "breaking of a leg." We have no means of

knowing what the insured thought when he received this certificate, and it matters little what his thoughts were in this connection, if it be found that the language used is plain and susceptible of but one construction. True, when the terms of an instrument have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose that the other understood it. Code, § 4617. But in construing this statute, which is simply declaratory of the common law, we have held that, if the language is plain, it cannot be used for the purpose of making the contract conform to the notions of one of the parties executing it. *Congower v. Equitable Mut. Life & Endowment Assn.* 94 Iowa, 499, 63 N. W. 192. In another case we said that the provision is applicable only where the writing involved is fairly susceptible of different meanings. *Rouss v. Creglow*, 103 Iowa, 60, 72 N. W. 429. See also *Field v. Eastern Bldg. & L. Assn.* 117 Iowa, 185, 90 N. W. 717.

The pivotal question in the case, then, is, Is the definition of the "breaking of a leg," used in the certificate in suit, fairly susceptible of different meanings? This all depends upon what effect shall be given the use of the words "shaft" and "shafts." Looking to the derivation of these words, we find that they mean "handle or haft; a shaven or smoothed rod." In the definition as given in the contract it is the shafts of both bones between the ankle and knee joint. This clearly excludes the heads of the bones, the joints themselves, or the process attached to these heads, which have distinct and definite names. Treating the words as technical, as they no doubt are, the plaintiff is in no better position. Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate. *Gauch v. St. Louis Mut. L. Ins. Co.* 88 Ill. 251, 30 Am. Rep. 554; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130. The medical profession are agreed that the shaft of a bone is something entirely distinct from the malleolus process. There is no room for any doubt as to what these words mean to the medical profession, and nothing in the record suggests that the parties did not use them in a technical sense. Even if there be a popular meaning of the term "shaft," it has not been disclosed to us; and, taking the full definition as given in the certificate itself, there are, as it seems to us, no two constructions to be put upon the language used. There was, it is conceded, no breaking of the shafts of both bones, unless we say the protuberance from the head of one of the bones known as the "malleolus process" is a part of the

shaft of the bone between the knee and ankle joint. Manifestly this protuberance is not so located. It projects from the end of the head of the bone downward toward the heel. Doubtless the accident is more serious than if both shafts had been broken, and plaintiff needs his insurance just as badly as if they had been, but this is no reason for changing the terms of his certificate. The defendant company had the right to narrow its liability, to define the terms used in its certificates, to remove from the field of debate the character of a particular injury, or, in other words, to make its own contract. Having made its contract, it is not within the province of a court of justice to change its terms to meet the equities of a particular case. Our views find support in the following cases: *Stevens v. People's Mut. Acci. Ins. Asso.* 150 Pa. 132, 16 L. R. A. 446, 24 Atl. 662; *Gentry v. Standard Life & Acci. Ins. Co.* 6 Ohio S. & C. P. Dec. 114, 5 Ohio N. P. 331; *Maryland Casualty Co. v. Hudgins* (Tex.) 64 L. R. A. 349, 76 S. W. 745.

The injury does not come within the terms of the certificate issued by the defendant association, and the court was in error in rendering judgment against it. For the reasons pointed out, *the judgment must be, and it is, reversed.*

Weaver, J., dissenting:

Among the most familiar rules of the law of insurance is that which requires the courts to construe every ambiguous and doubtful provision of the policy most strongly against the insurer. The company itself frames the instrument in language of its own choosing, and it brings to that effort the skill born of experience and the aid of learned and astute counsel. The average man to whom that contract is tendered is unlearned in such matters, and he accepts it for what it seems to say; relying upon the company, or upon the agent, who is usually his neighbor, to act in good faith and furnish him the indemnity for which he pays. It is to the credit of the great majority of the companies engaged in this most necessary and useful line of business that the confidence of the insured person is not often abused, and when he suffers loss within the apparent terms of the contract his claim is promptly adjusted and paid. Unfortunately, however, this rule is not universal, and not infrequently the courts are required to deal with policies which appear to have been designed with a deliberate purpose to deceive and mislead the holders. Buried in verbiage, ambushed in small type, obscured in technical terminology, are conditions, warranties, forfeiture clauses, and restrictive definitions without limit, which no one ever reads, nor are they in-

tended to be read or understood, until a loss occurs, when they are summoned forth from their native darkness to defeat a recovery by the assured, or to serve as a menace by which to force him to a compromise of his claim. Ordinarily the courts, when called upon, are prompt to thwart such injustice, though sometimes, as in the case at bar, they reach the conclusion that the arm of the law is too short to arrest the accomplishment of an admitted wrong. The principle stated at the outset of this dissent has been often and effectively applied, and, in my judgment, should be invoked in the present controversy.

In *Meyer v. Fidelity & C. Co.* 96 Iowa, 378, 59 Am. St. Rep. 374, 65 N. W. 328, the accident policy sued upon excepted from its operation injuries caused by "disease or bodily infirmity," and the company defended upon the theory that the cause of Meyer's death was within the exception. There was evidence tending to show that he was seen to sway and stagger as if seized with sudden illness, and fell, striking his head upon the pavement, receiving a fatal injury. On the trial of the case the company insisted that the word "disease" should be given its strict technical meaning,—*"any derangement of the functions or alteration of the structure of the animal organs,"*—thus necessarily including the slightest and most temporary, as well as the most serious and inveterate, ailments. To this contention we refused to yield, saying: "When speaking of an 'infirmity,' we generally mean the state or quality of being infirm physically or otherwise,—debility or weakness; and by . . . 'disease' we desire to convey the impression of a morbid condition resulting from some functional disturbance or failure of physical function which tends to undermine the constitution. . . . In using either of the words we do not, as a rule, refer to a slight and mere temporary disturbance or enfeeblement. *If this is true of our ordinary speaking and writing, it is certainly clear that the words should be given no broader meaning when we find them used by an insurance company in a clause of its policy which it relies upon to defeat a recovery thereon.* The language used is made up of words framed by the company or its legal advisers in an attempt to limit as narrowly as possible the scope of the insurance, and it is a universal as well as a fair rule, adopted by the courts everywhere, to construe the terms of the policy most strongly against the assurer, and to resolve every doubt or ambiguity in favor of the assured and against the assurer." This certainly is a most wholesome doctrine, and one which, I trust, has not yet "lost its savor." The language which I have italicized

in the foregoing quotation states, with a force not to be improved upon, the proposition of law which in my judgment controls this case,—that in a policy of accident insurance the company will not be allowed to escape liability by a technical construction of any word or phrase in the contract, but, for the purpose of preserving the policy holder's indemnity, such words and phrases will be given their popular meaning, as employed in ordinary speaking and writing. Apply that rule to the present case, and the right of plaintiff to recover is too clear for argument. The appellant is here relying upon the identical proposition by which the company in the *Meyer Case* sought to avoid recovery. It insists, and the majority opinion sustains its contention, that what is meant by the "shafts of both bones between the knee and ankle joints" must not be sought in common usage, or in our everyday speaking and writing, but we must delve in the maze of medical and anatomical nomenclature, and observe the minute lines of demarcation by which a learned profession has mapped and charted each particular bone of the human frame into subdivisions too small to permit the inscription of their ponderous Latin names. The opinion tells us that in ordinary parlance the word "shaft" is commonly the equivalent of "handle or haft"—"a shaven or smoothed rod." We find it applied also to an architectural column; to the trunk or the main stem of a tree; to the central stem or body of a feather; to an arrow; to the revolving bar or beam by which force or power is conveyed from an engine to various kinds of working machinery. It has many other applications, but those stated are enough to indicate that to the ordinary mind the word "shaft" conveys in a general way the idea of a body having considerable length in proportion to its diameter, more or less rounded or cylindrical in form, and continuous from end to end. Now, every person of ordinary intelligence knows that he has two bones in each lower leg; that those bones are more or less rounded in form, are comparatively straight, and continuous from knee joint to ankle joint; and, if he hears them spoken of as "shafts," his knowledge of the ordinary application of the term to other objects enables him to appreciate its aptness, but, in the absence of a technical education, he has no suspicion that the protection afforded by a policy which insures him against a breaking of these shafts can by any process of interpretation be limited to a mere fraction of the bones supposed to be thus designated. Indeed, until disaster arrives, and in his innocence he asks payment of indemnity, he will never dream that his shin bone is a "tibia," and its lower extremity nothing but

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a worthless "malleolus." Even if we assume the correctness of the definition and of the illustration given in the majority opinion, I am at loss to understand how it can be fairly said that the reference in the policy to the shafts of the bones between the knee and ankle joints "clearly excludes the heads of the bones, and processes attached to these heads, having distinct and definite names." The bone is one continuous, solid structure from its upper extremity at the knee joint down to and including the extreme tip at the ankle joint, and the last inch of the tip is no less a part of the bone than is any other inch throughout its length. The long bones of the leg, when denuded of flesh, are shown to be somewhat larger at the ends than at intermediate points, and it is these enlarged ends to which I understand the opinion refers as "heads." The proposition last quoted is, in effect, that by the word "shafts" the parties must be presumed to have meant that the company should be liable for no fracture except such as might occur in the smaller part of the bones, between the enlarged ends; and, had plaintiff sustained a complete fracture of both bones through both heads "between knee and ankle joints," his leg would still be unbroken, for the purposes of this case.

It is said by the majority, also, that "the distinction between the shaft of a bone and its extremities is too clear for argument." That there is a difference between a yardstick and the ends of a yardstick is admittedly evident to the dullest intellect, but just how to effect a "complete solution" of either "extremity" of a yardstick, and leave that ancient standard of measure unbroken and unimpaired, is beyond my comprehension. It appears, however, that the appellant is the discoverer of a method by which the seemingly impossible may be accomplished. Nor can I appreciate the conclusiveness of the argument based upon the thought that the so-called malleolus is a mere process or protuberance from the head of the bone, and is known to physicians and surgeons by a distinctive name. Cape Colony is none the less a part of Africa because it constitutes the small end of the continent, and has a name of its own. Moreover, the policy itself clearly indicates that the word "shaft" was used as applicable to the entire bone. In speaking of a fracture of the "shafts of both bones between the knee and ankle joints," it, in substance and effect, describes the bones to which it refers as extending from joint to joint, or, in other words, the bones entire from one extremity to the other. That is the meaning which would be given it by the average reader, and the insurer must be

held to have meant the phrase in the sense in which it would appeal to such reader. The company will not be permitted to assume that the insured person knows the technical meaning of terms employed in the policy. *Potter v. Phenix Ins. Co.* 63 Fed. 382.

That both bones of the plaintiff's leg were in fact broken, there is no dispute. The physician describes the injury as a "fracture of the tibia of the right leg, broken across the malleolus, and of the fibula 3 inches above the joint; a complete solution of the continuity of both bones." This I understand to mean that there was a complete breaking and severance of each of both bones into two separate fragments. The fact that the lower fragment of the tibia was small, as compared to the entire bone, is a matter of no moment. The breaking was complete, and plaintiff's cause of action was perfect. There is a noted precedent in fiction for the thought that the smallness of the fruit of transgression may be pleaded in extenuation of the fault, but the time has not yet arrived when we can safely recognize it as a principle of law.

Illustrating the tendency of courts to construe policies of insurance broadly and liberally, in the interest of the assured, I call attention to a few of the many precedents. Under a policy insuring against the accidental loss of "two entire feet," a recovery was had on proof that the assured received a gunshot wound in the back, producing total paralysis of both legs and feet. *Sheanon v. Pacific Mut. L. Ins. Co.* 77 Wis. 618, 9 L. R. A. 685, 20 Am. St. Rep. 151, 46 N. W. 799. Under an insurance against a like loss of an "entire hand," recovery was sustained on proof that a "little over one-half the hand, anatomically speaking," had been lost by an accidental injury. *Sneck v. Travelers' Ins. Co.* 88 Hun, 94, 34 N. Y. Supp. 545. Under a similar policy, it was shown that the assured had lost three fingers wholly, and part of the fourth, and that the joint of the thumb was destroyed. Contending for the literal construction of the policy, the company insisted that it required the amputation of the member at or above the wrist, to constitute the loss of an entire hand; but the court held that this "would be too much of a refinement upon language for practical purposes," and sustained an instruction submitting the question to a jury. *Lord v. American Mut. Acci. Asso.* 89 Wis. 19, 26 L. R. A. 741, 46 Am. St. Rep. 815, 61 N. W. 293; *Supreme Court of Honor v. Turner*, 99 Ill. App. 310. Bearing in the same direction, see *Corbett v. Spring Garden Ins. Co.* 85 Hun, 250, 32 N. Y. Supp. 1059. A condition against liability of the company for death or injury

by the "inhalation of gas" has been held to refer solely to a voluntary inhalation, and recovery upheld for the death of a policy holder by suffocation by gas in a well. *Pickett v. Pacific Mut. L. Ins. Co.* 144 Pa. 79, 13 L. R. A. 661, 27 Am. St. Rep. 618, 22 Atl. 871. To same effect, *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 3 L. R. A. 443, 8 Am. St. Rep. 758, 20 N. E. 347. An exception of death caused by "poison in any way taken, administered, absorbed, or inhaled," does not prevent recovery for a death caused by poison accidentally taken. *Metropolitan Acci. Asso. v. Froiland*, 161 Ill. 30, 52 Am. St. Rep. 359, 43 N. E. 766; *Travelers' Ins. Co. v. Dunlap*, 160 Ill. 642, 52 Am. St. Rep. 355, 43 N. E. 765; *Penfold v. Universal L. Ins. Co.* 85 N. Y. 317, 39 Am. Rep. 660. Where the insurance was against "total and permanent loss of eyesight," the assured was permitted to recover on proof of the total and permanent loss of one eye. *Maynard v. Locomotive Engineers' Mut. Life & Acci. Ins. Asso.* 16 Utah, 145, 67 Am. St. Rep. 602, 51 Pac. 259. In the last case cited the court says: "The terms of the by-law in question must be interpreted liberally and reasonably, and, as they appear to be susceptible of two constructions, that must be adopted which will more nearly carry out the benign object of the association and sustain the claim of the injured. The provision will not be scrutinized for the purpose of enabling the organization to escape liability to any of its members." Insurance against injury by which the assured is "totally disabled; absolutely, necessarily, and continuously confined to the house"—will sustain a recovery on proof of total disability for labor, although the injured person remained most of the time in the open air. *Scales v. Masonic Protective Asso.* 70 N. H. 490, 48 Atl. 1084. The court there argues that it was unreasonable to suppose that company intended its language to be understood literally, and adds: "Such supposition cannot be entertained without an accompanying inference that the defendant intended to deceive." Under a policy insuring against death by "external, violent, and accidental means," and excluding all "injuries from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled," a petition alleging that the assured came to his death by swallowing hard, pointed, resistant substances of food, which perforated his intestines, already weakened by disease, was held to state a good cause of action. *Milner v. Fidelity & C. Co.* 97 Fed. 836. A real-estate and loan broker, who held a policy against loss of time which shall "immediately and wholly disable and prevent him from prosecuting any and every kind of

business pertaining to his occupation," suffered the dislocation of a shoulder. He was able to go to his office every day and give orders, and directions to his assistant, but did no other work. It was held there was no error in submitting the claim to a jury. *Turner v. Fidelity & C. Co.* 112 Mich. 425, 38 L. R. A. 529, 67 Am. St. Rep. 428, 70 N. W. 898. See also *Young v. Travelers' Ins. Co.* 80 Me. 244, 13 Atl. 896. In the *Turner Case* the court restates the familiar rule as follows: "Where a stipulation or exception to a policy emanating from the insurer is capable of two meanings, the one is to be adopted which is the most favorable to the insured." The policy should "be framed with such deliberate care that no form of expression by which, on the one hand, the party insured can be caught, or, . . . on the other, the company can be cheated, should be found on the face of it."

The foregoing are a few of very many cases, all of which deny the right of an insurance company to escape liability on its policy by strict or technical interpretation of its language. In not one of the cases referred to could the policy holder have recovered, had the court permitted the contract to be interpreted strictly and technically, according to its literal terms, as this court proposes to interpret the policy now before us. In all of the decisions which it has been my privilege to examine upon this subject, I have failed to find a single example in which the facts called more loudly for the application of the rule thus approved than does the one at bar. This controversy involves but a trifling sum of money, and would not justify the time here given to its attention but for the precedent which it establishes. It is a matter of common notoriety that in the wake of legitimate insurance, which is the development of centuries, there has sprung up within recent years a countless horde of unsubstantial schemes, represented by swarms of persuasive agents and promoters, by whom a very large proportion of the people has been wheedled into purchasing so-called indemnity against all the ills to which flesh is
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heir. Many millions of dollars have been expended upon these glittering schemes by wage earners and small property holders, only to find concealed within their contracts some unsuspected condition which renders them valueless in the hour of misfortune, or, if perchance the contract be perfect in form, to find that the entire assets of the insurers are represented by an office desk filled with finely engraved stationery and advertising matter, describing with florid laudation the benevolent, fraternal, and unselfish character of the enterprise. I do not wish to be understood as placing the appellant company in this class. The record before us is very brief, disclosing but few facts, and the company is entitled to the benefit of the general presumption of good faith which attaches to all ordinary business transactions. This charitable presumption in which the law indulges also compels us to assume that, in framing its contract, the appellant used the words which we have been considering in the sense in which it must have known the plaintiff would understand them, and not in the technical sense in which it now asks the court to interpret them. To adopt any other theory would make necessary the inference that it deliberately intended to deceive.

The suggestion in the majority opinion that the company had the right to make its own contract is true in a restricted sense only. In few, if any, lines of business have legislatures and courts gone further in restricting and regulating contract rights and relations than in matters pertaining to insurance. The peculiar nature of the business has not only justified, but compelled, the interposition and exercise of this power of regulation and supervision for the protection of the public, and we should be careful not to relax our insistence upon every rule by which that protection is made effectual.

In my opinion, the judgment of the district court should be affirmed.

Bishop, J.: I concur in the conclusion reached by **Weaver, J.**

OHIO SUPREME COURT.

CINCINNATI, LAWRENCEBURG, & AU-
RORA ELECTRIC STREET RAILROAD
COMPANY, *Plff. in Err.*,

v.

George J. LOHE, Admr., etc., of William
Lohe, Deceased.

(68 Ohio St. 101.)

*1 An interurban electric railroad is
classed as a street railroad by the stat-
utes of this state.

2. While such interurban railroad
companies are subject to the same
regulations and have all the powers of
street railroad companies, so far as applica-
ble, the law of negligence governing the stand-
ing on a platform of a moving street car
in a municipality is not applicable to the

case of standing on such platform of a mov-
ing interurban car in the open country.

3. The law of negligence governing
the standing on a platform of a mov-
ing interurban car outside of a
municipality is the same as in the case
of steam cars; and where a rule of the com-
pany prohibits passengers from standing on
the platform, and notice thereof is properly
posted, or where the passengers, upon re-
quest, refuse to enter the car, there being
in either case vacant seats, they remain on
the platform at their peril.

4. In a contract for safe carriage,
there is an implied agreement that
the passenger will obey the reasonable rules
of the carrier; and where the passenger pur-
posely violates such rule, and is thereby in-
jured, he cannot recover damages from the
carrier in an action on the contract.

*Headnotes by the Court.

(March 3, 1903.)

NOTE.—Is an interurban railroad company con-
trolled by the general railroad law in re-
gard to the operation of railroads as car-
riers of passengers?

The cases are very meagre on this question. Many cases have arisen in which the rule might have been determined, but the question was not discussed. For instance, in cases against street railroad companies for injuries to passengers the rule of contributory negligence is generally applied, and to substantiate that rule the court often cites cases that were actions against steam railroad companies operating under the general railroad law, without attempting to distinguish between those cases. Such cases are not cited in this note. The rule is stated in CINCINNATI, L. & A. ELECTRIC STREET R. CO. V. LOHE that an interurban electric railroad is classed as a street railroad by the Ohio Statutes, and subject to the same regulations; yet, the law of liability is that of a general railroad for injuries received by a passenger outside of the city limits. This seems to be sound. A few cases which appear to have been those of interurban railroads, but were not technically classed as such by the courts, incidentally discuss the duty of the carrier to the public.

In New York the question of applicability of the general railroad law to a horse railroad was raised, but in two cases it was held that the defendants did not bring themselves within the terms of the statute.

As in *Lehr v. Steinway & H. P. R. Co.* 26 N. Y. Week. Dig. 433, 8 N. Y. S. R. 813, Affirmed in 118 N. Y. 556, 23 N. E. 889, which was an action against a railroad company using horse cars, for injuries caused to a passenger who was crowded off the front platform, the defendant claimed that it was exempt under N. Y. Laws 1850, chap. 140, § 46 (general railroad law), providing: "In case any passenger on any railroad shall be injured while on the platform of a car, or on any baggage, wood, or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury: Provided said company at the time furnished room inside its 67 L. R. A.

passenger cars sufficient for the proper accommodation of its passengers." It was held that at this time there was no seat furnished him in the car, and therefore the statute invoked by the defendant had no application.

So in *Nolan v. Brooklyn City & N. R. Co.* 87 N. Y. 63, 41 Am. Rep. 345, which was an action by a passenger for injuries received by being jolted off the front platform of a street car, drawn by horses, by reason of the driver whipping one of the horses, it was contended that the defendant was exempt under New York Laws 1850, p. 211, § 46, *supra*. It was held that this act relieved companies from liability where they posted in their cars a warning against riding on the platform, and furnished a seat for the passenger within the car; but the notice in this case was: "Passengers are forbidden to get on or off the car while in motion; or on or off the front platform; or on or off the side, except nearest the sidewalk." This was held not to forbid the riding on the front platform.

In an action against a horse railroad, the court distinguished between the difference in the care required of a passenger and that of one on a railroad train, holding that the general rule of contributory negligence arising from riding on a platform, applicable in a steam railroad case, does not apply to a horse railroad.

This was in *Meesel v. Lynn & B. R. Co.* 8 Allen, 234, which was an action for injuries sustained by a passenger, riding on the front platform of a horse railroad car, being thrown from the car by a jerk. The court referred to cases discussing the law of care required in railroad cases, and said: "In the cases above cited, it ought to be known by all persons who have anything to do with railroad trains that it is hazardous and inconsistent with the exercise of ordinary care to leave the seats provided for passengers and stand upon the platform, or attempt to leave the train while it is in motion, or to sit with an elbow projecting beyond the external surface of a window, or to cross a moving train by passing between the cars. But, in respect to the facts stated in this report, there is no such general knowledge as enables the court to say that

ERROR to the Circuit Court for Hamilton County to review a judgment affirming a judgment of the Court of Common Pleas in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed.*

Statement by **Burket**, Ch. J.:

The plaintiff in error, the Cincinnati, Lawrenceburg, & Aurora Electric Street Railroad Company, is the owner of an inter-urban electric street railroad, extending from Cincinnati to Lawrenceburg and Aurora, with a branch extending from Cleves to Harrison. The road is constructed with heavy rails laid on cross-ties, and equipped with large coaches, with seats on each side of the aisle, two compartments,—one a smoker,—a vestibule at each end, with steps leading to the ground, and propelled in the ordinary manner by electricity. On July 4, 1900, William Lohe was received as a passenger at Cleves to be carried to Harrison, paid his fare, and took a position on

the rear platform or vestibule, where he remained, smoking a cigar, until the car became derailed and fell on its side, and he was killed. It was a rule of the company that passengers were not allowed on the platform, and a notice was posted on the platform where he stood: "Passengers not allowed on the platform." His attention was called to this notice by the conductor, and he was ordered to go into the car, as there were empty seats there for his accommodation. He refused, and said that he did not care about going in, as he was smoking a cigar. Shortly thereafter the assistant conductor requested him to step inside the car, but he remained on the platform until the car became derailed in going around a curve, and he was killed. Those in the car were not injured, except one man, whose leg was slightly injured. The petition of the plaintiff below avers that, in consideration of the fare so paid, the railroad company undertook to safely carry the deceased as a passenger from Cleves to Harrison, and

the plaintiff did not use due care. On the contrary, it is well known that the highest speed of a horse railroad car is very moderate, and the driver easily controls it, and stops the car by means of his voice, his reins, and his brake. In turning around an angle from one street to another, passengers are not required to expect that he will drive at a rapid rate; but, on the contrary, might reasonably expect a careful driver to slacken his speed. The seats inside the car are not the only places where the managers of the train expect passengers to remain; but it is notorious that they stop habitually to receive passengers to stand inside till the car is full, and then to stand upon the platforms till they are full, and continue to stop and receive them even after there is no place for them to stand except on the steps of the platforms. Neither the officers of these corporations, nor the managers of the cars, nor the traveling public, seem to regard this practice as hazardous; nor does experience thus far seem to require that it should be restrained upon the ground of its danger."

In Alabama a dummy line was held to be a railroad, and the railroad law in regard to trains stopping at an intersecting crossing was held applicable. One of the reasons given was that this application would protect human life.

In *Birmingham Mineral R. Co. v. Jacobs*, 92 Ala. 187, 12 L. R. A. 830, 9 So. 320, which was an action for the death of an engineer on a dummy line between Birmingham and Ensley City, against a railroad for failure to stop at intersections, thereby causing the death of the intestate, it was held that a dummy line was a railroad, under Ala. Code, § 1921, providing that such corporation shall have power to construct, maintain, and use a street railroad upon the streets, and upon the lines, and between the termini named in the certificate, in any city or town, upon such terms and in such manner as may be authorized by the proper authorities. The court said: "A railroad organized under this act of the legislature, running beyond the corporate limits of any city or town and through counties, is not and necessarily cannot be a

street railway, within the meaning of the Constitution, and the provisions of the Code in regard to street railways. Except as to its termini, it is entirely independent of municipal control. It derives its corporate powers and existence under the act of the legislature, after leaving the city boundaries, by contract with the counties through which it runs. There is no limitation to the extent of such a road. Under its provision, a road could be constructed from Huntsville to Mobile,—traversing the entire length of the state. There is no limitation upon the power and character of the propelling force, or the business to be conducted. It is common knowledge that railroads incorporated under this act, having in use heavy dummy engines, run from Birmingham to Bessemer City, and to other parts of the state, traversing wide scopes of country with regular stations, soliciting patronage, and competing with other railroads in carrying both freight and passengers. The very act itself, in the second section, no longer designates railroads organized under its provisions, after they leave the corporate limits, as street railways, but as 'railroad companies.' They are engaged in the same business as other roads, propelled by the same dangerous power of steam, and attended with the dangers incident to the operation of other railroads. Is there any reason why such roads should not provide comfortable depots for passengers in the country, and have their freight rates regulated, where they carry freight, and be taxed as other railroads, engaged in like business? Is there any reason why they should not be required to put up sign boards, and ring signal bells, and stop their trains at public road crossings and at railroad crossings, and observe all the safeguards required of other railroads, to prevent collisions and for the protection of human life? Is it reasonable to hold that, because of the structure of dummy engines, many of these regulations can be observed and complied with by those in control of them more easily than other engines: therefore they shall not obey them at all? After leaving the city limits, as we have shown, they are no longer

that by the negligence of the company the car was thrown from the track, and, without any fault on his part, he was thereby killed. The railroad company answered, and denied all negligence on its part, and denied that his death was caused without any fault on his part. Upon a trial before the court and a jury, a verdict was returned in favor of the administrator and against the company. A motion for a new trial was overruled, and judgment entered on the verdict, to all of which proper exceptions were saved. The circuit court affirmed the judgment, and thereupon a petition in error was filed here by the railroad company, seeking to reverse the judgments of the lower courts. The errors complained of arise upon the charge as given, and upon refusal to charge as requested, and these will be noted in the opinion.

Messrs. Peck, Shaffer, & Peck and Shepherd & Shaffer, for plaintiff in error.

By reason of violation of the rule, de-

ceased ceased to be entitled to the protection due a passenger, and was only entitled to the exercise of that degree of care which would protect him against wilful or reckless injuries.

Thane v. Scranton Traction Co. 191 Pa. 249, 71 Am. St. Rep. 767, 43 Atl. 136; *Bard v. Pennsylvania Traction Co.* 176 Pa. 97, 53 Am. St. Rep. 672, 34 Atl. 953; *Nieboer v. Detroit Electric R. Co.* 128 Mich. 486, 87 N. W. 626; *Booth, Street Railways*, ¶¶ 339, 340; 3 Thomp. Neg. 2d ed. ¶ 2956; *Nellis, Street Surface Railroads*, p. 473.

Interurban electric traction lines more nearly resemble steam roads as to construction and equipment and service than street railroads, and the rules of law governing the conduct of passengers on steam railroads should be applied to them.

The general rule with reference to steam-railroad cars is that, if a passenger elects, to ride upon the platform without any necessity, real or apparent, for taking that position, and while so riding is injured under

street railways, subject to municipal regulations, and, if not railroads within the meaning of the general law, we may well inquire, What kind of railroads are they, and by what laws are they governed? Can it be presumed that the legislature intended to provide for the incorporation of a species of railroad companies *sui generis*, not subject to any law except the common law, for common carriers, while the duties and liabilities of all other railroad companies are regulated and controlled by statutory enactments? We are of the opinion that the Ensley Railway comes directly within 'railroad companies,' as defined by § 1173 of the Code of 1886, and which is as follows: 'Section 1173. Meaning of "Railroad Company." Unless clearly otherwise apparent from the context, the term "railroad company," as used in this chapter, includes any person or corporation owning or operating a railroad.'

The protection of passengers traveling on electric cars is said to be governed by the general railroad law, in Alabama.

This rule is stated in *Louisville & N. R. Co. v. Anchors*, 114 Ala. 492, 62 Am. St. Rep. 116, 22 So. 279, which was an action against a railroad company for killing a conductor on an electric car, the complaint alleging that the defendant ran its trains in the city without signals and at excessive speed, contrary to the city ordinance. The court said: "Section 1145 of the Code of 1886 provides as follows: 'When the tracks of two railroads cross each other, engineers and conductors must cause the trains of which they are in charge to come to a full stop within 100 feet of such crossing, and not proceed until they know the way to be clear; the train on the railroad having the older right of way being entitled to cross first.' The demurrer raises the question as to whether the railroad of the Oxford Lake Line, an electric railroad running from Anniston to a point beyond the corporate limits of the city, upon which the plaintiff's intestate was conductor, is a railroad, within the meaning of said § 1145. In the case of *Birmingham Mineral R. Co. v. Jacobs*, 92 Ala. 199, 12 L. R. A. 830, 67 L. R. A.

9 So. 320, we had occasion to consider §§ 1145 and 1173. The question in that case was whether railroads using dummy engines, and operated beyond city limits, are subject to these provisions. After careful deliberation, this court reached the conclusion that railroad corporations organized under and by virtue of §§ 1918 and 1921 of the Code of 1886, as amended by act of February 25th, 1887 (Acts 1886, 1887, p. 144), were not strictly street railways, as contemplated in the statute providing for the organization and operation of street railroads (§§ 1603-1612, Code 1886), and that railroads organized under the act of February 25th [1887] *supra*, using dummy engines, were subject to said statutory provisions. The question now is whether a railroad upon which electricity is used as the moving power is a railroad, within the provisions of the statute. The statute itself makes no distinction, and, in considering the purposes intended in the adoption of these regulations, we are unable to see any good reason why persons traveling upon electric cars are not entitled to the same protection as those traveling upon cars propelled by steam. Public necessities, even within city limits, demand increased facilities for travel over the horse car; and many decisions of courts applicable to street railways operated by horses could not be applied without manifest injustice to trains operated by steam or electricity. The speed, economy, and convenience afforded by electricity commend its use, even for commercial purposes, as well as travel, as superior in some respects to any other motive power thus far applied. A railroad within the provisions of the statute does not cease to be such railroad because it may discontinue the use of steam, and substitute that of electricity. The change in the motor power may relieve it from some provisions of the statute, but those which are needful for the protection of life and property continue in force. *Jacobs's Case*, 92 Ala. 199, 12 L. R. A. 830, 9 So. 320, and authorities cited; *Birmingham R. & Electric Co. v. Baylor*, 101 Ala. 498, 13 So. 793."

And the same rule was applied in *Missouri*.

such circumstances that he would not have been injured if he had not taken that position, he cannot recover damages from the railroad company.

Thomp. Neg. 5th ed. ¶ 2671; *Little Rock & Ft. S. R. Co. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10; *Heazle v. Indianapolis, B. & W. R. Co.* 76 Ill. 501; *Cleveland, C. C. & St. L. R. Co. v. Moneyhun*, 146 Ind. 147, 34 L. R. A. 141, 44 N. E. 1106; *Blake v. Burlington, C. R. & N. R. Co.* 78 Iowa, 57, 42 N. W. 580; *Kentucky C. R. Co. v. Thomas*, 79 Ky. 160, 42 Am. Rep. 208; *Wills v. Lynn & B. R. Co.* 129 Mass. 351; *Hickey v. Boston & L. R. Co.* 14 Allen, 429; *Palmer v. Pennsylvania Co.* 111 N. Y. 488, 2 L. R. A. 252, 18 N. E. 859; *Mitchell v. Southern P. R. Co.* 87 Cal. 72, 11 L. R. A. 130, note, 25 Pac. 245.

Standing or riding on the platform of a street car, when there is room inside, is not negligence *per se*, but is a question for the jury under proper instructions of the court.

Upham v. Detroit City R. Co. 12 L. R. A. 129, note, 85 Mich. 12, 48 N. W. 199; *Nolan v. Brooklyn City & N. Y. R. Co.* 87 N. Y. 63, 41 Am. Rep. 345; *Cincinnati Omnibus Co. v. Kuhnell*, 11 Ohio L. J. 189; Booth, Street Railways, ¶ 339.

Interurban roads are not to be classed with street railroads generally heretofore existing throughout the country, but constitute a class by themselves.

Schaaf v. Cleveland, M. & S. R. Co. 66 Ohio St. 215, 64 N. E. 145.

As to the danger of riding on platforms or steps, electric trolley cars occupy an intermediate position, and the established

rules in regard to steam and horse cars do not apply to them without modification.

Bumbear v. United Traction Co. 198 Pa. 198, 47 Atl. 961; *Thane v. Scranton Traction Co.* 191 Pa. 249, 71 Am. St. Rep. 767, 43 Atl. 136; *Nieboer v. Detroit Electric R. Co.* 128 Mich. 486, 87 N. W. 626; *Sweetland v. Lynn & B. R. Co.* 177 Mass. 579, 51 L. R. A. 783, 59 N. E. 443.

Messrs. Isaac B. Matson and Alfred B. Benedict for defendant in error.

Burket, Ch. J., delivered the opinion of the court:

Counsel for the railroad company requested the court to give the following charges to the jury:

"(1) If the jury should find from the evidence that William Lohe was standing upon the platform of defendant's car at the time when the car was derailed, and that he had been notified by the conductor to go inside the car, and that there was room within the car, where he might have been seated, and that said William Lohe failed or refused to comply with said request, but remained upon the platform, and that his death was due to the fact of his remaining in that position, your verdict should be for the defendant.

"(2) If the jury should find from the evidence that the defendant company had established a rule forbidding passengers to stand upon their platforms, and had posted notices of such rule upon the platforms of its cars, and that there was such a notice upon the platform of the car upon which William Lohe was riding upon the 4th day

and along the streets of a city or town for the carriage of persons from one point to another in such city or town, or to and from its suburbs. It is peculiarly an institution for the accommodation of people in cities or towns; its tracks are ordinarily laid to conform to street grades; its cars run at short intervals, stopping at street crossings to take on and discharge passengers, and in its business is confined to the carriage of passengers, and not freight. Booth, Street Railways, § 1; Elliott, Roads & Streets, p. 557; *Williams v. City Electric Street R. Co.* 41 Fed. 556; *Funk v. St. Paul City R. Co.* 61 Minn. 435, 29 L. R. A. 208, 52 Am. St. Rep. 608, 63 N. W. 1099. The road in question is quite a different thing from that just described. It is not strictly local in its character; it is not used to carry passengers from corner to corner, or from one section or portion of a city to another, or to transport persons from 'down town' to and from the suburbs; it pays little attention to streets and roads, but takes its course through the country just as any other railroad. It is a means of transporting persons from one city to another.—Its western terminus being at or near the eastern limits of Kansas City, and its eastern terminus the public square at Independence. It is rural rather than urban."

But in the case that arose in that state the electric railroad succeeded to the charter privileges of a steam railroad, and it was held to have taken the obligations of a railroad in acquiring its privileges.

This was held in *Hannah v. Metropolitan Street R. Co.* 81 Mo. App. 78, which was an action against an electric railway company operating between Kansas City and Independence for damages for killing stock where the right of way was unfenced. It was held that it was liable because it succeeded to the rights of a railroad company organized under the general railroad law. The court said that it assumed the obligations, "among which was to maintain and operate said railroad, and to observe, also, the statutory regulations required for the protection of stock along the road and guard the safety of the traveling public,—that is, maintain fences along its right of way to the like extent as required of its predecessor. . . . That defendant has changed the motive power from steam to electricity can make no difference; it still remains a railroad within the meaning of the act. . . . The law was intended as a protection to stock and to human life." The court said: "A street railway has been variously defined. As the name indicates, the primary meaning of street railway, or street railroad, is one constructed and operated on 67 L. R. A.

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of July, 1900, and that William Lohe was standing upon the platform at the time the car left the track, and that he had been requested to leave said platform and go inside the car, and that there was room for him within the car, and said William Lohe disregarded said notice and remained upon the platform; and if the jury further find that if he had gone into the car, and had not remained upon the platform, he would not have been injured,—then the verdict of the jury should be for the defendant in this action."

The court refused both of said charges, and proper exceptions were saved.

After attempting to so clearly define "proximate cause" and "contributory negligence" as to enable the jury to understand the same, the court charged the jury as follows:

"Let us now apply these rules to the case at bar. It is not denied that the deceased, William Lohe, was standing on the rear platform of the car in question immediately before the car was derailed. It is not contradicted by the evidence that the deceased was warned or requested to go into the car, and that, as a matter of choice, he preferred to remain outside, on the platform; that the company's employees did not further attempt to enforce the rule that passengers should remain inside of the car. The deceased was found dead, with a part of his body underneath the car or the vestibule. How he got there—whether by falling or jumping or by being jolted off—is disputed. A passenger who is not coerced or induced by the railroad company or its employees to stand upon a platform, or who stands upon the platform, not as a matter of necessity, but simply from choice, although it may be caused by the discomfort of a crowded car, assumes the risks and hazards which ensue from that position. The deceased therefore assumed the risks and hazards incidental and usual to that position. Whether the company, through its employees, posted such warnings upon the car, or whether prior to that time the defendant company failed at all other times, or only occasionally, whether such rule was disregarded by passengers at other times, will be immaterial in this case, because of the actual notice given him by the employees.

"The deceased, William Lohe, by his position, therefore, assumed the risk of being jolted off the platform by collision with teams, vehicles, or other obstructions upon the highway, or of being jolted off by the turning of sharp curves, or the sudden or quick stoppage of the car in case of emergency. The deceased did not, by the fact of standing upon the platform, assume the

risk of a derailment or upsetting of the car. The fact that he stood on the platform was a condition, and not a cause, of the derailment or upsetting of the car. Therefore the mere act of standing upon the platform could not be a proximate cause of the injuries and death of the deceased. But whether by any other act alone, or connected with the act of standing upon the platform, was the proximate cause of the injuries and death of the deceased, is for you to determine."

The correctness of this charge and of these requests depends to some extent upon the character to be assigned to the interurban railroad upon which the accident occurred. The law of negligence, or, rather, of contributory negligence, of one riding upon a platform of a street railroad car, is not the same as of one riding upon the platform of a steam railroad car. The legislation in this state as to railroads and street railroads has been kept separate and distinct. For a full consideration of the subject, see *Massillon Bridge Co. v. Cambria Iron Co.* 59 Ohio St. 179, 52 N. E. 192. Interurban railroads, such as the one in question in this case, are classed by the general assembly as street railroads. § 2780-17, Bates's Anno. Stat. The construction and operation of such railroads are authorized by the act of May 17, 1894 (91 Ohio Laws, p. 285), and carried into Bates's Annotated Statutes as §§ 3443-8 to 3443-13. Section 6 of that act is as follows: "Such companies shall be subject to the same regulations now provided for street railroads, in so far as the same are applicable, and shall have all the powers, in so far as they are applicable, that other street railroad companies have."

It seems reasonably clear that, while operating the cars of an interurban railroad within a municipality, the regulations and powers of a street railroad company are applicable; but when it comes to running cars of such railroads in the open country, upon a track substantially the same as the track of a steam railroad, and at a high rate of speed, it would seem that the same rules as to negligence and contributory negligence should prevail as are applicable to steam railroads, and that a passenger standing upon the platform of an interurban car in the open country should be held to the same rules as if he were standing on the platform of a steam car. The danger is the same in either case, and where there is no difference in danger there should be no difference in the care required, nor in the rights and liabilities flowing from the neglect to observe the proper care. For an injury received by a passenger on a steam railroad by reason of a collision or derailment while standing

upon the platform, in violation of the known rules of the company, there being vacant seats in the car, there can be no recovery against the railroad company. The authorities as to this seem to be uniform. *Little Rock & Ft. S. R. Co. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10; *Hickey v. Boston & L. R. Co.* 14 Allen, 429; *Kentucky C. R. Co. v. Thomas*, 79 Ky. 160, 42 Am. Rep. 208; *Cleveland, C. C. & St. L. R. Co. v. Moneyhun*, 146 Ind. 147, 34 L. R. A. 141, 44 N. E. 1106; *Palmer v. Pennsylvania Co.* 111 N. Y. 488, 2 L. R. A. 252, 18 N. E. 859; *Wills v. Lynn & B. R. Co.* 129 Mass. 351.

There are cases in which a recovery has been allowed where the passenger rushed to the platform to escape some other danger. Such was the case of *Mitchell v. Southern P. R. Co.* 87 Cal. 62, 11 L. R. A. 130, 25 Pac. 245, where an express messenger became alarmed at the rate of speed of the train while descending a steep grade, and, fearing a derailment, he rushed to the platform, intending to jump off into the sand. It was held that he could not be held to any particular course of conduct while attempting to avert a present threatened danger. In the case at bar the deceased was ordered into the car by the conductor, and requested to go in by the assistant conductor; there were vacant seats inside; a sign was up, "Passengers not allowed on the platform;" and yet he remained on the platform because he wanted to smoke a cigar. He remained there at his peril, and, even though the company may have been negligent in not preventing the derailment, he was also negligent in standing upon the platform. Those inside the car escaped without injury, and, if he had gone inside when ordered to do so, the presumption is that he, too, would have escaped. It is a case where it required the negligence of both himself and the company to bring about the disaster, and, where the injury is

brought about by the combined negligence of both, both are without remedy. *Pittsburgh & W. Coal Co. v. Estievenard*, 53 Ohio St. 43, 57, 40 N. E. 725, and cases there cited.

In view of the law as above stated, it is clear that the court of common pleas erred in the charge as given, and also in refusing to charge as requested, and that the circuit court erred in affirming the judgment.

There is another reason why there can be no recovery in this case upon the facts appearing in this record. The action is for a violation of the contract of safe carriage. Such a contract has implied therein that the passenger will obey the reasonable rules of the carrier. The rule against standing on the platform was a reasonable one, and this the deceased deliberately, persistently, and purposely violated, and that violation aided in causing the injury of which complaint is now made. Having himself first violated the contract, and that violation having brought about the injury, he has no cause of action against the company for violating a contract by the terms of which he first refused to be bound. As he, if alive, would have no cause of action, his administrator has none. It is urged that the action might have been in tort. This is true. He could sue either in tort or contract. He elected to sue upon the contract, and he is bound by his election.

The controlling facts of the case seem to be conceded, and the case seems to be one that might well be dismissed by this court after reversing the judgments below; but it may be safer to remand the case to the court of common pleas for further proceedings according to law and this opinion, and it is so ordered.

Judgments reversed and cause remanded.

Spear, Davis, Shauck, Price, and Crew, JJ., concur.

KANSAS SUPREME COURT.

John BALDWIN *et al.*, Plffs. in Err.,
v.

OHIO TOWNSHIP *et al.*

(.....Kan.....)

*1. The owner of lands through which a natural water course flows may accumulate surface waters falling upon lands

*Headnotes by CUNNINGHAM, J.

NOTE.—As to rights and liabilities in respect of surface waters generally, see also, in this series, *Gray v. McWilliams*, 21 L. R. A. 593, and *note*; *Willits v. Chicago, B. & K. C. R. Co.* 21 L. R. A. 608; *St. Paul & D. R. Co. v. Duluth*, 67 L. R. A.

adjacent thereto, and cast the same into such stream, without becoming liable to a lower riparian owner for damages, so long as the natural capacity of the stream is not exceeded.

2. An upper proprietor of lands is not liable to a lower proprietor for damages caused by diverting surface water and casting it into a natural water course passing through both estates, where such diversion is occasioned by the improvement of the upper estate in good faith, and

23 L. R. A. 88; *Edwards v. Charlotte, C. & A. R. Co.* 22 L. R. A. 246; *Sheehan v. Flynn*, 26 L. R. A. 632; *Albany v. Sikes*, 26 L. R. A. 653; *Jacobson v. Van Boening*, 32 L. R. A. 229; *Churchill v. Beethe*, 35 L. R. A. 442; *Fremont*,

where the injury is incidental, small, or not occasioned by the natural carrying capacity of the stream being exceeded.

3. A road overseer in good faith made a substantial improvement to a highway by grading it up and by cutting a ditch along its side, whereby surface waters were gathered and cast into a natural water course flowing across such highway, to the damage of a lower riparian proprietor. *Held*, that such proprietor could not recover damages or entoin the maintenance of such ditch; it not appearing that such damages were occasioned by the overflow of such stream by reason of the increased flow of water therein.

(November 5, 1904.)

ERROR to the District Court for Franklin County to review a judgment in favor of defendants in an action brought to recover damages for wrongfully casting water upon plaintiffs' property. *Affirmed*.

The facts are stated in the opinion.

Messrs. Gamble & Costigan, for plaintiffs in error:

For injuries occasioned to abutting lands by its operations on the highway, a township is responsible the same as a private individual would be for operations upon his lands which injured those of his neighbor.

Angell, Highways, 238.

Where a municipality puts into execution a scheme of improvements by which surface water is collected from a large area, and is carried by artificial means from where it would naturally be discharged, and made to flow onto the land of an abutting landowner, in ease of the lands of others, an actionable wrong is committed.

Patoka Twp. v. Hopkins, 131 Ind. 142, 31 Am. St. Rep. 417, 30 N. E. 896; *Miller v. Morristown*, 47 N. J. Eq. 62, 20 Atl. 61; *Soule v. Passaic*, 47 N. J. Eq. 28, 20 Atl. 346; *Hutchinson Twp. v. Filk*, 44 Minn. 536, 47 N. W. 255; 2 Beach, Pub. Corp. § 1149, and note; 1 Beach, Pub. Corp. §§ 757, 762, note 1, 768; *Young v. Highway Comrs.* 134 Ill. 569, 25 N. E. 689; *Atchison, T. & S. F. R. Co. v. Long*, 46 Kan. 701, 26 Am. St. Rep. 165, 27 Pac. 182; *High, Inj.* § 478; *Denver v. Williams*, 12 Colo. 475, 21 Pac. 617; *Gray v. McWilliams*, 21 L. R. A. 597, and note, 98 Cal. 157, 35 Am. St. Rep. 163, 32 Pac. 976; *Mizzell v. McGowan*, 125 N. C. 439, 34 S. E. 538; *Nicolai v. Wilkins*, 104 Wis. 580, 80 N. W. 939.

Messrs. Deford & Deford for defendants in error.

Cunningham, J., delivered the opinion of the court:

Plaintiffs' action was for the purpose of obtaining damages for injuries suffered by the alleged illegal diversion of surface water thrown upon their land by defendants, and for a mandatory injunction restraining the farther continuance of such injuries. The case is before us upon a transcript containing only the pleadings, the findings of fact made by the trial judge, the conclusions of law, and judgment. So as to the facts we have no light except what is disclosed by these findings. From them we ascertain that the plaintiffs were the owners of certain lands, which they used and occupied as their homestead, lying south of a public highway extending east and west along its north boundary, and had been such owners for several years prior to the commission of the wrongs of which they complained. During this time there was a natural water course entering the plaintiffs' land on its north side, and extending in a southerly direction nearly the full length of the land. This natural water course is spoken of as the west draw, and drains an area of about 38 acres on the north side of the highway. About 35 rods east of the point where this west draw crosses the highway is a surface-water drain, and about 27 rods still farther east is another surface-water drain. These two drain an area of about 48 acres, and are known as the middle and east draws, respectively. At the time the plaintiffs became the owners of the land occupied by them as aforesaid, and for some time prior thereto, culverts had been maintained across the middle and east draws at the point where the highway intersected them. These were of small dimensions, being 8 x 12 inches on the inside. There was also a bridge across the highway at the point where the west draw intersected it. We presume that ordinarily the surface waters coming down the middle and east draws passed through their respective culverts, and over and upon the plaintiffs' lands to the south in no defined channels, except that their general course was south and east. These waters finally falling into what is spoken of as Middle creek. The natural water course known as the west draw fell into Middle creek some distance west of the point where the middle and east draws joined it. In 1895 one John Blocklinger, who was then the duly elected, qualified, and acting road overseer of the road district in which this

E. & M. Valley R. Co. v. Harlin, 36 L. R. A. 417; *Jordan v. Benwood*, 36 L. R. A. 519; *North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co.* 40 L. R. A. 851; *Carland v. Aurlin*, 48 L. R. A. 862; *Brandenberg v. Zeigler*, 55 67 L. R. A.

L. R. A. 414; *McAskill v. Hancock*, 55 L. R. A. 738; *Chicago, R. I. & P. R. Co. v. Shaw*, 56 L. R. A. 341; *Franklin v. Durgee*, 58 L. R. A. 112; and *Todd v. York County*, 66 L. R. A. 561.

highway was located, for the purpose of improving the same, caused it to be graded up and a ditch dug along its entire north side, emptying into the west draw at its west end. He also removed the culverts which had theretofore intersected the highway at the middle and east draws. The effect of this was to collect all of the surface water which had theretofore passed down through these draws into this ditch, and by means of it to be carried westward and emptied into the west draw, thereby increasing the volume of water therein. It is of this increase of volume, and the damage caused to them thereby, that the plaintiffs complain. The court specifically found that "the digging of said ditch, the closing up and removal of said culverts, and the grading of said highway was a substantial improvement to the highway, and it was done with good faith, and with no other intention than to improve it;" and, further, "that the water carried along said ditch on the north side of said highway and emptied into said draw flows in and upon plaintiffs' farm to their injury;" further, "that, had such ditch along the north side of said highway not been constructed, the waters accumulating in said middle and east draws could not have gotten into said west draw, nor onto the land of plaintiffs, and this would be true even though the culverts at the intersection of said middle and east draws with the highway were removed; that the plaintiffs have suffered damages to their said farm by reason of the said surface water being collected from said middle and east draws into said ditch, and cast in a body upon their said farm; . . . and that they will continue to so suffer from said cause so long as said ditch is permitted to remain as it was when said action was begun and is now." As a conclusion of law the court held as follows: "The surface water having been accumulated in an artificial ditch and cast in a body upon the land of Mr. Baldwin, the defendants would be enjoined, were it not for the fact that it was cast upon the farm of the plaintiffs by means of a natural water course." Thereupon judgment was rendered against plaintiffs for costs, to reverse which they are now here.

Several reasons are urged by defendants in error for the affirmation of this judgment, other than the one given by the court. We prefer, however, not to give these reasons attention, but to discuss the matter entirely from the standpoint taken by the court below. We shall assume that the party responsible for the making of the ditch and the improvement of the highway, whether such party was the township, township officers, or the road overseer, occupied 67 L. R. A.

the same relation to the plaintiffs as would a private owner, and that they had a right to dispose of surface water coming upon the highway in the same manner and to the same extent as would the private owner of a dominant adjoining estate. "The commissioners of highways, where they undertake to drain a public highway, possess the same rights, and are governed by the same rules, as adjoining landowners who may undertake to drain their own lands, except where they may be proceeding under the eminent domain laws of the state." *Young v. Highway Comrs.* 134 Ill. 569, 25 N. E. 689. The common-law rules regulating the rights and duties of adjoining owners of lands relative to surface water obtain in this state. *Atchison, T. & S. F. R. Co. v. Hammer*, 22 Kan. 763, 31 Am. Rep. 216; *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241. Under those rules, it is well settled that the owner of the upper estate may not gather surface water falling or accumulating thereon, and by means of artificial channels divert it from its natural course, and discharge it upon the lower estate, to the damage of the owner thereof. This rule, however, goes hand in hand with the other equally well-settled doctrine that as to such waters either owner may stand upon the defensive. The owner of lands through which a natural water course flows may, however, accumulate and cast into such water course in a body the surface water falling upon lands adjacent thereto. Such streams are the drains provided by nature for the discharge of surface water gathered by natural forces and the general contour of the lands. The rule is thus stated by Farnham, *Waters*, § 186: "The force of gravity, which causes all waters flowing on the earth to seek the lowest level, creates natural drainage, and provides for the distribution of all water, whether surface water or otherwise. This natural drainage is necessary to render the land fit for the use of man. The streams are the great natural sewers through which the surface water escapes to the sea, and the depressions in the land are the drains leading to the streams. These natural drains are ordained by nature to be used, and, so long as they are used without exceeding their natural capacity, the owner of land through which they run cannot complain that the water is made to flow in them faster than it does in a state of nature. Among the steps which are taken for the improvement of property, one of the first is to remove the water from it as rapidly as possible. The right to drain upon and over lower lands without making compensation for such privilege is the same whether the higher land is the farm of an individual owner or is a

public highway; and highway commissioners have the right to have the surface water falling or coming naturally upon the highway drain through the natural and usual channel upon and over lower lands, and have the right to construct ditches or drains for the purpose of conducting such surface water, even though it is accumulated in ponds, into such natural and usual channels, although the effect may be to increase the volume of water thus carried upon lower lands. In accordance with this principle, the flow of the water into the natural streams may be hastened so long as the water is not caused to overflow the banks of the stream to the injury of the land through which it flows." Gould, *Waters* [3d ed.] § 274, states the same rule as follows: "The owner of land has a right to discharge the natural drainage of his land, and the surface water accumulating thereon, into a water course, whereby it becomes a part thereof; and in so doing he may change or concentrate its flow in artificial channels, thus accelerating the flow and increasing the volume of water in the stream, provided its natural capacity is not exceeded, and those whose supply is rendered more variable cannot complain." In a note to the case of *Mizell v. McGowan* (N. C.) 85 Am. St. Rep. 733, it is said: "We have just noticed the difference between merely drainage onto another's land, and draining into a natural channel or water course which flows across such land. So far as streams or natural water courses are concerned, there can be no doubt that one may drain into them, and thereby increase their volume, without subjecting himself to liability for any damage suffered by a lower owner." In support of this proposition the following cases are cited: *Miller v. Laubach*, 47 Pa. 154, 86 Am. Dec. 521; *Cairo & V. R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139; *Treat v. Bates*, 27 Mich. 390; *Jackman v. Arlington Mills*, 137 Mass. 277; *Waffle v. New York C. R. Co.* 53 N. Y. 11, 13 Am. Rep. 467; *McCormick v. Horan*, 81 N. Y. 86, 37 Am. Rep. 479; *Jenkins v. Wilmington & W. R. Co.* 110 N. C. 438, 15 S. E. 193; *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 57 Am. Rep. 447, 6 Atl. 453; *Rath v. Zembleman*, 49 Neb. 351, 68 N. W. 488. From a careful study of these and other cases, we are not disposed to indorse the broad doctrine announced in the text of the note, or hold that in no case the lower riparian proprietor may not recover damages for injuries inflicted by diverting surface water into a natural water course by an upper riparian owner, but are disposed to hold that such owner may not gather and divert surface

water from its natural course of flowage, and cast it into a natural water course, to the serious damage of the owner of the lower estate by overflow. In order that such damages may be recovered for, or their continuance enjoined, they must, however, be of a serious and sensible nature. It is quite obvious that the rule, as against the dominant proprietor, cannot be enforced in its minutest detail and for its minutest infraction. To say that no surface water may be diverted and cast into a natural stream is practically to prohibit the removal or shifting of any of the soil from its natural condition. Such a strict application would result in preventing the processes of agriculture and of other necessary improvement.

In speaking upon another phase of this question, but with equal applicability to this, this court, in *Gibbs v. Williams*, 25 Kan. 216, 37 Am. Rep. 241, says: "If the right to run in its natural channels was annexed to surface water as a legal incident, the difficulties would be infinite indeed. Unless the land should be left idle, it would be impossible to enforce the right in its rigor, for it is obvious every house that is built, and every furrow that is made in a field, is a disturbance of such right. If such a doctrine prevailed, every acclivity would be and remain a watershed, and most low ground become reservoirs. It is certain that any other doctrine but that which the law has adopted would be altogether impracticable." So, in actual practice, the law must and does recognize the right of the dominant owner to divert, at least incidentally, for a proper purpose, and in good faith, the flow of surface water from its natural course,—especially so, when it is cast into a natural water course, and where but little damage is occasioned. Were this not so, improvements of the land for the purposes of agriculture, roadmaking, and other betterments would be seriously hampered and impeded. Again, it clearly appears from the authorities that not all damages suffered by the owner of the lower estate may be recovered for, or the continuance of enjoined, but only such damages as result from the overflowing of the stream because its natural capacity has been exceeded. That the flow has been accelerated or deepened, that the banks of the stream have been washed away in places, and sand bars created at other points, are not within the purview of the law to be relieved from. Upon this point it is said in *Farnham, Waters*, § 488: "Drainage being necessary to fit the land for successful occupation, and the streams being the natural channels of drainage, the flow of the surface water may be hastened into the streams so far as it can

be done without flooding lower property." See also cases cited above, and *Drake v. Hamilton Woolen Co.* 99 Mass. 574; *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105; *Rutherford v. Holley*, 105 N. Y. 632, 11 N. E. 818. "Merely increasing the flow of water in a natural water course does not, like increasing the flow of surface water, give a right of action. Riparian owners cannot complain when such increase is due to the building or change of grade of streets and the improvement of lots fairly within the territory drained by such water course, when its capacity is not exceeded." *Kemper v. Widours' Home*, 6 Ohio Dec. Reprint, 1049.

The plaintiffs have here argued this case as though the finding of the court was that the damage suffered by them was occasioned by the flooding of their lands, caused by the overflow of this natural water course. Such, however, is not the case. The court did not so find. While he found that the plaintiffs were damaged, he did not find that such damage was consequent upon the overflow of this natural water course; and, as he found

that they were not entitled to recover, we must presume that the damage suffered was such, and only such, as, under the law, they could not recover for.

We conclude that, because it here affirmatively appears that the improvements which were made upon the highway were of a substantial character and made in good faith, and because it does not appear that the diversion of the surface water from the middle and east draws occasioned thereby was more than a mere incident to the making of such substantial improvement, and because it does not appear that the damages suffered by the plaintiffs were occasioned by the overflow of the natural water course into which such surface water was turned, or that such damages were other than what were occasioned by the hastening or increasing of the flow, that the same were *damnum absque injuria*, and hence not recoverable for.

The judgment of the lower court is affirmed.

All the Justices concur.

MISSISSIPPI SUPREME COURT.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, *Appt.*,

v.

Dana BLACKMAR, for Use of GEORGIA HOME INSURANCE COMPANY.

(.....Miss.....)

Papers pertaining to the business of an insurance agent and belonging to his employer are not baggage, and therefore, in case they are placed in a trunk which is checked as baggage, an action cannot be maintained for the benefit of the employer for loss caused by delay in their transportation.

(December 5, 1904.)

APPEAL by defendant from a judgment of the Circuit Court for Warren County in plaintiff's favor in an action brought to recover damages for delay in transporting baggage. *Reversed.*

Statement by **Whitfield**, Ch. J.:

Dana Blackmar was the agent of the Georgia Home Insurance Company, and on July 1, 1903, purchased a ticket over the

Yazoo & Mississippi Valley Railroad from Natchez, Mississippi, to Baton Rouge, Louisiana, both points being on said railroad. He checked his trunk to Baton Rouge. The trunk contained his wearing apparel and all the papers pertaining to his business. Blackmar was the special agent and inspector for the Georgia Home Insurance Company. The trunk was not delivered at Baton Rouge promptly, and Blackmar left there with instructions to the agent there to send the trunk to New Orleans. The trunk was delayed, and was not delivered to him in New Orleans until July 11th. Blackmar claimed that the delay in the delivery of the trunk caused him to lose six days' time, and to pay a hotel bill for six days, and to pay \$2 for telegrams in his effort to recover the trunk. The Georgia Home Insurance Company brought this suit in a justice of the peace court in the name of said Blackmar, for its use, to recover \$10 per day for the six days lost by Blackmar, this being the amount paid him as salary, the sum of \$36, hotel bill, and other expenses, \$2, and recovered a judgment for

NOTE.—As to what constitutes baggage, see also cases in *notes* to *Hartwell v. Northern P. Exp. Co.* 3 L. R. A., on page 346, and *Carpenter v. New York, N. H. & H. R. Co.* 11 L. R. A. 759; and the later cases in this series of *Staub v. Kendrick*, 6 L. R. A. 619; *Metz v. California Southern R. Co.* 9 L. R. A. 431; 67 L. R. A.

Oakes v. Northern P. R. Co. 12 L. R. A. 318; *Ocean S. S. Co. v. War*, 20 L. R. A. 123; *St. Louis S. W. R. Co. v. Berry*, 28 L. R. A. 501; *Kansas City, P. & G. R. Co. v. State*, 41 L. R. A. 333; *Cooney v. Pullman Palace-Car Co.* 53 L. R. A. 690; and *Illinois C. R. Co. v. Matthews*, 60 L. R. A. 846.

the amount sued for,—in all, \$98. Defendant appealed to the circuit court, and plaintiff recovered a judgment there for the same amount. Defendant's motion for a new trial was overruled, and it appeals.

Messrs. Mayes & Longstreet for appellant.

Messrs. McLaurin, Armistead, & Brien, for appellee:

This is a suit for damages sustained by appellee on a breach of contract because of the loss of time enforced on appellee's agent by reason of the inexcusable delay of appellant in delivering his trunk.

Gulf, C. & S. F. R. Co. v. Vancil, 2 Tex. Civ. App. 427, 21 S. W. 303; *Texas & P. R. Co. v. Douglas* (Tex. Civ. App.) 30 S. W. 488; 4 Elliott, Railroads, p. 2631.

Damages may be recovered in a proper case for delay as well as for loss or injury to baggage.

3 Am. & Eng. Enc. Law, pp. 584, 585.

Baggage is what the passenger takes with him for his own personal use and convenience according to the habits or wants of the particular class to which he belongs, either in reference to the immediate necessities, or to the ultimate purpose of his journey.

3 Am. & Eng. Enc. Law, p. 529; 4 Elliott, Railroads, p. 2607; *Gleason v. Goodrich Transp. Co.* 32 Wis. 85, 14 Am. Rep. 716; *Kansas City, Ft. S. & G. R. Co. v. Morrison*, 34 Kan. 502, 55 Am. Rep. 252, 9 Pac. 225; *Cooney v. Pullman Palace-Car Co.* 121 Ala. 368, 53 L. R. A. 690, 25 So. 712; *Mississippi C. R. Co. v. Kennedy*, 41 Miss. 678.

Negligent delay of Blackmar was a direct loss to appellee, for which it should have the right to recover.

6 Cyc. Law & Proc. p. 676; *Baltimore Steam Packet Co. v. Smith*, 23 Md. 402, 87 Am. Dec. 575; *Curtis v. Delaware, L. & W. R. Co.* 74 N. Y. 116, 30 Am. Rep. 271.

Whitfield, Ch. J., delivered the opinion of the court:

Perhaps the definition given by Chief Justice Cockburn in *Maorow v. Great Western R. Co.* L. R. 6 Q. B. 622, is as accurate a definition of "baggage" as can be found. That definition is this: "We hold the true rule to be that whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage. This would include, not only all articles of apparel, whether for use or ornament, . . . but also the gun case or the fishing apparatus of the sportsman, the

easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveler, and the taking of which has arisen from the fact of his journeying. On the other hand, the term 'ordinary luggage' being thus confined to that which is personal to the passenger, and carried for his use or convenience, it follows that what is carried for the purposes of business, such as merchandise or the like, or for larger or ulterior purposes, such as articles of furniture or household goods, would not come within the description of ordinary luggage, unless accepted as such by the carrier." The sheets of paper constituting the memoranda of the agent, Mr. Blackmar, are manifestly papers relating exclusively to the business of his company. We are unable to concur in the view that they can in any proper or legal sense fall within the legal definition of baggage. They are not such things as were for his personal use or his personal convenience. Their use was in no sense personal to the traveler. On the contrary, they were carried, distinctly and exclusively, "for the purposes of business," to quote the definition of Chief Justice Cockburn. They were not legally or properly put as baggage in his trunk, and, not being properly put there as baggage, no damages can be recovered for delay in their shipment in the trunk. It would therefore make no difference whether the suit was one brought for loss of these papers as constituting properly a part of the baggage of Mr. Blackmar, or was one "for damages sustained by appellee on a breach of contract, because of the loss of time enforced on appellee's agent by reason of the inexcusable delay of appellant in delivering his trunk." Counsel for appellee say that the suit is of the latter character, and that learned counsel for appellant misconceive it as a suit of the former kind. But whether one or the other, if the memoranda are not properly baggage, nothing can be recovered as constituting the value of the memoranda, nor can anything be recovered as damages for delay in shipping. It must be said that the record is very vague and indefinite in giving an exact description of these memoranda, but it seems clear that the papers were the papers of the master, the insurance company, and not of this agent, and that they were not designed for his personal use or convenience or comfort, but strictly and distinctly as business papers in the transaction of the business of his master. We think it is clear, on a careful reading of the authorities cited on both sides, that no papers of the latter kind are in any proper or just sense baggage. And we understand this to be the doctrine as de-

clared in *Mississippi C. R. Co. v. Kennedy*, 41 Miss. 678. The railroad knew nothing about these memoranda being in the trunk, and it is not a case where the railroad company has consented to receive or accepted these memoranda as baggage knowingly, or in accordance with any usage or custom of the railroad. To hold these papers and documents—so important that their delay for a single day might involve a loss of from ten to fifty thousand dollars to the insurance company; papers and documents concededly the property of the company, and not of the agent; papers and documents which relate exclusively to the conduct of the business of the company, and which are in no way needed for the personal comfort, convenience, or use of the agent—constitute baggage, would be to expand the definition of baggage beyond anything warranted by any well-considered case. We have carefully considered the two strongest cases cited by learned counsel for appellee—*Staub v. Kendrick*, 121 Ind. 226, 6 L. R. A. 619, 23 N. E. 79, and *Gleason v. Goodrich*

Transp. Co. 32 Wis. 85, 14 Am. Rep. 716—but we do not think either in point here. In the *Gleason Case* the book which contained the prices of all the component parts of Sheffield goods was the personal property of the agent; the suit there being for the value of the book specially as such. And so in the other case the suit, again, was for the value of an illustrated catalogue prepared by the agent himself, being his own personal property, estimated to be worth \$50. These cases are much the strongest cited by learned counsel for appellee, but we think the decisive weight of authority, as well as these cases properly considered, would exclude memoranda, such as those involved in this suit, from the category of personal baggage. See *Mauritz v. New York, L. E. & W. R. Co.* 23 Fed. 765, and, for a valuable discussion, *Choctaw, O. & G. R. Co. v. Zwitz*, 13 Okla. 411, 73 Pac. 941.

It follows that the judgment must be reversed and the case remanded for a new trial.

MISSOURI SUPREME COURT.

Sophia B. MUELLER, *Appt.*,
v.
Mena BUENGER.

(.....Mo.....)

1. A will may pass title to after-acquired real estate under a statute providing that every person may by last will devise "all his estate, real, personal, and mixed."
2. The intention of the testator, as gathered from the four corners of the will, in the light of the circumstances under which it was written, will determine whether or not he has disposed of after-acquired real estate.
3. The one-half of a tract of land acquired by a testator after the execution of his will will pass under the residuary clause, and not under the clause disposing of the half which he owned at the time the will was made, where by the latter clause he gave to his niece "my interest" in the tract, and by the residuary clause gave to his wife "all the remainder of my property, both real and personal, I may possess at my death, . . . excepting that property which I have mentioned" in the former clause of the will.

(November 23, 1904.)

NOTE.—As to effect of will to pass after-acquired real estate, see also, in this series, *Morgan v. Huggins*, 9 L. R. A. 540; *Jacobs's Appeal*, 11 L. R. A. 767; *Webster v. Wiggin*, 28 L. R. A. 510; and *Clayton v. Hallett*, 59 L. R. A. 407.
97 L. R. A.

APPEAL by plaintiff from a judgment of the Circuit Court for St. Louis County in favor of defendant in a proceeding to establish title to certain real estate. *Affirmed.*

The facts are stated in the opinion.

Mr. George W. Lubke, Jr., for appellant:

A will speaks, not from the time of its execution, but from the date of the testator's death. It therefore passes title to property acquired after its execution, unless from the terms of the will itself, by fair construction, it indicates otherwise.

Liggat v. Hart, 23 Mo. 127; *Webb v. Archibald*, 128 Mo. 299, 28 S. W. 80, 34 S. W. 54; *Haley v. Gatewood*, 74 Tex. 281, 12 S. W. 25; *Strevens v. Bayley*, 8 Ir. C. L. Rep. 410; *Castle v. Fox*, L. R. 11 Eq. 542; *Russell v. Chell*, L. R. 19 Ch. Div. 432; 2 *Woerner*, Am. Law of Administration, p. 889; *Bigelow's Jarman, Wills*, 6th Am. ed. pp. 317, 327.

Therefore, if, between the date of the execution of a will and the date of the testator's death, the conditions of the testator's estate have changed, it must be presumed that the testator had such changes in mind when he died, and, having made no changes in his will, its terms must be interpreted in the light of the conditions existing at the latter date.

Vitt v. Clark, 66 Mo. App. 214.

Mr. George W. Wolff for respondent.

Marshall, J., delivered the opinion of the court:

This is an action under § 650, Rev. Stat. 1899, to determine the interests of the parties, under the will of William Buenger, to 53 arpents of land in St. Louis county. The plaintiff claims title to the whole of the land, except an undivided one twenty-fourth thereof, which is vested in the heirs of Ann T. Hume; and the defendant claims that the plaintiff is only entitled to an undivided one-half of the land, and that she is entitled to a life estate in the other half thereof, with remainder to Annie Holtman, her child by her first marriage, and, in the event of her death without issue, then the remainder to go to certain persons named in the will. The plaintiff is a niece of the testator, and the defendant is his widow.

At the trial the plaintiff showed that at the date of the will William Buenger owned a certain farm in St. Louis county, containing 50 arpents, and known as the Franklin farm, and that at the date of the will he also owned an undivided one-half interest in the 53 arpents; the other half interest being at that time (less the one twenty-fourth of said other half, which was vested in the heirs of Ann T. Hume) vested in Joseph L. Hyatt. He also owned other real and personal property, which is not in controversy here. Being so possessed, said William Buenger made his will on January 29, 1889. That will was as follows:

"I, William Buenger, of the county of St. Louis, in the state of Missouri, do make and publish this my last will and testament. I am weak in body but sound in mind, and know what I am doing. After the payment of all my just debts, I give and devise unto my niece, Sophia Buenger, daughter of Henry Buenger, the farm known as the Franklin farm, situate lying and being in the county of St. Louis, and the state of Missouri, containing fifty (50) arpents, bounded as follows, to wit: East by lands owned by Gustavus Wittich, south by Aubuchon and Maher, west by my own, and north by the Missouri river. Also my interest in the tract of land owned by Joseph L. Hyatt and William Buenger, containing fifty (50) arpents, to have when she attains the age of twenty-one (21) years, to have and to hold the same forever. But if my widow should die or marry before Sophia attained the age of twenty-one (21) years, then she is to come into immediate possession of the above-described land.

"I give and bequeath unto my two brothers and two sisters, Henry Buenger, Casper H. Buenger, Riker Klostermeyer, and Louisa Branderler, or their heirs, two thousand dollars (\$2,000), to be divided equally between them share and share alike, but my 67 L. R. A.

brother Henry is now dead, and I wish that the five hundred dollars that was for him to go to his three sons, William, Henry, and Harmon Buenger, share and share alike, to be paid within two years after this will is probated; I except Harmon Buenger's share; I wish his share of the five hundred dollars to remain in my estate until he is of age and to bear six per cent per annum until paid. Interest commencing two years after this will is probated.

"I also give and bequeath unto Charles Meyer, my nephew, the following parcels of land, now belonging to me in the Monroe tract: Nos. seven (7) and eight (8) containing fifty-five acres more or less, to have and to hold forever, provided, that he pays William Buenger and Conrad Buenger (sons of Casper H. Buenger) each one hundred (\$100) dollars, and one hundred (\$100) dollars to William Klostermeyer, also fifty (\$50) dollars each to William and Henry Buenger, sons of Henry Buenger. This must be paid within two years after this will is probated.

"I give and devise unto my beloved wife, Mena Buenger, all of the remainder of my property, both real and personal, I may possess at my death during her natural life, excepting, however, that property which I have mentioned in the first part of this will; and if my wife should marry then I give and devise unto Annie Holtman, daughter of my wife by her first husband, the following parcels of land, Nos. twenty-three (23), twenty-four (24), and twenty-five (25), and if my wife die before Annie Holtman then Annie Holtman shall have the whole of this property, and if Annie Holtman should die without living children of her body, then this estate, except as already provided, shall be divided equally between the following named persons or their heirs (and Annie's husband if she has any): My brother Henry and Casper H. Buenger, Riker Klostermeyer, Louisa Branderler, Theodore Wolff, Annie Kamper (the wife of August Kamper) and the heirs of Fritz Wolff (the heirs shall inherit only the parents' part).

"I hereby appoint my wife, Mena Buenger (without being required to give security) my sole executrix of this, my last will and testament, hereby revoking all former wills by me made.

"In witness whereof, I have hereunto set my hand this twenty-ninth day of January, A. D. 1889. William Buenger."

The plaintiff also showed that, after the execution of his will, William Buenger, to wit, on April 25, 1895, acquired the other half of the 53 arpents (less the one twenty-fourth thereof aforesaid) that had been owned by Joseph L. Hyatt.

This was all the evidence offered by the plaintiff, and was all the evidence adduced in the case, for the court excluded the evidence offered to be introduced by the defendant "tending to prove the circumstances, surroundings, situation, and family relations of William Buenger, the objects of his bounty, and extent and value of his estate, and also the statements of the testator, made before and after the execution of the will, as to his intentions." The court then rendered judgment in favor of the defendant, and adjudged the plaintiff to be entitled to an undivided one-half interest in the 53 arpents, and the defendant entitled to a life estate in the other part acquired from Hyatt, and her daughter and the persons named in the residuum clause of the will entitled to the remainder in that part. From that judgment the plaintiff appealed.

The only question presented by this record is whether the plaintiff is entitled to the whole of the 53 arpents (less the one twenty-fourth aforesaid), or whether she is entitled to only an undivided one-half of the whole. The law upon this subject has been so thoroughly and ably discussed in the prior adjudications in this state that a review of these cases will easily solve the case at bar. One of the best-considered, learned, and satisfactory discussions of the subject is contained in the opinion of Leonard, J., in *Liggat v. Hart*, 23 Mo. 127; and, because of its force and clearness, the following extensive excerpt therefrom is both justified and appropriate. The learned judge said: "Mr. Butler, in a very able note to Coke's First Institutes (191a), after specifically pointing out the difference between the Roman and the feudal law upon the subject of succession to the estates of deceased persons, thus forcibly sums up the contrast: 'By the Roman law the heir was a person appointed indiscriminately by the law or the deceased to represent him, and, in consequence of that representation, was entitled to his property and bound by his obligations. In the feudal law the heir was a person of the blood of the ancestor, appointed by the original contract to the succession, and, in consequence of that succession, was supposed, more by the general notions of mankind than by the notions of the feudal polity, to represent the ancestor. By the Roman law the heir succeeded to the property of the ancestor in consequence of this civil representation of him, and supposed continuation of his personal estate. In the feudal law he acquired a national representation to the ancestor in consequence of the feudal succession. In the Roman law real and personal property was equally the subject of inheritance. In the feudal law inheritance was confined to real prop-

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erty. The Roman heir claims as such all from the person last possessed, and nothing from the original donor. The feudal heir claims as such all from the donor, and nothing from the person last possessed.' The power of an owner to appoint a successor to his property, both real and personal, after his death, which seems to be nothing more than one of the natural rights of property, prevailed to its full extent among the Saxons of England. When, however, upon the establishment of the Normans, the feudal system became part of the law of England, so that tenants in fee could not alien without the consent of the lord, the power of disposing by will, as well as every other mode of aliening the land, generally ceased. And, although the feudal restraint upon alienation could not but gradually yield, as an unnatural limitation upon property, and accordingly many of the restraints were removed before Granville wrote, yet the power of disposing by will was not allowed for a long time afterwards, partly from the fear lest persons should be imposed upon in their last extremity, and partly for the want of that notoriety which the common law required in all transfers of real property. During the suspension of the direct power which continued from Henry II. to the latter end of the reign of Henry VIII., it was indirectly but substantially acquired, and exercised by means of uses. This indirect practice, however, of devising lands, was at length checked by the statute of the 27th Henry VIII., which, transferring the legal estate to the use, extinguished for a time the separate equitable ownership, and with it the incidental power of devising. The consequence was that lands again became generally unalienable, except by a conveyance, to take effect in the lifetime of the proprietor; but the legislature found it necessary, within a few years afterwards, to allow of testamentary dispositions of land, and for that purpose the statute of wills was passed, in 31 Henry VIII. and amended in the 34th of the same King. 1 Powell, Devises, chap. 1; Cruise, Real Prop. title 38, chap. 1.

"While the power of disposing of lands by will was exercised by means of uses, the will being considered the mere appointment of a use, it was holden that it could only operate on lands of which the party was possessed at the time, and could not affect any lands subsequently acquired; and the courts accordingly adopted the same narrow principle when they came to put a construction on the statute of wills; and, therefore, although the idea of a real devise was, as Lord Mansfield remarked (*Hogan v. Jackson*) 1 Cowp. 303), derived from a Roman will, which was the appointment of

an heir to succeed to the property and to discharge the obligations of the ancestor, including his testamentary donations, yet it was treated in the very English law not like an English will of personal property, when the executor corresponds with the instituted heir of the Roman law, but as the particular conveyance of the lands embraced in it, and was subjected, in the particular now under consideration, to the rules applicable to such conveyances, instead of being treated as a testamentary disposition to take effect after the death of the disposer. It accordingly became a settled rule in the construction of the English statute of wills that, if a testator devised all the real estate of which he should be seised at the time of his death, and after the making of the will he purchased lands in fee, such after-acquired property, whether it was conveyed to the testator or to a trustee for him, did not pass by the will, but descended, as to the legal inheritance in the former case, and as to the equitable in the latter, to the testator's heirs at law (1 Jarman, Wills, 85; *Bunter v. Coke*, 1 Salk. 237, 3 Bro. P. C. 19); and the reason of this was not on account of the intent on the part of the testator, but because he had no legal power to dispose by will of land which he did not own at the time; and the reason given for this construction was not merely that a limited testamentary power was conferred by the very words of the act, but because such was the legal consequence, in the absence of any express provision to the contrary, of considering a devise, not in the nature of a will, but of a particular conveyance. Under the old law, therefore, when a testator made a general gift of his real and personal estate, he was considered as meaning to dispose of these respective portions of property to the full extent of his testamentary power, and it accordingly took effect as a gift of such real estate as belonged to him at the time of the execution of the will, and, as to the personalty, as a disposition of whatever he should possess at the period of his decease; and this construction has prevailed in the United States, wherever the British statute of wills has been adopted, either by express enactment, or as a part of the general system of law.

"Lord Mansfield once remarked that common sense would never teach a man the difference between the testamentary gift of a horse and a house, and that originally the construction might as well have been otherwise, but that it was then too well settled to be disturbed. Indeed, experience has at length taught the British nation that it had better have been settled otherwise from the beginning, as the construction given has been found to defeat the real intention of testa-

tors; and accordingly they have remedied the evil in 1 Vict. chap. 26, by providing that testators may dispose of all the real and personal estate to which they may be entitled at the time of their death, and that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will; and the result is that the distinction in an English will between real and personal property, that was not obvious to common sense in the days of Lord Mansfield, is now abolished, and an English devise of land operates now as a will of personal property did before the passage of the late act, and passes whatever real estate the testator may possess at the time of his death, unless a contrary intent appear. It is also to be remarked that the same experience that produced the British amendment act upon this subject has resulted substantially in the same enactments in the several states where the English rule of interpretation had been introduced and prevailed. Accordingly, in Massachusetts, at their revision in 1835 (Rev. Stat. [1836] p. 417, § 3), it was provided that after-acquired real property should pass by a will in like manner as if it were possessed at the time of the making of the will, if such appeared to be the intent of the testator; and similar enactments have been adopted in Maine, New Hampshire, New York, Pennsylvania, and other states. *Winchester v. Forster*, 3 Cush. 366.

"The Virginia statute of 1785 expressly extends the testamentary power to the real property which the testator may have at his death, and was followed in this particular in Kentucky and Illinois; and the result of the decisions in these states is that after-acquired lands pass, when such appears to be the intention of the testator, although in Virginia they retain the rule adopted in England, that the words of the testator in reference to his real property are to be understood as referring to the time of the making of the will, unless a different intent appear. *Turpin v. Turpin*, 1 Wash. (Va.) 75; *Harrison v. Allen*, 3 Call (Va.) 297; *Warner v. Swearingen*, 6 Dana, 200; *Willis v. Watson*, 5 Ill. 66. The legislation in our state has been somewhat peculiar. The first act upon the subject, passed in 1807, was copied from the Virginia statute of 1785, and confers, in one section, upon persons of full age testamentary power over all real estate then owned, or which the testator may have at his death, and in a subsequent section confers testamentary power over the personal estate, in general terms, upon persons who are over eighteen years of age.

The law so continued without any change until the revision of 1835 [Rev. Stat. 1835, p. 616], when, under the plan of revising then adopted, of dropping what were deemed superfluous words, the phraseology was changed to what it now is, and the testamentary power over both real and personal property was incorporated into one section, and conferred in the same general words; and the same phraseology was continued in the revision of 1845, and we presume, also, in the last revision. The language now used, however, is not the language of the old English statute,—“that any person having an estate may dispose of it at his pleasure,” etc., but that every person may, “by last will, devise all his estate, real, personal, and mixed,” etc.

“No doubt is entertained but that, under the act of 1807, after-acquired real property would pass by will, whenever such appeared to be the intention of the testator. The reason why it did not pass under the English statute was the want of testamentary power, and, that power being expressly given by our original act, the objection was out of the way; and such seems to have been the construction given to the statute in Virginia, Kentucky, and Illinois.

“But the question is as to the construction of the present law. Must we hold that the act now in force does not confer testamentary power over after-acquired land, and, on account of the change in the phraseology of the statute, which was made in 1835, go back to the construction put upon the original statute? We think not. The language now used does not require such a construction at our hands. It is different from the language of the English statute of wills. The testamentary power is given here in general language. It embraces both real and personal estate, and is a power to make a testamentary disposition of all the testator’s property, without any distinction between real and personal property, and not a mere power of particular disposition. It is more in the nature of a Roman will than an English devise of real property. But, however this may be, when we consider the plan of revising that was adopted,—the impolicy of creating changes in laws of daily practical importance; the little probability, when all around us were abandoning the old, narrow construction of the testamentary power, that our legislature should adopt it, for the first time, by an express provision for that purpose,—and when we consider, too, that neither the community nor the profession generally, as we believe, have been aware of the supposed change, and that men have generally acted as if the original act of 1807 were still in force, and that estates have been administered and dis-

tributed accordingly,—we do not think that we would be warranted in declaring that the legislature, by the change in the language, intended to effect the substantial change in the meaning of the law that is supposed; and we shall accordingly give to the act, as it now stands, as literal a construction in favor of the testamentary power as we should have felt constrained to have given to the original act.”

The learned judge then applied the principles of law so declared to the facts in judgment, and pointed out that, after a specific devise of a watch to one and a burial lot to another, the will in that case provided, “I hereby direct my executors to sell the whole of my real, personal, and mixed property,” and, after the payment of his debts and the sum of \$100 to such of his nephews as should be named James, he directed the proceeds of such sale “to be sent to my executors in Ireland,” to be there invested for the use of his brothers and sisters. And it was held the will applied as well to property acquired after the will was made as to the property owned by the testator at the date of the will. And there can be no two minds as to the correctness of the conclusion there reached, for the devise was practically of the whole estate to the same beneficiaries. As applied to the case at bar, that opinion is not only valuable for its historical data, but also for the rules of law laid down. This is especially true as to the evolution of the statute of wills in this state from 1807 to 1856, when the opinion was written.

The statute of wills of 1845 (Rev. Stat. 1845, chap. 185, § 1) and of 1855 (Rev. Stat. 1855, chap. 167, § 1) provided: “Every person of twenty-one years of age, and upwards, of sound mind, may, by last will, devise all his estate, real, personal, and mixed, and all interest therein, saving to the widow her dower.” And § 2 of the revisions of 1845 and 1855, relating to wills, provided: “Every person over the age of eighteen years, of sound mind, may, by last will, dispose of his goods and chattels.” There is no substantial difference, so far as concerns this case, between that statute and the act of 1879, which was in force when this will was made, on January 29, 1889. The act of 1879 (Rev. Stat. 1879, chap. 71, § 1) provided: “Every male person, twenty-one years of age and upwards, of sound mind, may, by last will, devise all his estate, real, personal, and mixed, and all interest therein, saving the widow her dower. And every male person over the age of eighteen years, and of sound mind, may, by last will, bequeath all his personal estate, saving the widow her dower.” It is unnecessary here to refer to the power given

to married women to make wills. There is therefore no material difference, so far as concerns this case, between the statutes that were in force when *Liggat v. Hart*, 23 Mo. 127, was decided, and the statutes as they are to-day. *Liggat v. Hart*, 23 Mo. 127, was cited and followed in *Applegate v. Smith*, 31 Mo. 166. In that case the testator lived in Kentucky, and made his will there. He devised to his wife "his whole estate, real, personal, and mixed, wherever situated." He afterwards purchased land in Missouri, and the only question was whether the after-acquired land passed to the devisee. In that case the devise was of the whole estate, and Scott, J., said: "The only material point in this case is whether the after-acquired lands passed by the devise to Martha Applegate. The will was made in Kentucky, and, by the law of that state, there must be something in the will itself which showed that after-acquired lands were intended to be passed by it, in order that it may have that effect. A general devise of all his property, or of all his estate, or a general disposition of his land, will not authorize such a deduction. But his intention to devise whatever interests he may own in land at his death must be disclosed by the language used, or by the actual import of the provisions contained in the will." It was pointed out, however, that, as the land lay in Missouri, the laws of this state would govern, and that, under the laws of this state, a nonresident owner of lands in this state was allowed to make a will of such land; and it was held that the law as to after-acquired land was correctly laid down in *Liggat v. Hart*, 23 Mo. 127. Here, again, it will be observed the devise of the whole estate was to the same beneficiary; and the only question, therefore, was whether the will covered the after-acquired property, or whether as to that the testator died intestate.

The question here involved next came before this court in *Hale v. Audsley*, 122 Mo. 316, 26 S. W. 963. That case turned upon the construction of the will of Charles Sterne. The second paragraph of that will gave his wife a life estate in his home place, with a remainder in fee to his granddaughter and her heirs. The third paragraph of that will gave his granddaughter and her heirs another tract, of about 700 acres, and added: "And I further will and devise to my said grandchild and the heirs of her body, any and all other real estate, I may now have or hereafter may acquire, wherever situated," etc. The fifth paragraph of that will also gave to his granddaughter "an undivided interest of one third of what is called the Latham farm, containing three hundred and twenty acres." The sixth par-

agraph of that will provided that, if his granddaughter died without issue or heirs of her body, the "real estate hereinbefore mentioned and described" should go to the testator's nephews and nieces in equal parts; but, if his said grandchild left heirs of her body surviving her, the land should go to them in fee. That case involved the right of said granddaughter to convey a one-sixth interest in the Latham farm. At the date of the will the testator and one Hale owned each an undivided half of the two-thirds interest in the farm, and one Branch owned the other one third. After the execution of the will the testator and Hale purchased Branch's one-third interest, and held it in undivided shares, of one sixth each, at the time of the testator's death. Black, J., speaking for this court, said: "The question is whether the one-sixth interest acquired by Sterne [the testator] after the date of the will passed to the plaintiff [the granddaughter] Lelia, and the heirs of her body, by force of the residuary clause in the third paragraph of the will, or to her absolutely, under the fifth paragraph. Real property acquired after the date of a will will pass to the devisee where it appears from the will that the testator intended to thereby dispose of such after-acquired property, and it will pass, according to the intention of the testator, the same as in case of property owned by the testator at the date of the will. *Liggat v. Hart*, 23 Mo. 127; *Applegate v. Smith*, 31 Mo. 166. This will appears to have been prepared with care, and it seems to us its meaning is clear and not open to two constructions, and that the undivided one-sixth passed to Lelia by virtue of the residuary clause in the third paragraph. The fact that this clause is found in the third paragraph, and not in the fifth, or some subsequent part of the will, is wholly immaterial. This residuary clause in the most express terms disposes of any after-acquired real estate, and it also disposes of all real estate owned by the testator at the date of the will, and not thereby specifically devised. The question, then, is whether the language of the fifth paragraph can be expanded so as to include this one-sixth. At the date of the will the testator owned a one-third interest in the Latham farm. It is this interest he is speaking of when he says he devises to Lelia 'an undivided interest of one third in what is commonly called the "Latham farm;" and in the same paragraph he again speaks of this interest as 'my said interest of one third in said Latham farm.' It is perfectly manifest that the testator, in making this devise, had in mind only the interest which he then owned, and it was this interest of one third, and

this only, that he undertook to dispose of by this paragraph. To say the testator intended to give this after-acquired interest of one sixth to Lelia upon the terms named in the fifth paragraph is to make a codicil for him when he did not see fit to make one himself. This we cannot do. We have no power to deal with testaments in any such way. It is true, we must construe the will from a consideration of all its parts, and in the light of the surrounding circumstances under which it was written; but we cannot change the plain, clear, and emphatic language of the testator. The fifth paragraph disposes of a one-third interest, and no more. The trial court held that the after-acquired one-sixth passed by the fifth paragraph, and in this it erred. The judgment is reversed and the cause remanded, to be tried on the construction of the will here pointed out." The difference in that case was that, under the residuary clause contained in the third paragraph of the will, the devise was to the granddaughter and her heirs, whereas, under the fifth paragraph, the devise was to the granddaughter absolutely. The trial court held that the granddaughter took the after-acquired one-sixth interest in the Latham farm, under the fifth clause of the will; and this court held that to be error, and that the granddaughter took such after-acquired interest under the third clause of the will. The gravamen of that case is in the following words: "Real property acquired after the date of a will will pass to a devisee where it appears from the will that the testator intended to thereby dispose of such after-acquired property, and it will pass according to the intention of the testator at the date of the will. *Liggat v. Hart*, 23 Mo. 127; *Applegate v. Smith*, 31 Mo. 166." And in that case the intention of the testator as to the Latham farm was ascertained from the fifth paragraph of the will to be that he only intended to give her absolutely the undivided one-third interest therein that he owned at the date of the will, and therefore the after-acquired one-sixth interest in said farm passed to her and the heirs of her body under the residuary clause of the will. That decision, as applied to the facts in judgment here, would result in holding that the testator intended to devise to his niece, the plaintiff herein, by the first paragraph of the will, his undivided one-half of the 53 arpents that were owned by him at the date of the will, and that, as the other undivided one-half interest therein was then owned by Hyatt, the testator did not intend to devise that, but that, as the testator acquired Hyatt's undivided interest in said 53 arpents after the date of the execution of the will, he intended that

it should pass under the residuary clause of the will to his wife for life, with remainder in fee to the persons named in the residuary clause.

The question was again before this court in *Webb v. Archibald*, 128 Mo. 299, 28 S. W. 80, 34 S. W. 54. That case turned upon a construction of the will of Mrs. Margaret Lindsay. By the first clause of her will the testatrix bequeathed to her daughter, the plaintiff, Kate Webb, \$3,750, to be invested in land for her sole use. By the second clause of the will the testatrix bequeathed 420 acres of land, which was therein described to be "all of my real estate," to her three children, Thomas Archibald, William Archibald, and Margaret Winkler, and to her grandson, Harry Archibald, and their heirs and assigns, each to have one fourth of said real estate. By the third clause of her will the testatrix bequeathed to her son William Archibald \$1,000, for the purpose of making him even with her other children. This will then concluded as follows: "Out of the balance of my property, I desire my debts to be paid, and should there be anything left I desire it to be equally divided between Thomas Archibald, William Archibald, and Margaret Winkler; above named are all of my children, as I have never had any children by my present beloved husband, Clark Lindsay." Between the date of her will and the date of her death the testatrix acquired another tract of land, of 120 acres, and also several thousand dollars worth of personal property. The plaintiff claimed one fourth of such after-acquired real and personal property by descent, upon the theory that as to such after-acquired property Mrs. Lindsay died intestate. The trial court took this view, and rendered judgment accordingly. This court reversed the judgment, and held that the after-acquired property passed, under the residuary clause of the will, to Thomas Archibald, William Archibald, and Mary Winkler, the other children of the testatrix, and that it was the intention of the testatrix that, as the plaintiff had been fully provided for by the first clause of the will, and as she was not named as one of the residuary legatees in the will, she was not entitled to any part of the after-acquired property. Brace, J., speaking for the court, solved the legal questions involved in such clear and convincing terms that they throw a flood of light upon the case at bar. He said: "In the leading case of *Liggat v. Hart*, 23 Mo. 127, Leonard, J., said: 'Men know that their wills are not to take effect until they die, and they make them for the purpose of fixing the distribution of their property from that moment.' Since that decision,

construing the first section of our statute of wills, there never has been any question in this state but that the language of a will is to be construed as of the date of the decease of the testator, unless the contrary appears to have been his intention, and that the will operates upon all the estate of the testator, real and personal, at the time of his decease, so far as its terms are applicable, unless the intention of the testator appears to be otherwise. 1 Redf. Wills, 3d ed. chap. 9, § 1. The language of the will in question leaves no room for doubt that the testatrix, in the disposing clauses of her will, was fixing the distribution of her property 'from the moment of her death.' The first item of her will, containing the legacy to the plaintiff, discloses this as her thought, in the expression 'on my death,' which runs through the dispositions of the will. Nor does that language leave any room for doubt that the testatrix intended to dispose of all the property of which she was possessed at the moment of death, for, after making all the specific bequests she desired, she closed the third and last item with a residuary clause disposing of 'anything left' 'out of the balance of my property.' There is nothing in the language of the will, nor rules of law given for its interpretation, upon which the idea of an intestacy as to any of the testatrix's property can be predicated. There is no room in the case for the indulgence of any presumptions on account of a disherison. There is no disherison in the case. The testatrix carefully named all those who by nature had immediate claims on her bounty, and as carefully provided for them. That the provision made by her may have been unequal as between them can furnish no basis for a presumption that she intended an intestacy as to any of her property; yet, in order to sustain the trial court in its ruling, we should not only have to indulge in some such presumption, but permit it to override, not only the foregoing well-settled principles of law for the construction of the testatrix's will, but her unequivocally expressed intention as to the share the plaintiff should have in her estate; for nothing can be clearer than that it was the intention of the testatrix, not only that the plaintiff should have no interest in the testatrix's landed estate, but that her husband should have no interest in such estate, or in any lands that might come to her by means of the legacy left in the will. In both respects the intention of the testatrix would be defeated by the ruling of the trial court that she died intestate as to the 'Winfrey farm.' This brings us to the only remaining question,—To whom did that farm pass by the will? It passed either by

the second item or the residuary clause of the third item of the will. Reading these items together, it is impossible to escape the conclusion that the intention of the testatrix was to make a difference between her three children and her grandchild named therein; that there was a part of her estate in which she wished that they should all share equally, and there was a part of her estate in which she wished that only her said three children should share equally, and in which her grandchild should have no share. The estate in which the four should share equally was devised by the second item. It was a landed estate. The disposing part of that item is 'all my real estate.' This expression, if there had been nothing more, would have been sufficient to pass all her real estate, including any that she might have acquired after the execution of the will. She did not stop there, however, but immediately, in the same item and connection, proceeded to define those terms by giving her meaning thereof to be the 'farm on which I now live,' and the timber land south of it. It is not material that she may not have given correctly the number of acres therein. There is no difficulty in identifying the land devised, and it was in these particular lands that the four were to share equally at her death. For purposes of description, she referred to an existing state of things; thus giving an illustration of the exception to the general rule, hereinbefore stated, that the language of the will is to be interpreted as having been used with reference to the time of the death of the testator; the exception being, in the language of Ellsworth, J., in *Gold v. Judson*, 21 Conn. 616, that, 'wherever a testator refers to an actually existing state of things, his language should be held as referring to the date of the will, and not to his death, as this is then a prospective event. Such, it is clear, is the construction of the word "now."' The estate in which her three children, Thomas Archibald, William Archibald, and Margaret Winkler, were to share equally, but in which the grandchild, Harry Archibald, was to have no part, was devised in the residuary clause of the third item of the will; and it was to be anything left of her property after her debts were paid, not included in the specific bequests,—anything left, whether of real or personal property."

The rules that result from these cases, therefore, may be briefly stated to be as follows: First, the intention of the testator is the controlling guide, and that intention must be gathered from the four corners of the will, in the light of the circumstances under which it was written; second, if the devise is of the whole estate of the testator

to the same beneficiary, it will pass after-acquired property as well as all that he owned when the will was made; third, if the devise is of a particularly described interest in certain land to a particular devisee, and if there is a devise of the residuum of his estate to other particularly named devisees, or to his heirs generally, then any after-acquired interest in the property mentioned in the particular devise will pass under the residuary clause to the persons therein named, and will not go to the particular devisee named in the particular devise of the particular interest. It only remains to apply these rules to the case at bar. The testator first provided for the payment of his debts. Then he made provision for his niece, the plaintiff herein, by giving her the Franklin farm, of 50 arpents, and also gave her "my interest [which at that time was an undivided one-half] in the tract of land owned by Joseph L. Hyatt and William Buenger [the testator]," which contained 53 arpents. He then gave his two brothers and sisters, or their heirs, \$2,000, in equal parts. He next gave his nephew 55 acres of land, on condition that he paid certain specified sums within a specified time to certain persons named. And having thus specifically provided for his other relatives and family, his mind turned to his wife and her daughter by her first marriage, and by the residuary clause of his will he devised "unto my beloved wife, Mena Buenger, all of the remainder of my property, both real and personal I may possess at my death during her natural life, excepting, however, that property which I have mentioned in the first part of this will." He then provided that, if his wife should marry, he devised certain of said residuum to his stepdaughter, and, if his wife died before his stepdaughter, the latter should have "the whole of this property," and, if his stepdaughter died without issue, "then this estate, except as already provided, shall be equally divided" among his

brothers and sisters. Thus the intention of the testator clearly appears to be to give the plaintiff the whole of the Franklin farm and the half of the 53 arpents he then owned, and of which Hyatt owned the other half, and to give his wife "all the remainder of my property, both real and personal, I may possess at my death during her natural life, excepting . . . that property . . . mentioned in the first part of this will," and the remainder to go as above explained. This is the only provision he made in his will for his "beloved wife." Thus it appears that the devise to the plaintiff was of a particular interest in particular land, whereas the devise to his wife covered all his property, real and personal, except what he had particularly given to plaintiff, and the 55 acres particularly given to his nephew. Not only this, but the devise to the plaintiff was of the particular interest in the tract of land "owned by Joseph L. Hyatt and William Buenger," while the devise to his wife was of "all the remainder of my property, both real and personal, I may possess at my death." The devise to the plaintiff therefore related to and covered only a particular interest in a particular tract of land owned by him at the date of the will, whereas the devise to the wife covered, not only the residue of all real and personal property that he owned at the date of the will, but also the residue of all "I may possess at my death;" thereby intending to give to his wife any property he might acquire between the date of the execution of the will and the date of his death.

The Circuit Court therefore properly held that the after-acquired interest in this case passed under the residuary clause of the will to the persons therein named, and not to the plaintiff under the first clause of the will, and *the judgment must be affirmed.*

All concur, except **Robinson, J.**, absent.

IDAHO SUPREME COURT.

MAPLETON BANK *et al.*, *Respts.*,
v.

D. W. STANDROD *et al.*, *Appts.*

(8 Idaho, 740.)

*1. A written transfer of a certificate of

*Headnotes by SULLIVAN, J.

NOTE.—Validity of pledge or other transfer of stock of corporation when not made in books of company, as against attachments, executions, or subsequent transfers.

I. The elements of the problem, 857.

II. Registry not necessary in absence of statute or by-law, 860.

67 L. R. A.

shares of stock in a corporation, made in good faith, and for value, and possession taken thereof as a pledge for the payment of a private debt of the assignor, and the transfer not entered on the proper book of the corporation, has preference over a subsequent attachment thereof in favor of a creditor of the assignor or transferrer of the stock.

III. Statutes requiring transfer on books, 864.

IV. By-law requiring transfer on books, 872.

V. Provision of certificate requiring transfer on books, 875.

VI. Requirement of record with county clerk, 875.

VII. Effect of effort to secure transfer, 876.

2. That provision of § 2611, Rev. Stat., which provides that a transfer of stock, made by indorsement and delivery of the certificate, is not valid, except between the parties thereto, until the same is entered upon the books of the corporation, was not intended as a protection to creditors of a stockholder, but was intended to protect the corporation, its members, and its creditors.

3. Where stock has been pledged and transferred by indorsement and delivery as security for the payment of a debt, and transfer not entered on the books of the corporation, and is thereafter attached at the instance of a creditor of the stockholder, such attachment is valid only against the interest of the assignor therein after the debt had been paid.

(December 20, 1902.)

APPEAL by defendants from a judgment of the District Court for Bingham

VIII. *Effect of notice to purchaser or creditor*, 677.

IX. *Persons not entitled to benefit of statutes*, 680.

X. *Estoppel of pledgee*, 682.

XI. *Statutory recognition of transfers of certificates*, 683.

I. *The elements of the problem.*

The answer to the questions, What is necessary to make an effectual transfer of corporate stock? depends primarily upon a satisfactory solution of the further question, What is corporate stock, and by what is it represented? For the purposes of this *note*, however, which will attempt merely to gather the cases which have dealt with the first question. It will be necessary merely to indicate the views which have been held respecting the second one. Theoretically a share of stock in a corporation is merely a right to a share of its assets and profits: so that in one sense the corporation may be regarded merely as the debtor of the shareholder. In this view, the interest of the shareholder may be transferred in the manner necessary to assign a fund in the hands of a debtor or trustee. This question is fully treated in a *note* to *Phillip's Estate*, 66 L. R. A. 760, to which reference is made. The English rule, represented by *Dearle v. Hall*, 3 Russ. Ch. 1, to the effect that notice must be given to the debtor or trustee, has been applied by some cases.

Thus, it has been held that notice to the corporation is necessary to protect the rights of the assignee against those of subsequent attaching creditors. *State Ins. Co. v. Sax*, 2 Tenn. Ch. 509. This ruling is placed upon the analogy between certificates of stock and assignments of choses in action proper, or funds in the hands of trustees, which latter property, under the Tennessee rule, could not be assigned so as to give a title valid as against subsequent assignments without notice to the debtor or trustee. The court says the practical wisdom of the rule is obvious, because it affords a ready means of tracing the title to stocks, and gives purchasers a security which they otherwise would not have. That ruling is, however, 67 L. R. A.

County in favor of plaintiffs in an action brought to foreclose a pledge of stock. *Affirmed.*

The facts are stated in the opinion.

Messrs. Clark & Holden and *E. E. Chalmers* for appellants.

Messrs. H. K. Linger and *F. S. Deitrich*, for respondents:

The lien of a general creditor, arising from the attachment of stock belonging to the attachment debtor, is not superior to the lien of a prior pledgee in good faith and for value, having actual possession of the certificates of stock, which had theretofore been assigned to him by indorsement, the attaching creditor having actual notice thereof before execution sale.

Our statute was not intended to protect strangers, or to govern the relations between third parties and stockholders. It affects business transactions only with

opposed to *dicta* in *Cornick v. Richards*, 3 Lea, 1.

But in an English case it was held that, in the absence of statute requiring notice of an assignment of shares, no notice need be given. Thus, where shares were in possession of an assignee as collateral security, and the interest of the assignor was subsequently assigned to another person as security without notice to the first assignee, it was held that such assignment was good as against an attachment of the property in the hands of the first assignee. *Robinson v. Nesbitt*, L. R. 3 C. P. 264.

And the view of the Tennessee court did not prevail generally in the business world. The certificate which was given by the corporation to the stockholder as the representative of the interest to which he was entitled had too many characteristics of tangible property, and could too conveniently be treated as the property itself, to escape such treatment; and therefore, for all purposes of buying, selling, pledging, and contracting generally between person and person in the open market, the business world has treated these paper certificates, for practical purposes, as actual property. As stated in *Lipscomb v. Condon*, the certificates of stock are not the stock itself, and some of the courts and legislatures have proceeded upon that theory, and have adopted rules which would hamper their treatment as such.

So in *Agricultural Bank v. Burr*, 24 Me. 256, there is a *dictum* to the effect that the title as it appears on the books of the corporation is the evidence of title upon which the shares may be attached by a writ, or seized and sold upon an execution. The sale by an officer would transfer the title without regard to any certificate which the owner might hold.

The theory that in some way the interest of the stockholder as it appeared on the corporate books was, as suggested in the case last cited, the tangible thing that was subject to transfer, has received considerable recognition, and many cases have been decided and many statutes based upon it, as will subsequently appear. But the convenience of buying and selling the shares by transferring the paper was so great that in most cases both courts and

which the corporation is connected, or in which it has an interest.

Thurber v. Crump, 86 Ky. 408, 6 S. W. 145; *Port Townsend Nat. Bank v. Port Townsend Gas & Fuel Co.* 6 Wash. 597, 34 Pac. 155.

The vendee of unregistered stock is, by the statute, simply prevented from asserting his claim as against those to whom the corporation records give notice, namely, the corporation and its creditors and stockholders.

Dan. Neg. Inst. 4th ed. §§ 1708e, 1708f; Cook, Corp. 4th ed. §§ 486, 487, 490; 1 Morawetz, Priv. Corp. §§ 195 *et seq.*; Angell & A. Priv. Corp. 11th ed. § 354; 1 Spelling, Corp. ¶ 498; Drake, Attachm. 5th ed. §§ 223, 245, 525, 608; Lowell, Transfer of

Stock, §§ 93, 95, 96; Wade, Attachm. § 30, p. 30; *May v. Cleland*, 117 Mich. 45, 44 L. R. A. 163, 75 N. W. 129; *Seeligson v. Brown*, 61 Tex. 114; *Lund v. Wheaton Roller Mill Co.* 50 Minn. 36, 36 Am. St. Rep. 623, 52 N. W. 268; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Batesville Teleg. Co. v. Myer-Schmidt Grocer Co.* 68 Ark. 115, 56 S. W. 784; *Port Townsend Nat. Bank v. Port Townsend Gas & Fuel Co.* 6 Wash. 597, 34 Pac. 155; *Masury v. Arkansas Nat. Bank*, 35 C. C. A. 476, 93 Fed. 603; *Kern v. Day*, 45 La. Ann. 71, 12 So. 6; *McClintock v. Central Bank*, 120 Mo. 127, 24 S. W. 1052; *Tombler v. Palestine Ice Co.* 17 Tex. Civ. App. 596, 43 S. W. 896; *Goyer Cold Storage Co. v. Wildberger*, 71 Miss. 438, 15 So. 235; *Thurber v. Crump*,

legislatures have been forced to permit it to be done. So far as a subsequent purchaser is concerned, this course can work no ill result. If he wishes to purchase all he has to do for his protection is to demand a delivery of the certificates, which is all he could require in case of any other kind of personal property. If, as between stockholder and corporation, the stock can be transferred only by surrender of the certificate, it would seem that possession of the certificate was all the protection a purchaser required. In a New York case it was held that where stock can be transferred only on the books of the company a transferee without entry on the books gets the entire title, legal and equitable, as between himself and his assignor, with all the rights which the latter possesses. But, the stock not having passed by the delivery of the certificate and power of attorney, the legal title remains in the seller so far as affects the corporation and subsequent bona fide purchasers who take by transfer duly made upon the books. Hence, a buyer in good faith of the person in whose name the stock stands on the books, who takes a transfer in conformity to the charter and by-laws, becomes vested with a complete title to the stock, and cuts off all the rights and equities of the certificate holder to the stock itself. But the court says that, with regard to the corporation, notice that the certificate is outstanding is notice that it is owned by someone else, and equivalent to actual notice of all the rights which inquiry would develop. Therefore, if it permits a transfer without production of the certificate it may be liable to the holder, whose rights are thereby cut off. *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 80, *Affirming* 38 Barb. 534.

And that doctrine was recognized in *McNell v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341.

In *Bank of Commerce's Appeal*, 73 Pa. 59, it is said, as between adverse claimants of the certificate the possession of it with the transfer upon it is often the test of title.

Even in case of attachment and execution creditors the hardship of a rule making possession of the certificate evidence of title is more apparent than real. Unless the statutes give the public access to the corporate books knowledge as to the ownership of stock must depend on reputation, whether the fact depends on book entries or on reputation, and the 67 L. R. A.

difficulty of obtaining manual possession of the shares would be as great in one case as in the other. Some cases have intimated that creditors must rely on their debtor's possession of the certificates, and that attachments must reach them to be valid.

In *Colonial Bank v. Whitney*, L. R. 11 App. Cas. 426, where the certificates provided that they must be surrendered before a transfer would be made on the books of the company, the owner of shares pledged them as collateral security, and then became bankrupt, and the question arose as to whether the pledgee or the assignee in bankruptcy had the better title. Lord Blackburn said: I think it is clear that anyone who is about to give credit to the bankrupts as being the owners of the interest represented by the shares ought to know that he had no legitimate ground for believing that they were the owners of the whole interest, unless the certificates were produced or accounted for. And, since inquiry as to what had become of the certificates would (unless the bankrupts were fraudulent liars, which we have no right to assume) have led to the disclosure of the fact that they were pledged. Therefore, the circumstances were such as to prove that the bankrupts were not the reputed owners of the interests in the shares, and the order upholding the title of the bankruptcy assignee (L. R. 30 Ch. Div. 261) was reversed. Lord Watson said that the provision that the certificate must be produced before a transfer could be made was an assurance by the corporation on which the lawful holders of the certificates were entitled to rely, to the effect that, according to their usual practice, the corporation would decline to register any transfer of shares until the relative certificates were produced, or, where nonproduced, satisfactorily accounted for.

The sheriff cannot validly seize and sell the stock while the certificate is outstanding so that he cannot obtain possession of it. All that he can seize and sell in such case is the right and interest of the person in whose name the stock stands without prejudice to the rights of the true owner. But where a judicial tribunal, after a fair test, in good faith by the corporation, orders the stock to be transferred to the purchaser under such seizure and sale, the corporation cannot be liable to the holder of the certificate, who takes no steps to protect

86 Ky. 408, 6 S. W. 145; *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261; *Telford & F. Turnp. Co. v. Gerhab* (Pa.) 13 Atl. 90; *Morton v. Cowan*, 25 Ont. Rep. 529; *Weston v. Bear River & A. Water & Min. Co.* 6 Cal. 425; *People ex rel. Mead v. Elmore*, 35 Cal. 653; *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600; *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. 369; *Spreckels v. Nevada Bank*, 113 Cal. 272, 33 L. R. A. 459, 54 Am. St. Rep. 348, 45 Pac. 329; *West Coast Safety Faucet Co. v. Wulff*, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 623; *Doty v. First Nat. Bank*, 3 N. D. 9, 17 L. R. A. 259, 53 N. W. 77; *Smith v. Nashville & D. R. Co.* 91 Tenn. 221, 18 S. W. 546; *Parker v. Bethel Hotel Co.* 96 Tenn. 252, 31 L. R. A. 706, 34 S. W. 209;

New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; *Fraser v. Charleston*, 11 S. C. 486.

Our statutes were taken from California. The doctrine has long been established by the California courts, that only transfers and purchases in good faith and without notice are protected as against an unregistered pledge, and not a mere attaching creditor, but at most a purchaser without notice at the execution sale, is protected.

People ex rel. Mead v. Elmore, 35 Cal. 653; *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600; *Spreckels v. Nevada Bank*, 113 Cal. 272, 33 L. R. A. 459, 54 Am. St. Rep. 348, 45 Pac. 329.

In adopting a statute, it is taken with the construction already put upon it by the

himself. *Friedlander v. Slaughter House Co.* 31 La. Ann. 523.

In *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 3 Am. St. Rep. 586, 15 Pac. 691, where the legal owner of stock, which stood in the name of another and had been sold under execution against the latter, attempted to assert his rights as a stockholder without producing the certificates or notifying the company that he was the legal owner, the court makes the possession of the certificates the evidence of title, and states that the company must act only on that evidence as recognizing the rights of rival claimants.

In *McFall v. Buckeye Grangers' Warehouse Assn.* 122 Cal. 468, 68 Am. St. Rep. 47, 55 Pac. 253, where the question was as to the validity of a levy on stock which had been pledged without transfer on the books of the corporation, and the certificates immediately returned to the pledgee, in whose possession they were when the attachment was levied, the court, without discussing the effect of the nontransfer on the stock books, but apparently assuming that a memorandum of the transfer which appeared in such books might be sufficient, held that the failure to preserve the transfer of possession defeated the pledge.

Where the stockholder has, under an agreement with other stockholders, deposited his certificate with a trustee, an attempt to pledge to a third person by delivering the trustee's receipt and a power of attorney to transfer the stock is not effective as against a subsequent execution creditor, who actually seizes the certificate in the hands of the trustee, where the statute provides that, to effect a pledge of stock, the certificates must be put into the possession of the pledgee. *Bidstrup v. Thompson*, 45 Fed. 452.

The fact that the statement of the corporate books is not the ultimate evidence of the property right, and cannot safely be made the basis of business transactions regarding the stock, is illustrated by the rulings in regard to stock affected with a trust.

In *Mowry v. Hawkins*, 57 Conn. 453, 18 Atl. 784, where the attempt was made to place stock belonging to a married woman in the name of her husband as trustee, but, by mistake, it was placed in his individual name, and was attached as his property, the attaching creditors contended that, standing in his name on the books, it was subject to attachment by his 67 L. R. A.

creditors; but the court says this position is too broad; that, in the absence of fraud, stock may stand in the name of one, which belongs to another, without being liable to attachment for the debts of the nominal owner. That must be so as to all creditors who have not been misled or deceived by it, and as to those who are advised as to the true state of the title.

And the same principle is recognized in *Skiff v. Stoddard*, 63 Conn. 198, 21 L. R. A. 102, 26 Atl. 874, 28 Atl. 104, where the pledgee of stocks which had been transferred into the name of the pledgee was permitted to redeem them as against persons subsequently dealing with the pledgee in such a manner as to enable them to claim an interest in the stock so pledged.

In *Shropshire Union R. & Canal Co. v. Queen*, L. R. 7 H. L. 496, Reversing L. R. 8 Q. B. 444, where stock belonging to a corporation stood in the name of one of its directors in trust for it, and he pledged the certificates as collateral for his own debt, it was held that the pledgee secured no title as against the rights of the corporation. The lord chancellor said that one dealing with a registered owner ought to have known that, although the shares stood in his name, and he had the certificates in his possession, yet the beneficial interest might be in some other person, and, if he did not secure the legal title, but only an equity, it would be subject to the equitable rights of a prior beneficiary. He says that the pre-existing equitable title may be defeated by a supervening legal title obtained by transfer. He further says that "it is said that there was some implied protection in the possession of the certificates; so that, if the holder passes them over to another person, that other person would think he obtained a good title because no transfer could be permitted without the production of the certificates." But he answered that whether or not a transfer should be permitted without a production of the certificates was entirely within the discretion of the corporation. And Lord Hatherley said that the only mode in which a transferee could make himself perfectly safe was to obtain at least a transfer of the shares, and perhaps to go farther, and obtain, also, a registry. The pledgee had not obtained the ownership because he had not obtained a transfer, and had acquired nothing that would pass to him in equitable right.

The fact that the stock is not transferred to

highest court of the state from which adopted.

Sutherland, Stat. Constr. §§ 319, 333; 23 Am. & Eng. Enc. Law, p. 432; *Redway v. Moore*, 3 Idaho, 312, 29 Pac. 104.

Sullivan, J., delivered the opinion of the court:

This is an action to foreclose a pledge of 5 shares of the capital stock of the Farmers' State Bank, a corporation doing business at Idaho Falls, state of Idaho, which had been pledged by the defendant T. A. Harris to the Mapleton Bank, a banking partnership of Mapleton, in the state of Iowa, and the appeal is from the judgment on the judgment roll alone. The defendant T. A. Harris made no appearance, and the

defendants the Farmers' State Bank and C. G. Peck, secretary thereof, filed disclaimers. The defendants who are appellants, William Lindsey and D. W. Standrod & Company, answered separately, and join in this appeal. The facts were stipulated, and the following is a sufficient statement of them for a decision of this appeal: On July 2, 1900, at Mapleton, state of Iowa, defendant T. A. Harris executed to the cashier of the said Mapleton Bank his promissory note for \$1,500, due six months after date, with interest at the rate of 8 per cent per annum, attorneys' fees, etc., and at said time and place, as a part of said transaction, and as security for the payment of said promissory note, assigned and transferred to said bank two certificates of shares of the capital

the name of the true owner, but remains in the name of his vendor, does not defeat the right of the true owner to pursue and recover the stock in case it is stolen from him without his fault and sold by the thief to another stranger without apparent authority, either from the owner or the one in whose name the stock stands registered, any further than the fact that the certificates were indorsed. *Barstow v. Savage Min. Co.* 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349.

But in *Winter v. Belmont Min. Co.* 53 Cal. 429, where the registered owner indorsed and delivered the certificates to another person and then feloniously removed them from his possession and sold them, the purchaser was held to have acquired a good title free from the rights of the pledgee. The court, in discussing the earlier cases, states that their doctrine had not been entirely satisfactory, but that they had been followed on the principle of *stare decisis*, and that, "even though we entertained a grave doubt as to the soundness of the original decision, we think that it ought not now to be disturbed."

Under the Alabama statutes, the rights of one for whom stock was subscribed by another, in whose name the certificates were taken, is subordinate to those of an execution creditor of the latter, although he has paid several instalments on the stock. *White v. Rankin*, 90 Ala. 541, 8 So. 118.

But a statute permitting the charging for benefit of creditors of shares standing in the name of a debtor in his own right, does not authorize the charge of shares standing in his name in trust for others. *Cooper v. Griffin* [1802] 1 Q. B. 740, 66 L. T. N. S. 660; *Howard v. Sadler* [1893] 1 Q. B. 1.

II. Registry not necessary in absence of statute or by-law.

It thus appearing that the business interests and the expeditious transfer of the vast property represented by stock certificates demand that an indorsement and delivery of the certificates themselves, accompanied by a power of attorney to effect a transfer, shall be sufficient, the great majority of the courts have acceded to that demand unless overruled by the legislature, notwithstanding the certificate is theoretically not the property.

The New Jersey court has said that, by a 67 L. R. A.

commercial usage as universally acknowledged by the business community as the law of commercial paper, a certificate of stock, accompanied by an irrevocable power of attorney, is presumptive evidence of ownership in the holder. And, where he is a holder for value, his title cannot be impeached. Under this well-recognized principle, large amounts of property daily pass from hand to hand; are sold and resold, or hypothecated for loans, without an actual transfer on the books of the company. *Prall v. Tilt*, 28 N. J. Eq. 480.

A sale of stock in a corporation is valid as against a subsequent attaching creditor of the transferrer, although no transfer of the stock is made on the books of the company in the absence of any express provision of statute or of the charter of the corporation requiring such transfer to be made. *Boston Music Hall Assn. v. Cory*, 129 Mass. 435.

A pledge not transferred on the books of the corporation is valid as against a subsequent execution sale on a judgment against the pledgeor. *McClintock v. Central Bank*, 120 Mo. 127, 24 S. W. 1052.

A transfer of a certificate of stock in the absence of any legislative enactment passes title to the assignee, and is valid against creditors of the assignor without transfer on the books of the corporation. *Cornick v. Richards*, 3 Lea. 1. The court says the books of the corporation are not public records in any proper sense of our law. Why one private individual shall be required to effectuate the sale of the property of another in which he has no title or interest as property by entering the fact in his books it is not easy to see, not even if the fact be that the parties selling had originally purchased the property from him. The court further says: "In adopting a rule as to the transfer of this peculiar kind of property, we should look to the nature of the property, the uses to which it is put in the transaction of the business of the country, and at the same time not be unmindful of the established habits of dealings with the same among business men: this last should have an influence in this question of full weight, because we may be assured that what has been universally agreed on and established as the custom of such merchants is the result of a felt need that has been met by the keenest practical sagacity dealing with the question. . . . The universal practice is to transfer or assign the certificate of the

stock of the said Farmers' State Bank; one of said certificates being for 5 shares and one for 10 shares, making a total of 15 shares. Said certificates were transferred by indorsement thereon in writing, and signed by the defendant T. A. Harris, and thereafter the plaintiff bank retained the possession of said stock certificates. Said promissory note was not paid when it became due, and this action was brought to foreclose the pledgee's lien upon said shares of stock on July 23, 1901. Said shares of stock have not been transferred on the books of the corporation, the Farmers' State Bank. On the 9th day of February, 1901, William Lindsey, as a general creditor of said T. A. Harris, brought suit against him in Bingham county, and by writ of attach-

ment sought to attach said shares of stock, and defendants D. W. Standrod & Company, also being general creditors of said defendant Harris, brought suit against him in like manner, and sought to attach said 15 shares of stock. The said writs of attachment were levied as provided by subdiv. 4 of § 4307, Rev. Stat., and the secretary of said Farmers' State Bank made return to said writs to the effect that, according to the books of said bank, said Harris was the owner of 15 shares of the capital stock of said bank, which had not been transferred on the books of said bank corporation. The trial court entered judgment on the facts as stipulated in favor of the plaintiffs as prayed for in the complaint. The stipulated facts show that the respondents are

stock with a power of attorney in blank to be filled up, authorizing a transfer by the corporation on its books to the purchaser, on the presentation of which power, properly authenticated, the corporation transfers the stock to the purchaser or holder, and, when the sale is absolute, it is usual to issue new certificates to the party, taking up the old. Such a practice facilitates the easy use of this property in commercial transactions. The requirement that the title could alone be transferred on the books of the corporation, or by notice to the corporation, would greatly tend to trammel this use; and, as far as we can see, notice to the corporation can serve no practical end, and has no appropriate place in the transaction, so far as passing the title from a holder to a purchaser, or the right of a creditor as to a purchaser, for he can, as he will always do, protect himself by requiring an assignment of the certificate, and then a transfer on the books of the corporation. The rule requiring transfer on the books of the corporation can only serve to give a creditor who has a judgment or attachment a legal advantage who has never given credit on the faith of the stocks, over the other who has advanced his money on them and taken the evidence of his security by a transfer of the certificate. In such a contest the equities are altogether in favor of the assignee, who has advanced his money on the faith of the collateral."

And that rule was recognized in *Cherry v. Frost*, 7 Lea, 1.

Pledges of stock are valid as against third persons by mere delivery of the certificates. *Factors' & Traders' Ins. Co. v. Marine Dry Dock & Shipyard Co.* 31 La. Ann. 149.

In *Fraser v. Charleston*, 11 S. C. 486, the court cites, with apparent approval, cases holding that the delivery of a certificate of stock to a purchaser, attended with a power of attorney to transfer, will confer a right that cannot be impeached or set aside by a subsequent execution or attachment against the vendor. The court says the case involves only the question as to the rights of the creditor of the assignor. The moment the equitable assignment has been ascertained their rights are concluded. The legal owner would have been estopped, and they have no rights which he had not.

A pledgee to whom shares of stock had been assigned and delivered as collateral security is secured against the creditors of the pledgeor 67 L. R. A.

without transfer on the books of the corporation. And it is immaterial that the stock is temporarily placed in possession of the pledgeor to effect a cancelation and reissuance of stock by the corporation; the court holding that the pledgeor could act as the agent of the pledgee in effecting such transfer. *McClung v. Colwell*, 107 Tenn. 302, 89 Am. St. Rep. 961, 64 S. W. 890.

Where the stock of a corporation is assigned to the corporation itself as security for a loan the title of the assignor to the stock is so far divested that it cannot be sold under an execution against him. *Early's Appeal*, 89 Pa. 411; *Eby v. Guest*, 94 Pa. 160; *Evans v. Brownson*, 8 Pa. Co. Ct. 456.

The delivery of the certificates properly indorsed transfers all the interest of the record owner, leaving no interest, either legal or equitable, in him which is subject to seizure under attachment. *Dunn v. Star F. Ins. Co.* 19 N. Y. Week. Dig. 531.

In *Kern v. Day*, 45 La. Ann. 71, 12 So. 6, the court held that giving a pledgee of stock, who had possession of the certificates, but had not transferred them on the books, priority over a subsequent attaching creditor of the record owner, does not violate any principle of estoppel which might be claimed against the pledgee; since the pledgeor could not sell or dispose of the stock without producing the certificate, and, so long as that was in possession of the pledgee, third persons would not be prejudiced.

In *Ross v. Southwestern R. Co.* 53 Ga. 314, and *Southwestern R. Co. v. Thomason*, 40 Ga. 408, there is general language to the effect that the sale and transfer of stock, with an order to transfer it on the books of the corporation, pass the title as against everyone but the corporation. The transfer on the books is only to protect the interests of the company. And the same general principle is recognized in *Bates-Farley Sav. Bank v. Dismukes*, 107 Ga. 212, 33 S. E. 175.

Where the charter and by-laws of the company do not require a transfer on the books to make an effectual transfer of stock, a pledge, accompanied by delivery of the stock certificates and notice to the president of the corporation, will prevail as against a subsequent attachment against the pledgeor. *Allen v. Stewart*, 7 Del. Ch. 287, 44 Atl. 786.

In a contest between attaching creditors, respectively, of one in whose name corporate

the transferees, in good faith and for value, as a pledge, of the certificates of stock in question, by a written assignment and the delivery of the certificates of stock to respondents; that the appellants are general creditors of the defendant Harris, and are not purchasers of said shares of stock, either innocent or otherwise, and that all the lien that appellants have upon said stock was acquired by said attachment proceedings, which was subsequent to the written assignment and delivery of said stock certificates to respondents.

The question for determination, as presented by the record, is: Is the lien of a general creditor, arising from the attachment of stock belonging to the attachment debtor, superior to the lien of a prior pledge

in good faith, and for value, having actual possession of the stock certificates, which had been assigned to him in writing, the attaching creditor having actual notice of such assignment before execution sale? Counsel for appellants, in their printed brief and oral arguments, present the general question whether, under the facts of this case, the attachment lien acquired by appellants or the pledge of said stock by Harris to the Mapleton Bank had preference, and contend that the attachment lien has the priority. In support of that contention is cited § 2611, Rev. Stat., which is as follows: "Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock are personal property, and

stock stood on the books of the corporation and another who was alleged to be the equitable owner, the court held that it was not the law of Connecticut that the true owner is precluded from asserting his rights as against an attaching creditor of the one in whose name the stock is permitted to stand, unless the latter has been misled thereby. *New York Commercial Co. v. Francis*, 28 C. C. A. 199, 51 U. S. App. 663, 83 Fed. 769.

The Connecticut rule depends upon the interpretation of statutes, and the cases will be found in the succeeding subdivision. The rule as thus adopted applies in favor of an attachment or execution, as well as of voluntary transfers.

In *Memphis Appeal Pub. Co. v. Plke*, 9 Helsk. 698, where there was a conflict between a right claimed under execution sale and a subsequent sale and transfer of the stock, the court said it was not necessary that a transfer of the stock should be made on the books of the corporation to perfect the title under the execution sale if the sale was valid the judgment debtor was divested of his title when the sale was completed.

And that rule was followed in *Young v. South Tredegar Iron Co.* 85 Tenn. 189, 2 S. W. 202.

An attachment of stock gives a lien superior to that of a subsequent bona fide transfer to one without notice of the attachment. *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913; *Chesapeake & O. R. Co. v. Paine*, 29 Gratt. 509.

An attachment of stock takes precedence of a subsequent sale. *Kentucky Nat. Bank v. Avery*, 12 Nat. Corp. Rep. 111.

There are cases which will be noticed later, which take an opposite view of this question, holding that a transfer on the books is necessary to protect the title against creditors of the vendor. These conflicting decisions are caused by the application to the solution of the problem of two principles of law which are well settled and perfectly equitable in and of themselves, and the only uncertainty is as to which one should control the answer to the question under consideration. The first rule is that a man cannot sell what he does not own, and that his creditors are not entitled to apply to the satisfaction of his debts the property of strangers. Under this rule, it is held that an attachment of stock pledged, but not transferred on the books of the company, 67 L. R. A.

reaches only the interest which the debtor has remaining in the stock. *Norton v. Norton*, 43 Ohio St. 509, 3 N. E. 348.

Creditors can reach only rights of the debtor. Dissenting opinion of Erie, Ch. J., in *Watts v. Porter*, 3 El. & Bl. 743.

So an assignment of stock for the benefit of creditors, although not entered on the books of the company, has precedence over a subsequent attachment against the assignor, since the attachment can reach only the interest which the debtor has. *Haldeman v. Hillsborough & C. R. Co.* 2 Handy (Ohio) 101.

So in *Dunster v. Glengall*, 3 Ir. Ch. Rep. 47, it was held that the statute permitting the interest of a judgment debtor to be charged operated only upon the interest which he actually had at the time the order was passed; so that, in case he had made an assignment of shares of stock as collateral security, a charging order, even on a judgment previously entered, would not take precedence of the rights of the assignee.

And the same rule was followed in *Scott v. Hastings*, 4 Kay & J. 633.

A certificate of stock is not negotiable either in form or in character, and whoever takes it does so subject to its equities and burdens, and, though ignorant of such equities and burdens, his ignorance does not relieve him of the effect of the prior transfer, or enable him to hold discharged therefrom. *George H. Hammond & Co. v. Hastings*, 134 U. S. 401, 33 L. ed. 960, 10 Sup. Ct. Rep. 727.

The rights of a pledgee will, however, be protected only so as to give him full indemnity, and he will not be permitted to withhold the equity of the pledgee from the reach of creditors.

In *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600, an injunction was denied to the holder of an unregistered transfer of stock to enjoin the execution sale of the stock under a judgment recovered by a creditor of the transferrer. The court said that the stock was of greater value than the debt for which it was pledged, and it saw no reason why this interest might not be seized under execution; and that, under the rule in that state, an execution creditor was not within the protection of the statute requiring the registration of transfers, and that the transferee might protect his rights against purchasers at the sale by giving notice of the

may be transferred by indorsement by the signature of the proprietor, or his attorney, or legal representative, and delivery of the certificate; but such transfer is not valid except between the parties thereto, until the same is so entered upon the books of the corporation as to show the name of the parties by and to whom transferred, the number and designation of the shares, and the date of the entry. Corporations may, by by-laws, provide that no transfer of its stock shall be made upon its books until all indebtedness to the corporation of the person in whose name the stock stands, whether for assessments, calls, or otherwise, is paid." Under statutes of other states, like the section of our statute above quoted there is a conflict of decisions as to their

proper interpretation, but upon a careful investigation of those decisions we find that the decided weight is in favor of sustaining the rule that a written transfer of stock, made in good faith and for value, although not entered on the books of the corporation, has preference over a subsequent attachment thereof in favor of a creditor of the assignor of the stock. Said § 2811 declares that, when certificates of shares of stock are issued, such shares are personal property, and may be transferred by indorsement by the signature of the owner or his attorney or legal representative and a delivery of the certificates; which was done in the case at bar. But the last clause of said section provides that such transfers are not valid, except between the parties there-

transfer, so that there was no right to an injunction in the case.

In *Second Nat. Bank v. First Nat. Bank*, 8 N. D. 50, 76 N. W. 504, a pledgee of stock in a national bank brought an action for damages against the bank for refusal to transfer the stock on its books after it had purchased the stock on execution sale against the pledgee. The court, without discussing the validity of the pledge, held that the equity of redemption of the pledgee was subject to execution, and that the purchase under it without anything to show the amount of the pledgee's claim was sufficient to defeat the pledgee's right to have the stock transferred to it as owner.

In *Kyle & Co. v. Montgomery*, 73 Ga. 337, where pledged stock was not transferred upon the books as required by the by-law, and the stock was subject to a lien in favor of the company, and was attached by a creditor of the one in whose name it stood, after which the claim of the company was satisfied from a source that did not appear, and the pledgee appropriated the stock, which was greatly in excess of the amount of its claim, the court said: The circumstances give the transaction a very suspicious appearance, requiring explanation before the pledgee is entitled to the stock against the attaching creditors. The transaction on its very face affords evidence of unfairness, and, without satisfactory explanation, would subject the property, at least to the extent of any excess beyond the pledgee's demand, as it existed when the attachment was served.

The other rule is that one man will not be allowed to give another a fictitious credit by making him the ostensible owner of property belonging to the former, and, after credit has been accorded him on the faith of such property, withdraw it from the reach of the creditors by asserting his own claims.

In *Pinkerton v. Manchester & L. R. Co.* 42 N. H. 424, there was no statute or by-law regulating the mode of transferring the stock, but the court held that shares of stock were within the provisions of the statute of Elizabeth, and that, to make a valid transfer as against creditors, all the steps must be taken to effect a change of possession that the property admitted of, and that this included a transfer on the books of the corporation: so that, unless the transfer was so made within a reasonable time, it was of no avail against attachment creditors. The court says, in the case of stocks the

natural and appropriate indication of ownership is the entry upon the stock record. This is indicated by the ordinary course of dealing in such property, and has been assumed in the legislation for many years. Until then the transfer is recorded, or is entered for record: "we think there has been no such change of possession as will prevail against an attaching creditor, unless in cases where due diligence has been used to make such record and the attachment has intervened."

Therefore a transfer not entered on the books of the company is invalid as against attaching creditors without notice. *Buttrick v. Nashua & L. R. Co.* 62 N. H. 413, 13 Am. St. Rep. 578.

So in *State ex rel. Rankin v. Leete*, 16 Nev. 242, 250, there is a *dictum* to the effect that as to everyone but the parties to the transaction the legal title to the stock does not pass until it has been entered on the books of the company.

And in *Morehead v. Western North Carolina R. Co.* 96 N. C. 362, 2 S. E. 247, the court, in discussing the rights secured by an attachment, says it seems to be supported by the authorities that a legal transfer of stock can only be effectuated by a transfer on the books of the company.

In *Cady v. Potter*, 55 Barb. 463, it is said that a bona fide assignee of stock, who first secures a transfer on the books of the company, will secure a better title than a prior assignee for value, who fails to secure a transfer on the books.

But the latter decision must be read in the light of *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 80, noticed in subd. I., *supra*, which intimated that the corporation might be liable to the true owner for permitting a transfer without production of the certificate. The result of that decision is that a second grantee would not be very likely to secure a transfer and so perfect his title.

There would seem to be less reason for the application of this latter rule to transfers of corporate stock than to transfers of other classes of personal property. So far as the title can be said to depend on the entries in the corporate books, it is almost entirely secret, and the mere fact that a person's name appears in such books as a stockholder has no tendency to give him a fictitious credit, except with persons who have a right of access to the books. Moreover, persons intending to purchase or ex-

to, until the same are entered on the books of the corporation with the formalities therein prescribed. Construing that provision with other sections of our statutes in relation to corporations, it is clear that that provision was not intended to apply to strangers or personal creditors of stockholders, or to govern the relation between third parties and stockholders. That provision affects business transactions, only, with which the corporation is connected, or in which it has an interest. Section 2591, Rev. Stat., relates to corporations, and provides that a book of by-laws must be kept, which shall be open to the inspection of the public. Section 2639 provides that certain records must be kept of the business transactions of the corporation, and that all such

records shall be open to the inspection of any director, member, stockholder, or creditor of the corporation. The records provided for by that section are not required to be open to the inspection of the public, but must be open to the inspection of any director, member, stockholder, or creditor of the corporation. Creditors of the corporation may inspect the records kept under the provisions of that section, but private creditors of a director, member, or stockholder are not, by its terms, given the right to inspect the same. Section 2640, Rev. Stat., provides that, in addition to the records required to be kept by § 2639, corporations for profit must keep a book, to be known as the "Stock and Transfer Book," in which must be kept, among other

tend credit on the faith of stock usually require the production of the certificates; and do not institute a search through the offices of the numerous corporations of the country to ascertain the financial standing of the one with whom they are to deal. It is only when a creditor is searching for property on which to levy that he looks into the corporate books, and it is no fraud upon him, when he has found property apparently belonging to his debtor, to compel him to recognize the rights of persons who have advanced money on the property, and taken the shares into their possession.

III. Statutes requiring transfer on books.

It thus appearing that, in the absence of statute, the transfer of the certificate without registering it is sufficient to protect the transferee from the claims of the creditors of the transferor, the question arises as to the effect of statutory provisions that the transfer of corporate stock shall be made only on the books of the corporation. The answer to this question depends in part on the language of the statute and in part on the demands of the business world as recognized in the preceding subdivision of this note. The language of the statute may be such that there is no room for interpretation. It may, in terms, declare that a transfer on the books is necessary to defeat the claims of creditors. But, if the intent of the legislature is uncertain, the tendency of the courts is to hold that the provision relates to the internal management of the corporation, and does not affect the rights of persons dealing with the stock. The decisions are far from uniform, but part of the seeming conflict may be eliminated by observing the provisions of the statute before the court.

Provision that stock shall be transferred on books.

When the provision is that the stock shall be transferable on the books of the corporation it would seem that the rights of successive or conflicting claimants from the record owner were not intended to be affected by the statute; and such is the weight of authority.—at least when viewed in the light of cases dealing with stronger statutory provisions.

A charter provision that the shares shall be transferable on the books of the company does not prevent a transfer by assignment of the 67 L. R. A.

certificates properly indorsed as against a creditor of the pledgor without notice of the facts. *Broadway Bank v. McElrath*, 13 N. J. Eq. 24. The court says in manufacturing corporations, especially, the pledge of stocks affords the most ready and advantageous mode of effecting loans for the demands of business. "To require a transfer of the stock to the lender as security for the loan against the right of attaching or execution creditors will at once destroy the value of the security, or compel the borrower to devalue himself of his character as corporator to forfeit his control of the business of the corporation, of his right to dividends, and of all his other rights as a stockholder in the corporation. Why should the owner of stocks be deprived of the privilege of mortgaging or pledging his stock for the security of a loan, without stripping himself of all his rights of ownership, more than the owner of any other property?"

If the statute merely provides that the transfer shall be made on the books of the corporation, a transfer of the certificate properly indorsed will pass title as against creditors of the transferor, or subsequent purchasers from him. *Strange v. Houston & T. C. R. Co.* 53 Tex. 162. The court says such certificate and transfer are prima facie sufficient to authorize the holder to demand of the corporation the privileges and benefits to which the original holder would be entitled. This construction of the legal effect of the certificate of stock and its transfer is now required almost as a matter of necessity, both for the benefit of corporations, and of trade, since stocks in incorporated companies have become such an important basis for speculation and collateral security. To hold otherwise would virtually withdraw such stocks from all other than the home market.

In *Mooar v. Walker*, 46 Iowa, 164, where the question was as to the effectiveness of an attempted attachment of stock which was held to be informal, and therefore insufficient, the court stated that the section of the statute requiring a transfer of stock to be on the books of the company was intended as a protection to the company, and is designed to apply only where the sale or transfer of the stock in some way conflicted with the interests of the company.

Opposed to this rule are some early Massachusetts cases, which held that an attempted transfer was of no avail until it was registered.

things, transfers of stock, which book must be kept open to the inspection of any "stockholder, member, or creditor." That book is not required to be kept open to the inspection of private creditors of stockholders or the public, but to "any stockholder, member, or creditor." "Creditor," as used in that section, means a creditor of the corporation, not a private creditor of a stockholder. That being true, that part of § 2611 which provides that transfers of stock by written assignment and delivery are not valid, except as between the parties thereto, until the same are entered upon the books of the corporation, was not intended to protect the public, or a private creditor of a stockholder, but was intended for the protection of the corporation, its members and

creditors. It was not intended to make invalid the transfer of stock by indorsement and delivery, and not entered on the books of the corporation for the benefit of creditors of stockholders. And in case of a pledge of shares simply by indorsement and delivery, as in the case at bar, an attachment by a creditor of the assignor would only be valid against the interest of the assignor after the debt had been paid for the payment of which the stock had been pledged. It would be remarkable if, in the enactment of said § 2611, it was intended to apply to the creditor of a stockholder, that such creditor was not permitted to examine the record, where all transfers of stock must be entered. *Aulbach v. Dahler*, 4 Idaho, 654, 43 Pac. 322, is cited as sustaining appel-

Thus, in *Central Nat. Bank v. Williston*, 138 Mass. 244, it was held that the policy of the legislature had been to make stock liable to attachment, and therefore that a statute providing that shares may be transferred by an instrument which shall be recorded by the clerk of the corporation should be construed so as to make an unrecorded transfer of no avail as against a subsequent attachment by one having no notice of the assignment.

The delivery of a certificate of stock in a corporation, indorsed with a printed transfer with intention of transferring the stock as security for a debt, is of no avail as against an attaching creditor. *Boyd v. Rockport Steam Cotton Mills*, 7 Gray, 408; *Blanchard v. Dedham Gaslight Co.* 12 Gray, 213.

But that rule was changed by the legislature. See *Andrews v. Worcester, N. & R. R. Co.* 159 Mass. 64, 33 N. E. 1109.

In *Kellogg v. Stockwell*, 75 Ill. 68, the court, in discussing the effect upon the rights of assignor and assignee of a statutory provision requiring transfers of stock to be made on the books of the company, stated that the provision will be regarded as designed for the protection of the company, and perhaps a purchaser without notice.

Shall be transferred only on books.

Stronger than the phrase considered above, but in the main receiving the same construction, is the provision that the stock shall be transferable only on the books of the corporation. Such phrase is generally held to be for the sole protection of the corporation, and not to operate in favor of subsequent purchasers or creditors.

The certificate accompanied by a power of attorney to transfer the shares on the books of the company invest a holder for value with title as against subsequent transferees from the original holder, notwithstanding a provision in the charter of the company that the stock is transferable only on its books, such provision being intended merely for the protection and benefit of the company. *Mt. Holly, L. & M. Turnp. Co. v. Ferree*, 17 N. J. Eq. 117.

A charter provision that stock shall be transferable only on the books of the corporation has no relation to purchasers and creditors; so that a bona fide assignment entitles the assignee to a transfer on the books of the corporation. *L. R. A.*

ration which is not affected by a subsequent attachment of the shares as the property of the transferrer. *Clark v. German Security Bank*, 61 Miss. 611.

In *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454, Affirmed in 74 Mo. 77, the court says it would seem to be settled that the purpose of requiring a transfer of stock upon the books of a corporation is that the company may know who are its shareholders, and also to protect bona fide purchasers and creditors, and persons dealing with the bank. The shares are not in possession of the assignor merely because they stand in his name on the books of the corporation; and a bona fide transfer of the certificates of stock cannot be said to imply a secret trust. If this is to be considered as a race between two creditors, the creditor who has obtained actual possession of the stock seems to be in better position.

Statutory provisions that the stock of a corporation shall be transferred only on its books are intended only for the protection and benefit of the company, and a pledge of the certificate is good as against a subsequent purchaser from the pledgor who did not require the certificates to be transferred to him. *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 267.

Notwithstanding the statute provides that stock shall be transferred only on the books of the company, an unrecorded transfer is valid as against a subsequent attachment with notice. *Nicollet Nat. Bank v. City Bank*, 38 Minn. 85, 8 Am. St. Rep. 643, 35 N. W. 577.

So a transfer of stock not entered on the books of the company takes precedence over a subsequent attachment against the vendor. *Lund v. Wheaton Roller Mill Co.* 50 Minn. 36, 36 Am. St. Rep. 623, 52 N. W. 268.

In *Culp v. Mulvane*, 66 Kan. 143, 71 Pac. 273, it is said that, under the statutes of that state, a transfer on the books of the company is not essential to a valid transfer of the stock between the parties thereto, or those claiming under them. The statute in question provided that the stock should be transferable only on the books of the company in the manner prescribed by the by-laws. The court says, it has been held that such a provision must be limited in its application to the objects sought to be accomplished by the statute, which objects referred to matters growing out of the stockholder's relation to the company and its creditors, and does not make invalid an unregis-

lants' contention. That was a case of a creditor bringing suit against the corporation bank to recover on certificates of deposit amounting to about \$3,000, and the question involved there was whether a shareholder was liable for the unpaid balance on his stock, he claiming that he had sold the stock, but had failed to have the transfer entered on the books of the corporation. That action was brought to enforce a stockholder's liability by a creditor of the corporation, and is not in point. Kentucky has a statute almost, if not quite, identical with our § 2611, the construction of which was involved in the case of *Thurber v. Crump*, 86 Ky. 408, 6 S. W. 145. The court said: "But the section *supra* does not operate as a registration law in the

interest of the creditors of the stockholder, for the reason that the books of the company are not required to be kept open for the inspection of the public. The books are required to be kept open to the stockholders only. Outsiders have no right to demand an inspection of the books. Therefore the section in question was not intended for the protection of creditors. [As to them, the stock of the stockholder is as unrecorded stock.] As to the creditor, the stock of the stockholder is as though the stockholder held it in his pocket on some private individual, in which [latter] case a bona fide transfer for value is good against the transferer's creditors. So, in the case at bar, the recording of the transfer of stock on the books of the company, not being required

there transfer between vendor and vendee. The court further says, it is not to be denied that very respectable authorities hold the contrary view; but these are in the minority in number and hold the more unsatisfactory position. Continuing, the court says, it is a matter of common knowledge that the constant practice of the commercial world is to pass title to stock in corporations, or impose thereon the burden of collateral obligations by a simple passing from hand to hand of the indorsed paper certificates of stock. Vast volumes of business are transacted upon the faith that such transfer is perfectly good as between the parties thereto, who act in good faith, without a formal transfer upon the stock register. The transfer vests in the assignee as against the assignor, or in one claiming under him, the full beneficial use and right to the stock, whether it be called an equitable or legal right, or both.

Laws providing for the transfer of shares only on the books of the corporation are not intended for the benefit of creditors of individual shareholders. *Continental Nat. Bank v. Elliot Nat. Bank*, 7 Fed. 369.

Where the owner of certain stock of the United States, which was, under the statute, transferable only on the books of the government bank where it was registered, pledged it without making the transfer, and became indebted to the government, the court held that his administrator had a right to appropriate the proceeds of the stock to the satisfaction of the claim of the pledgee in preference to the claim of the government. *United States v. Cutts*, 1 Sumn. 133, Fed. Cas. No. 14,912. Mr. Justice Story says that the true interpretation of the statute is that, so far as the United States and the proprietors of the stock are concerned, no transfer is to be considered as complete and perfect, so as to pass the legal ownership of the stock and make the purchaser the legal owner, until the transfer has been entered upon the public books. No person can transfer the same as such owner, or entitle himself to receive the dividends, unless he stands as recorded proprietor on the books. I understand the statute to provide only for legal transfers, and to look to them and to them only; leaving the parties at liberty to create whatever equitable titles and liens they may choose, and to enforce them by the general remedies between them and their representatives which the jurisprudence of the country recognizes for that 67 L. R. A.

purpose. And the judge, in referring to the Connecticut decisions, stated that, unless they were capable of explanation on local grounds, but turn upon more general principles, they do not appear to him founded on as solid grounds as those which maintain a different doctrine.

A statute providing that stock shall be transferable only on the books of the corporation is intended to prescribe a mode of transfer as between the corporation and a stockholder in all matters relating to the internal government and management of the corporation, rather than between the stockholder and a third person; and therefore a pledge of the stock is good as against an attaching creditor, although it is not recorded on the books, although it may not be good as against one purchasing at an execution sale for value and without notice. *Masury v. Arkansas Nat. Bank*, 35 C. C. A. 476, 93 Fed. 603. In that case the purchaser was given full notice of the pledge prior to the sale, and bought with full notice of the fact that the equitable title to the stock was then in the pledgee.

But a year later the question as to the effect of the statute upon an absolute transfer again arose before the circuit court of another district in the same state, and that court, after distinguishing the *Masury Case* on the ground that that involved merely a pledge, held that, under the statute, an absolute transfer, if not recorded, was void, even in favor of attaching creditors with notice, and who became purchasers at the sale by merely crediting the amount of their bid upon their claim. *Fabrney v. Kelly*, 102 Fed. 403. The court says as against the attaching creditor the purchaser of the stock acquires no title from the transferer. The latter held both the legal and the equitable title. And, even if the attaching creditor was not an innocent purchaser, the transferee of the stock had no standing to question his title.

The latter decision finds some precedent in decisions of the state courts.

In *Trimble v. Vandegrift*, 7 Houst. (Del.) 451, 32 Atl. 632, the court ordered the sale under execution of stock standing in the name of the judgment debtor, notwithstanding the corporation had been notified that it had been sold prior to the levy of the execution. The ground of the order is not given, but the judgment creditor insisted that he was entitled to the order upon the ground that he claimed the

for the benefit of the stockholder's creditors, but for the benefit of the company and purchasers, the transfer of the stock without the transfer being entered upon the books of the company limited the passage of the legal title strictly to the vendor and vendee, as between the vendee and the company and a subsequent purchaser for value and without notice of the prior purchase at the time he had his transfer recorded on the books of the company; but, as between such purchaser and the creditors of the stockholder, the purchaser acquires a perfect legal title. See *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Lowell, Transfer of Stock*, 93, 95, 96." See also *Port Townsend Nat. Bank v. Port Townsend Gas & Fuel Co.* 6 Wash. 597, 34 Pac. 155; *Dan. Neg. Inst.*

4th ed. §§ 1708e, 1708f; *Cook, Corp.* 4th ed. §§ 486, 487, 490; 1 *Morawetz, Priv. Corp.* §§ 195 *et seq.*; *Angell & A. Priv. Corp.* 11th ed. § 354; *Spelling, Corp.* ¶ 498; *Drake, Attachm.* 5th ed. §§ 223, 245, 525, 608; *Lowell, Transfer of Stock*, §§ 93, 95, 96; *Wade, Attachm.* § 30. As numerous decisions from many state courts are cited in the text-books above referred to upon the question under consideration, we shall not cite them here. Appellant cites *Weston v. Bear River & A. Water & Min. Co.* 5 Cal. 186, 63 Am. Dec. 117; *Re Murphy*, 51 Wis. 519, 8 N. W. 419, and *Ottumwa Screen Co. v. Stodghill*, 103 Iowa, 437, 72 N. H. 669, as supporting his contention. Counsel evidently overlooked the fact that *Weston v. Bear River & A. Water & Min. Co.* 5 Cal.

sale to be void, and that this was the proper method of testing it, and that the sale had not been completed as against the execution because of failure to record the transfer on the books of the company.

In *State ex rel. Koons v. First Nat. Bank*, 89 Ind. 302, the court, in dealing with the right of a sheriff to transfer stock of a national bank upon its books, to one who had purchased at an execution sale, as against a claim of the bank that the stock had been pledged to a third person, said, if, as contended, the pledgee held the stock in pledge, he must have appeared upon the books of the bank as the owner of the stock. He could not have held it so in pledge unless it had been transferred to him on the books of the bank by the pledgeor before the levy and sale.

In *Commercial Bank v. Kortright*, 22 Wend. 348, 34 Am. Dec. 317, it is said that a general custom to make a transfer of stock by a blank indorsement a legal transfer cannot prevail as against a statute providing that the transfer can be made only on the books of the company; but it is also said that such a transfer will pass an equitable title which will give the assignee a preferable claim over any person who has not a prior equity, unless he has obtained a legal title to the stock by an actual assignment upon the books without notice of the equity.

It may be doubted, in view of *Chemical Nat. Bank v. Colwell*, 132 N. Y. 250, 30 N. E. 644, whether that represents the present rule in New York.

An early Massachusetts case held that, where the charter of the corporation provides that its shares shall be transferred only at the office of the corporation and on its books, an attempted transfer by assignment of the certificates, together with a power of attorney to effect the transfer, is ineffectual against a subsequent attachment by one having no notice of the attempted transfer, although notice has been given to the company. *Fisher v. Essex Bank*, 5 Gray, 373. The court says, it is important that the title be easily and certainly ascertained, that the mode of acquiring and aliening it be fixed and known, and that it may at any time be made available by a process of law for the debts of the owner. All these objects are most effectually accomplished by making the transfer at the office of the corporation the decisive act of passing the property, the legal, transferable, attachable interest. It 67 L. R. A.

is necessary to fix some act and some point of time at which the property changes and vests in the vendee, and it will tend to the security of all parties concerned to make that turning point consist of an act which, while it may be easily proved, does at the same time give notice to the transfer.

Not valid "except as between the parties," unless registered.

Even when the provision is that the transfer shall not be valid, "except as between the parties," unless entered on the books, the tendency of some courts is to hold that the word "parties" includes privies, and that, therefore, the transfer is valid as against attaching creditors and subsequent purchasers.

Under a statute providing that a transfer of stock shall not be valid, except as between the parties, until the same is recorded in the books of the corporation; and that the books shall be open for inspection of "stockholders or creditors of the corporation,"—an unregistered pledge is valid as against the right of a purchaser at a subsequent execution sale, against the one in whose name the title stands on the books. The court says, where all persons interested have not a right of access to the records of stock of the corporation, it has been almost universally held that an unrecorded transfer is good as against a purchaser at execution sale, against the owner of record, even although such purchaser has no notice whatever of such transfer. "The principle upon which a majority of the decisions seems to rest is that, by the express provisions of the statute, the transfer between the parties is good, and that, since the general rule in equity is that a purchaser at a judicial sale will take the real, instead of the apparent, interest of the judgment debtor, it follows that, by the application of such rule, the purchaser at a sale of such stock would, in equity, take only such interest therein as the judgment debtor had at the time the lien enforced by the execution sale attached." The creditors of the corporation being the only ones entitled to inspect the books, it must be assumed that the statute making an unregistered transfer invalid was for their benefit. *Port Townsend Nat. Bank v. Port Townsend Gas & Fuel Co.* 6 Wash. 597, 34 Pac. 155.

In *Kentucky Nat. Bank v. Avery*, 12 Nat. Corp. Rep. 111, it is said that, where the

186, 63 Am. Dec. 117, was again before the supreme court of California in 6 Cal. 425. In the latter case the court held that a party who purchases at sheriff's sale stock of an incorporation, knowing that the certificates of such stock have been previously hypothecated, is chargeable with notice of such fact, and takes subject to the claim of the pledgee, even where the transfer has not been made on the books of the corporation. In *People ex rel. Mead v. Elmore*, 35 Cal. 653, the court, after citing *Weston v. Bear River & A. Water & Min. Co.* 5 Cal. 186, 63 Am. Dec. 117, and 6 Cal. 425, and *Naglee v. Pacific Wharf Co.* 20 Cal. 529, says it was held in those cases "that transfers of stock which have not been entered on the books of the company, as provided in the statute, are nevertheless

valid as against all the world, except subsequent purchasers in good faith without notice." The same doctrine is reaffirmed in *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600, and *Speckels v. Nevada Bank*, 113 Cal. 272, 33 L. R. A. 459, 54 Am. St. Rep. 348, 45 Pac. 329. The doctrine as laid down in *Weston v. Bear River & A. Water & Min. Co.* 5 Cal. 186, 63 Am. Dec. 117, has been greatly modified, if not overruled entirely, by later decisions. The above-cited cases from Wisconsin and Iowa cite the case of *Weston v. Bear River & A. Water & Min. Co.* as authority. Those courts evidently were not cited to the same case in 6 Cal. and later decisions of the California court limiting and distinguishing the first decision. The California supreme court is evidently inclined to take a view much more

owner of stock sells and delivers it to a bona fide purchaser for value, he passes all that he has—a perfect title—to his purchaser, who *eo instanti* becomes the absolute owner of the legal and equitable title to the same. There is no title or interest, legal or equitable, to his stock remaining to be attached or levied on by the creditors of his vendor. The attaching creditor can acquire no higher or greater right to the stock than the defendant in the attachment owned at the time of the levy. And it is immaterial that the statute provides that transfers of stock shall not be valid, except as between the parties thereto, until they are regularly entered on the books of the company.

Under a statute providing that transfers of stock shall not be valid, except as between the parties thereto, until entered on the books of the corporation: but which makes the books subject only to the inspection of the stockholders,—a transfer without registration is good as against creditors of the former owner, but not as against subsequent purchasers without notice. *Thurber v. Crump*, 86 Ky. 408, 6 S. W. 145.

And in *American Wire-Nail Co. v. Bayless*, 91 Ky. 94, 15 S. W. 10, it is said that a transfer on the books of the corporation is merely to protect the company and others who might propose to purchase the stock.

So *MAPLETON BANK v. STANBROD* held that a statutory provision that a transfer of stock is not valid, except between the parties, until it is entered upon the books of the corporation, is not intended as a protection to creditors of the stockholder, but is intended to protect the company, its members, and creditors. Therefore, a transfer in pledge, without entry on the books, is good as against subsequent attaching creditors of the transferrer. The court held that creditors of shareholders had no right of access to the stock books, and the statute could not be presumed to have been enacted for their benefit.

With regard to the effect of this phrase, the opinions of the courts are more evenly divided, however, and there is a respectable amount of authority the other way.

The notice to the intending purchaser, and the ineffectual attempt to secure a transfer, have been in some cases held sufficient to carry 67 L. R. A.

the decision in favor of the pledgee, as will appear in subsequent subdivisions.

Under a statute providing that the transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the corporation, a transfer is not valid as against subsequent attaching creditors of the assignor without notice until it has been so entered. But by that statute the books were made subject to inspection by any person desiring the same. *Ft. Madison Lumber Co. v. Batavian Bank*, 71 Iowa, 270, 60 Am. Rep. 789, 32 N. W. 336. The court said there is no question as to the preponderance of authority. It is clearly in favor of the attachment. But it continues: "We are not influenced more by this fact than what seems to be the plain language and intent of the statute, and the difficulty and uncertainty which would often attend securing debts by attachment of stock, if stock, as against attaching creditors, can be transferred by mere delivery of the certificates, and if the books provided expressly for inspection by such creditors, are to serve especially the purpose of a false scent."

And that case was followed in *Ryan v. Campbell*, 71 Iowa, 760, 32 N. W. 340, and *Commercial Nat. Bank v. Farmers' & T. Nat. Bank*, 82 Iowa, 192, 47 N. W. 1080.

And in *Perkins v. Lyons*, 111 Iowa, 192, 82 N. W. 486, the doctrine was carried to the extent of holding that an attempted transfer was not valid, even where the creditor had actual notice and the assignee requested the transfer officer to make the transfer, and he failed to do so. The court said that such a request did not exhaust all the reasonable means at the disposal of the assignee to effect the transfer: the fact being that at the time the request was made the stock book was within easy reach and there was nothing to prevent the transfer being made immediately; but that the assignee did not insist on that being done, but left it to the secretary to do, which the latter forgot.

The California statute of 1850 expressly provided that no transfer of stock should be valid, except as between the parties thereto, until the same had been entered on the books of the company. And under this statute it was held that the rights of the attaching creditor cannot be defeated by a prior unregistered transfer. *Weston v. Bear River & A. Water & Min. Co.* 5 Cal. 186, 63 Am. Dec. 117. The judge writing the

liberal to the pledgee than that taken in the *Weston Case*, but refrains from doing so because of its regard for the principle of *stare decisis*. It is not necessary for us to extend this opinion, for from an examination of the authorities above cited the view we take of the question under consideration is fully sustained, and the reasons for that rule of construction are forcibly and succinctly set forth in the authorities above cited, and at § 490 of Cook on Corporations [5th ed.] the author closes his discussion of this question as follows: "It may be added, in regard to this whole subject, that the decisions and statutes of the various states show clearly that public policy and the legitimate demands of trade have gradually caused the courts and legislatures of the various states to establish the rule that

a sale or pledge of certificates of stock has precedence over a subsequent attachment levied on that stock for the debt of the vendor or pledgeor, and that the failure of the pledgee or purchaser of the certificate to obtain a registry on the corporate books is not fatal to his interest in the stock. In the great commercial centers, where certificates of stock pass from hand to hand, and are pledged to banks and financial institutions daily to secure great sums of money, the necessity of such a rule is imperative."

The judgment must be sustained, and it is so ordered. Costs of this appeal are awarded to the respondents.

Quarles, Ch. J., and Stockslager, J. concur.

opinion said: I shall not dispute that, in the absence of legislation, the transfer of the stock would be valid; but I regard the statute as imperative in its prohibition. He continues: It cannot be fairly contended that this provision was designed as a protection to the company alone.

A subsequent hearing in that case introduced the question of the effect of notice, and changed the decision. 6 Cal. 425.

The earlier decision was followed in *Naglee v. Pacific Wharf Co.* 20 Cal. 530, where the court said, with respect to the two decisions in the *Weston Case*, that it might not be quite clear upon what principle the distinction between them rests. If by the operation of the statute the transfer was absolutely void against all persons except the parties, and for that reason was void against the rights of an attaching creditor, there seems to be some difficulty in saying that this right of the attaching creditor can be defeated by giving him notice after his lien has attached, or giving bidders at the sale notice of a prior transfer.

The intention of the legislature by the passage of the California statute was to prevent frauds on third persons, as well as to protect the company; and under it the books of the corporation are the only criterion to determine the question of ownership. *Strout v. Natoma Water & Min. Co.* 9 Cal. 78.

In *West Coast Safety Faucet Co. v. Wulff*. 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622. It is stated that it is settled law in this state that one who purchases at execution sale shares of a corporation, standing on the books of the corporation in the name of the judgment debtor, is entitled to have the certificate of such shares reissued to him as such purchaser, if at the time of the purchase he acts in good faith, and without notice that the outstanding certificate has been assigned or pledged to some person other than the judgment debtor. In order that an assignee or pledgee of a certificate may protect his rights, as against a purchaser at execution sale, he must cause a reissue to him of a certificate, or he must serve notice on the corporation that he holds the certificate as such assignee or pledgee.

As between a general assignee for creditors and a subsequent attaching creditor of stock which had already been pledged for a loan, a statute providing that no transfer of stock shall

be valid, except as between the parties, until the same shall be entered on the books of the company, will defeat the unrecorded title of the assignee. *Lyndonville Nat. Bank v. Folsom*, 7 N. M. 611, 38 Pac. 253.

Under a statute providing that no transfer shall be valid, except as between the parties thereto, until the same shall have been entered upon the books of the corporation, an unrecorded transfer is not valid as against a subsequent execution levied upon the stock as property of the registered owner. *Re Murphy*, 51 Wis. 519, 8 N. W. 419. The court says that, under the language of the statute, all transfers of shares not entered on the books are invalid as to attaching or execution creditors of the assignor, as well as to the company and subsequent purchasers in good faith. All transfers not so entered on the books are absolutely void because they are made void by the statute.

The Connecticut statutes provide that stock may be pledged by delivery and a power of attorney for their transfer, but that no such pledge without an actual transfer of the stock shall be valid against any person but the pledgeor and his personal representatives until a copy of the power shall have been filed with the treasurer or secretary of the corporation. *First Nat. Bank v. Hartford Life & Annuity Ins. Co.* 45 Conn. 22.

A transfer of stock not recorded on the books of the corporation is of no avail as against a subsequent assignment by the transferor for the benefit of creditors. *Shipman v. Etina Ins. Co.* 29 Conn. 245. But in that case the court says most striking and decisive badges of fraud attach to the transaction. The original owner held the apparent title on the books of the corporation, and dealt with the stock as his own, thus exhibiting to the world every *inducium* of ownership, and exercising the same control and dominion over the stock as before its assignment.

Where a married woman owning stock in a corporation attempted to pledge it for the debt of her husband by delivering the certificates and signing a written statement of the pledge, but without giving any power to transfer the stock on the books of the corporation, and subsequently sold the stock to the corporation, it was held that the pledgee had no claim against her estate on the ground that her sale was wrongful as to him, since no valid pledge

WEST VIRGINIA SUPREME COURT OF APPEALS.

Jeff LIPSCOMB, Admr., etc., of P. Lipscomb, Deceased,
v.

Levi Z. CONDON *et al.*

Albert N. HORNER, *Appt.*

(.....W. Va.....)

*1. By the common law, shares of stock in a corporation, being in the nature of choses in action, intangible property incapable of manual seizure, are not subject to execution or attachment. They are by statute.

*Headnotes by *POFFENBARGER, P.*

had ever been effected. *Platt v. Hawkins*, 43 Conn. 139.

Forbidding transfer until subscription paid.

A statute providing that there shall be no transfer of shares until the subscriptions are all paid in does not prevent a transfer by assignment from giving a right which is superior to that of a subsequent attaching creditor of the original owner. *Quiner v. Marblehead Social Ins. Co.* 10 Mass. 476.

But in *Coleman v. Spencer*, 5 Blackf. 197, which was a contest between an assignee and execution creditor of a subscriber to stock in the state bank, the court held that property in the form of such stock was entirely the creature of the charter establishing the institution, and must be governed, as to the manner of acquiring, holding, and transferring it, by the provisions of that instrument. Therefore, it was held that, where the original subscriber defaulted in the payment of the first call, and assigned the stock to one who made the payment, but who did not transfer the stock on the books, the stock was subject to execution against the subscriber on the ground that, prior to the payment, there was nothing to assign, and after the payment the assignment could be made only on the books of the bank.

Attachment of a subscriber's interest in the stock of a corporation before issuance of the certificates prevails over a prior transfer of his interest therein made by registered mortgage, but without giving actual notice thereof to the corporation. *Cates v. Baxter*, 97 Tenn. 443, 37 S. W. 219. The court says the transfer was not completed before the shares were attached, and in such cases the shares are subject to attachment by the creditors of the subscriber.

Provision for notice.

Shares of stock are not credits within the meaning of a statute providing that a pledge of credits not negotiable shall not be complete until notice is given to the debtor. *Plott v. Johnson*, 33 La. Ann. 1286. The court says that, if the question was an open one, it should be disposed to hold that the stock was within the provision of the statute, but that the question was foreclosed by former decisions. Therefore, a pledge not transferred on the books of the company is good as against a subsequent execution.

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2. Section 9 of chapter 106 of the Code of 1899, giving the plaintiff in an attachment proceeding a lien on the personal property of the debtor from the time of the levying of the attachment, or serving a copy thereof on the garnishee, on all the personal property, choses in action, and other securities of the defendant in the hands of the garnishee, and on any real estate of the debtor levied on by virtue thereof, from the selling out of the same, includes shares of corporation stock in the terms "personal property, choses in action, and other securities."

3. Such shares are personal estate, and a species of incorporeal property.

4. In a proceeding by the creditor of a

Subjecting to execution.

A statutory provision that shares of stock may be levied on does not apply to stock that has been pledged, and the certificates, properly indorsed, delivered to the pledgee, although no transfer has been made on the books of the corporation. *Weller v. J. B. Pace Tobacco Co.* 5 Ry. & Corp. L. J. 5, 2 N. Y. Supp. 292.

But it has been held that, under a statute making property subject to execution which remains in the order and disposition of the judgment debtor, stock standing in his name on the books of the corporation is so subject, although the certificates have actually been transferred to another. *Brock v. Ruttan*, 1 U. C. C. P. 218.

Transfer "to give share in enterprise."

A deposit as collateral security of shares in a corporation whose charter provides that the transfer shall be entered on the corporation's books, and that, until the transfer is made, the purchaser shall have no share in the undertaking of the corporation, will give the depositary a lien,—especially if notice of his rights is given to the corporation,—which will take precedence of the rights of a subsequent assignee in bankruptcy of the depositor. *Ex parte Dobson*, 2 Mont. D. & DeG. 685.

Stronger phrases.

The language of the statute may be such as to leave no doubt that the legislature meant to subject all stock not transferred on the books to the claims of creditors.

The Mississippi act of 1892 provides that the legal title to and beneficial interest in corporate stock shall remain in the person appearing on the books of the company, as to creditors, until after a bona fide transfer has been made on the books. *Goyer Cold Storage Co. v. Wildberger*, 71 Miss. 438, 15 So. 235.

A creditor who has levied an attachment on stock before receiving notice of its transfer is a bona fide creditor within the meaning of a statute which requires registration to perfect a title as against such creditors. *Berney Nat. Bank v. Pinckard*, 87 Ala. 577, 6 So. 364.

The Colorado statute provides that no transfer of stock shall be valid for any purpose whatever, except to render the person to whom the transfer is made liable for the debts of the

shareholder to subject his shares to the payment of his debt, the corporation in which the shares are held should be made the garnishee.

5. A certificate of stock is not the stock itself, but is evidence of its existence and ownership.

6. Though, when issued, such certificate is a muniment of title, it is not essential to the existence of the property represented by it.

7. A certificate is not necessary to a sale of shares. The beneficial interest in them is assignable by parol, the ownership passing immediately on consummation of the sale, by force of the contract, as in the case of ordinary choses in action, and not by operation of law.

8. A sale of shares for which no certificate has been issued may be evi-

denced by an informal written instrument, executed and delivered by the transferor to the transferee, without a power of attorney entitling the latter to have the same transferred on the books of the company.

9. In this state a shareholder may, upon his demand, obtain a certificate of his shares, but, unless demanded by him, it need not be issued; and he may freely transfer the shares without it if they are fully paid up, or security for the balance due on them, satisfactory to the board of directors, be given.

10. Section 21 of chapter 53 of the Code of 1899, requiring corporations to keep transfer books and the shares to be assigned therein, is intended for the protection and convenience of the corporation and its shareholders.

11. The books and papers of a private

company, unless it shall have been entered on the books of the company. The court says of this statute: It is a clear provision, taking from the owner of stock the right to transfer it in accordance with the known rules of the common law, and substituting therefor another and different mode. This change was doubtless made for the purpose of furnishing record evidence of the title, and, in view of the plain and explicit language employed, the statute cannot be disregarded. And the court held that, notwithstanding an unregistered transfer, the stock was still subject to attachment at the suit of the creditors of the original owner. The court says: We are aware that in some jurisdictions somewhat similar provisions have been held to relate solely to the government of the corporation in the transaction of its corporate business, to advise it of the names of those entitled to vote, receive dividends as stockholders, etc., and that creditors should not be allowed to take advantage of any failure to comply with such requirements. Such decisions have usually, however, been based upon statutes essentially dissimilar from those here under consideration, and frequently upon the construction to be given a by-law of the company, in the absence of express statutory restriction. But the decided weight of authority, as well as the better reason, we think, unite in support of the conclusion that when, as in this state, the statute of the state, as applicable to corporations, requires that shares shall be transferred in a particular mode, there must be at least a substantial compliance with the requirement in order to protect the property against future assignments or levies. But the Canadian court held that, under a statute providing that no transfer of stock shall be valid for any purpose whatever, save only as exhibiting the rights of the parties thereto towards each other, until entry thereof has been duly made in the books of the corporation, an unregistered transfer is valid as against a subsequent execution levy. *Morton v. Cowan*, 25 Ont. Rep. 529. The trial judge says the statute admits, recognizes, and declares that a transfer may be valid as exhibiting the rights of the parties thereto towards each other, and that concludes all that is to be ascertained in this case. The provision is not pointed at dealings between the holder and others, pending which an execution comes in. The sale, which is an act of the law, is not permitted to have

a tortious effect so as to cut out the rights of the bona fide assignee or pledgee. And this decision was affirmed.

Where the statute provides that title to stock shall not pass from the proprietor until the transfer has been so far entered on the corporate records as to show the names of the parties thereto, an unrecorded transfer of which notice has been given to the corporation, but which has not been entered on the books, is invalid as against a subsequent attachment against the transferor. *Fiske v. Carr*, 20 Me. 301.

And that ruling was followed in *Skowhegan Bank v. Cutler*, 49 Me. 315, where, however, the question whether the statute was intended for the protection of the corporation or creditors and purchasers of the record owner is open to debate, the tendency of strong courts is to give it the former effect, and to leave the business world free to deal with the title on the basis of the possession of the certificates.

The attitude of the New York courts is well illustrated by the recent case of *Chemical Nat. Bank v. Colwell*, 132 N. Y. 250, 30 N. E. 644, where although the question did not arise between a transferee and persons claiming under a transferor, the court said that the provision of the statute that no transfer of stock "shall be valid for any purpose whatever," except to render the transferor liable for the debts of the company, until it shall have been entered on the transfer book, is only for the protection of the corporation, and does not operate to prevent the passing of the entire legal and equitable title in the shares as between the parties by delivery of the certificate properly indorsed.

And in *Sabin v. Bank of Woodstock*, 21 Vt. 353, where the question arose as to the rights between one in whose name the stock stood on the books of the corporation and the corporation which attached the stock as belonging to another, the court held that, since the one in whose name the stock stood was not a bona fide purchaser until after the equities of the corporation attached, the rights of the corporation should prevail; but the court says, we should not be inclined to question that a bona fide purchaser of shares of one in whose name the shares stood on the books of the corporation would acquire a good title to the stock as against the world. In that case the charter provided that no transfer should be valid until

corporation under the laws of this state are not public, but private, records and documents.

12. An unregistered transfer of shares of corporation stock, for which no certificate has been issued, if made for a valuable consideration and without fraud, vests in the transferee a title to the shares superior to the claim of a subsequent attaching creditor of the transferor.
13. In the absence of fraud and statutory regulations, a creditor proceeding by execution or attachment only obtains such rights in the property seized as his debtor had at the time of the seizure.
14. The rights of a creditor respecting shares of corporation stock for which certificates have not been issued, alleged to be the property of his debtor, are the same as in the case of an ordinary chose in action.
15. When, under the provisions of § 23

of chapter 106 of the Code of 1899, a petition is filed in a suit in equity founded upon an attachment, setting up title by purchase, and the plaintiff in the cause relies upon fraud in the alleged purchase to defeat the claim of title so set up, the trial of the issue must be upon the petition without any other pleading, and by jury, unless trial by jury is waived.

16. In such case it is reversible error to hear and determine the issue upon the petition, and answer thereto, and depositions of witnesses, according to the rules and principles governing courts of equity.
17. Waiver of the right of trial by jury must be by consent entered of record. It cannot be merely inferred from the fact that the court tried the case without objection.

(December 6, 1904.)

It was recorded on the books of the corporation.

IV. *By-law requiring transfer on books.*

The almost overwhelming weight of authority is to the effect that a provision requiring transfer on the books of the corporation merely in its by-laws does not prevent a pledgee of the stock from acquiring a good title as against subsequent attaching creditors of the pledgeor. *Seelgson v. Brown*, 61 Tex. 114; *Tombler v. Palestine Ice Co.* 17 Tex. Civ. App. 596, 43 S. W. 896; *South Texas Nat. Bank v. Texas & L. Lumber Co.* 30 Tex. Civ. App. 412, 70 S. W. 768; *Hamilton v. San Antonio Foundry Co.* (Tex. Civ. App.) 51 S. W. 1104.

Failure to record a transfer, although required by the by-laws of the corporation, does not subordinate the rights of the transferee to subsequent attachment, or execution against the transferor. *Telford & F. Turnp. Co. v. Gerhab* (Pa.) 13 Atl. 90.

A transfer by assignment of the certificates properly indorsed divests the title of the assignor, and leaves nothing in him which can be reached by subsequent attachment, although the stock remains in his name on the books of the company. And it is immaterial that the by-laws of the company require the transfer to be made on the books. *Finney's Appeal*, 59 Pa. 398.

Where the owner of stock had transferred it into the name of another, and then assigned the certificates to a third person as security for a loan, no rights to the stock could be secured by an attachment against the assignor, although a by-law of the corporation required the transfer to be made on the books; since he had neither the legal, nor the equitable, title. *Beckwith v. Burroughs*, 13 R. I. 294.

A transfer by assignment and delivery of the shares of stock, together with notice to the corporation, gives a right superior to a subsequent attachment, although a by-law requires transfers to be upon the books of the corporation. *State Ins. Co. v. Gennett*, 2 Tenn. Ch. 100.

Where stock was pledged as collateral security and subsequently claimed by assignees for the benefit of creditors of the pledgeor, the court says it is true the stock is transferable only on the books of the corporation; but this simply means that the corporation will not

recognize anyone as the owner of stock who is not the transferee on its books of the person to whom the certificates were issued. But this has nothing to do with the rights which other persons may acquire as between themselves and the stockholder by the pledge and delivery of the certificates; and it was held that the pledge prevailed as against the claims of the assignees. *Blouin v. Hart*, 30 La. Ann. 714.

Although a by-law of the corporation provides that all transfers of stock shall be recorded on the stock books, a bona fide sale of the stock, together with a power of attorney to transfer it and a delivery of the certificates, is complete; and it is not necessary to make the transfer on the books to protect the stock against seizure by creditors of the transferor. *Smith v. Crescent City L. S. L. & S. H. Co.* 30 La. Ann. 1378. The court says the certificates of stock were the evidences of ownership, the title of the incorporeal rights represented by them, and these certificates were delivered to the purchaser. Having the certificates in their possession, the purchasers had a complete guaranty that the corporation would not transfer the stock to their prejudice, since the corporation had bound itself to hold these shares subject to transfer by surrender of the certificates. The thing sold, therefore, had passed beyond the control of the seller and into the power, possession, and control of the purchaser. The distinction is plain between requirements of the law in order that title and possession shall vest in the purchaser, and requirements of a by-law in order that the holder and owner of a title to shares shall receive from the corporation a certificate of ownership in his name, and be admitted to the rights and privileges of a corporation.

Stock in a corporation, if it actually belongs to another, cannot be sold under execution against the one in whose name it stands, although a by-law requires transfers to be made in the presence of one of the officers of the company. *Oerther v. First Nat. Bank*, 1 Legal Record Rep. 60 (Brightly's Dig.).

In *Gilbert v. Manchester Iron Mfg. Co.* 11 Wend. 628, where the court states that by-laws which prohibit a transfer, except on the books of the company, do not prevent the purchaser from acquiring all the title that the transferor had, although the transfer is not entered on the books, there is a *dictum* to the effect that, if

A PPEAL by intervener from a decree of the Circuit Court for Tucker County in favor of plaintiff in a proceeding brought to subject stock standing in the name of Levi Z. Condon upon the books of the corporation to the payment of Condon's debts. *Reversed*.

The facts are stated in the opinion.

Mr. W. B. Maxwell, for appellant:

The statute expressly provides that the owner of stock in a corporation may, for a valuable consideration, sell the same and deliver to the purchaser the certificates of stock, etc., and thereupon the title of the former owner shall vest in the purchaser so far as may be necessary to effect the sale, not only as between the parties, but also as against creditors.

the stock is under encumbrance at the time of transfer, it remains so.

The sale under an attachment against the original owner after he has delivered the certificates properly indorsed as collateral security passes no title to the purchaser, notwithstanding the by-laws of the corporation provide that no transfer shall be valid unless made on the books of the corporation. *Smith v. American Coal Co.* 7 Lans. 317. The court said that the pledgee had parted with all his interest in the stock; he had no interest in it which could be the subject of attachment after he parted with it.

By-laws of a corporation requiring transfers of stock to be entered on its books are for the benefit of the company only. Under such a by-law, it is sufficient to defeat the rights of attaching creditors that the right of another has attached to the stock before the levy of the attachment. *Goyer Cold Storage Co. v. Wildberger*, 71 Miss. 438, 15 So. 235.

A by-law providing that all transfers of stock shall be in a book to be kept for the purpose is merely for the convenience of the company itself, and therefore a transfer is valid, although not entered in the books, as against a subsequent attaching creditor. *Sargent v. Essex Marine R. Corp.* 9 Pick. 202.

A provision of a by-law of the corporation that the stock shall be transferred only on the books of the corporation refers merely to sales, and not to pledges; and therefore a pledge is good without transfer on the books. *Crescent City Seltz & Mineral Water Mfg. Co. v. Debleux*, 40 La. Ann. 135, 3 So. 726.

A by-law of the corporation providing that the stock shall be transferred only on the books of the company is not intended for protection of the creditors of the stockholders; and therefore a transfer, although not made on the books of the company, is valid as against subsequent attachment. *Bushnell v. Hall*, 9 Ky. L. Rep. 684.

Stock which has been assigned is not subject to execution levy against the original owner, although the transfer has not been made upon the books of the corporation as required by its rules. *Com. v. Watmough*, 6 Whart. 117. The ruling in that case is placed upon the ground that, under the statute authorizing levy upon stock, it is made liable only to be taken for the debts of the true owner. The court says: That stock shall be liable for the payment of the

Code, chap. 53, § 37; *Donnelly v. Hearn-don*, 41 W. Va. 519, 23 S. E. 646.

A bona fide purchaser of chattels, who gets possession thereof before a levy of an attachment thereon, gets good title to such chattels.

Poling v. Flanagan, 41 W. Va. 191, 23 S. E. 685.

The dominion of a man's property belongs to him, and not to his creditors. They can subject to their demands only the right which remains in him, and not that from which he has lawfully parted.

Davis v. Turner, 4 Gratt. 426; *Drake*. Attachm. §§ 223, 245.

If the transfer has been voluntary and without consideration, yet plaintiff cannot assail it unless he has clearly shown some

debts of the true owner is perfectly just and equitable; but that it shall be liable, also, to the payment of the debts of the persons in whose name it stands would certainly be very unjust. The court, in response to the argument that the same rule should be applied as is applicable to actual transfer of possession of personal property, and that the only mode of effecting a notorious transfer is to effect it on the books of the corporation, says: Stock, "from its very nature, is incapable of such possession so as to make it known or notorious who has the use or benefit of it, and thus raise a general belief in regard to the ownership thereof; even its existence may be unknown, excepting comparatively to but few persons. The only evidence of it that can be safely trusted as to this is the books of the bank or the corporation; but they, being of a private nature, are not open to public inspection. Hence it is, that the ownership of such stock, though held by the owner in his own name on the books of the corporation, is not supposed to have given him a general credit with the world. And for the same reason, if held by another in trust for him, the trustee is never supposed, by reason of its standing in his name on the books of the corporation, to have obtained a general credit on account of it. It is not, therefore, to apprise the world and prevent it from giving a false credit to the apparent owner of stock that the transfer thereof is required to be made on the books of the bank in the presence of one of its officers."

Transfers of national-bank stock.

Within the rule that a by-law requiring transfers to be recorded on the books of the corporation does not affect the rights of transferrers as between themselves are the cases dealing with transfers of national-bank stock.

The question whether shares in a national bank can be attached after they have been assigned but the transfer not entered on the books of the corporation is governed, not by the law of the state where the bank is located, but by the law which created the bank. *Continental Nat. Bank v. Elliot Nat. Bank*, 7 Fed. 369.

Under the provisions of the United States banking law, which provides that shares shall be transferred on the books of the association in such manner as may have been prescribed by the by-laws of the association, and a by-law

covinous device, or circumstance, indicating an actual fraudulent intent.

Greer v. O'Brien, 36 W. Va. 277, 15 S. E. 74; *Arnold v. Slaughter*, 36 W. Va. 589, 15 S. E. 250.

Unless the relationship of the parties is such as to dispense with the rule, or shift the burden of proof and place it upon the defendant; or unless the transaction is such as to be held to be fraudulent *per se*,—the plaintiff must prove fraud, and such fraud cannot be presumed.

Wood v. Harmison, 41 W. Va. 386, 23 S. E. 560; *Oberlin College v. Blair*, 45 W. Va. 812, 32 S. E. 203; *First Nat. Bank v. Bowman*, 36 W. Va. 649, 14 S. E. 989; *Clay v. Deskins*, 36 W. Va. 350, 15 S. E. 85; *United States v. Hancock*, 133 U. S. 193, 33 L. ed.

providing that the stock shall be transferable only on the books of the association, an unregistered transfer takes precedence over a subsequent attachment by a creditor without notice. *Continental Nat. Bank v. Elliot Nat. Bank*, 7 Fed. 369. This ruling is placed on the general ground that an attaching creditor must take his debtor's property subject to all equitable, as well as legal, charges, liens, or opposing titles, in the absence of any statute giving him a better right.

Stock of the bank of the United States is not subject to attachment against the one in whose name it stands on the books of the bank after he has transferred the certificates properly indorsed to another. *United States v. Vaughan*, 3 Binn. 394, 5 Am. Dec. 375.

A transfer of national-bank stock, good at common law, is good as against subsequent attaching creditors. *Doty v. First Nat. Bank*, 3 N. D. 9, 17 L. R. A. 259, 53 N. W. 77.

In the absence of any by-law of a national bank regulating the mode of transfer, preference will be given to an unrecorded transfer over subsequent attaching creditors of the original owner. *Scott v. Pequonnock Nat. Bank*, 21 Blatchf. 203, 15 Fed. 494.

A national bank may be held liable in damages for refusal to recognize the title of the transferee, whose transfer was not recorded as required by its by-laws, as against a title acquired under a subsequent attachment against the original owner. *Hazard v. National Exch. Bank*, 26 Fed. 94.

Opposing decisions.

The courts in a few states have taken the opposite view of this question.

In *Northrop v. Curtis*, 5 Conn. 246, where executions were levied on shares of stock at the time transfers were filed with the clerk, the principle contention was that no legal title rested in the judgment debtor because the by-laws of the company had not been complied with when he took his title. The court held that the title was properly in him subject to levy, and judgment was given by a divided court in favor of the execution creditor, without any extended discussion of the effect of the attempted retransfer before the levy of the execution; but the judge whose opinion is reported in the case says that the by-law declares "that no transfer or assignment shall be valid," un- 67 L. R. A.

601, 10 Sup. Ct. Rep. 264; *Colorado Coal & I. Co. v. United States*, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; *Baltzer v. Raleigh & A. Air Line R. Co.* 115 U. S. 634, 29 L. ed. 505, 6 Sup. Ct. Rep. 216; *Farrar v. Churchill*, 135 U. S. 615, 34 L. ed. 249, 10 Sup. Ct. Rep. 771.

Messrs. Dalley & Bowers also for appellant, on rehearing.

Messrs. F. M. Reynolds and J. P. Scott for appellee.

Poffenbarger, P., delivered the opinion of the court:

This is a suit in equity against a nonresident defendant to subject to the payment of a debt, amounting to \$5,000 and interest, by process of attachment and garnishment, cer-

less it is registered, thus suspending the validity of the act of transfer on the registration, thereby plainly intimating that, until the registration was effected, the stock must be regarded as that of the transferor. The judge says it was undoubtedly the legislative object to protect the community in their purchases of stock by rendering the books reasonable evidence of ownership; and, therefore, he held that the assignment need not be on the book itself, but that it is sufficient if a record of the assignment appear there.

As against attaching creditors of the transferor, a mere delivery of the certificate is not sufficient to transfer the title, but the rights of the transferee originate with the entry of the transfer on the books of the company, where the charter provides that the shares of the company shall be transferred only on the books of the company in the manner directed by the by-laws, and the by-laws provide that no assignment or transfer shall be valid, unless made in the form prescribed by the directors and registered by the clerk. *Northrop v. Newton & B. Turnp. Co.* 3 Conn. 544. The court held that the assignment of stock must be in the mode so declared, and that the method of conveying at common law was entirely suspended. Under the provisions of the statute and by-laws, the attempted assignment was of no avail until it was actually registered on the books of the company at full length.

Where, under authority of the legislature, the company enacts a by-law providing that no transfer of stock shall be good and valid until received for record by the clerk, who shall enter on the transfer the time he receives the same, which shall bear date accordingly, an attachment of the stock as the property of the one in whose name it appears on the books of the company will take precedence of a prior transfer which is not received for record until after the attachment. *Oxford Turnp. Co. v. Bunnell*, 6 Conn. 552.

A transfer of stock, not entered on the books of the corporation as required by its by-laws, is invalid as against an attaching creditor without notice; and it is immaterial that the transfer is part of an assignment for creditors which is recorded in the office of the clerk of court as required by statute, since the statutes governing such assignments do not supersede the necessity of the transfer on the books of the company. The court says an attaching creditor is

tain shares of stock in a corporation, which, the bill alleges, are the property of the defendant. The case presents a number of questions which seem never to have been passed upon by this court.

In the absence of any statute upon the subject, shares of stock in a corporation are not subject to execution. *Cook*, Corp. § 480; *Clark & M. Priv. Corp.* § 377, p. 1147. By that law intangible property incapable of manual seizure and delivery cannot be taken on execution. Attachment, being a purely statutory remedy, reaches only such property as is made subject to it by the statute. Hence, if the statutes governing the remedy by attachment do not make shares liable under it, it is clear that they cannot be subjected to the payment of debts

by such proceeding. *Drake*, Attachm. § 244; *Haley v. Reid*, 16 Ga. 437; *Foster v. Potter*, 37 Mo. 525; *Howe v. Starkweather*, 17 Mass. 240.

By § 20 of chapter 53 of the Code of 1899 it is declared that such shares shall be deemed personal estate. Section 9 of chapter 106 gives the plaintiff in an attachment proceeding a lien from the time of the levying of his attachment or serving a copy thereof, as provided in that chapter, "upon the personal property, choses in action, and other securities of the defendant against whom the claim is, in the hands of, or due from any such garnishee, on whom it is so served." By these provisions the legislature has expressly made choses in action liable to garnishment; and shares of corpo-

not bound to look beyond the books of the company to ascertain whether his debtor has made an assignment of the stock standing in his name. *Dutton v. Connecticut Bank*, 13 Conn. 493.

If the by-law provides that transfers of stock shall be made only upon the books of the corporation, a transfer without entry on the books is not valid as against a subsequent execution levied upon the stock as the property of the original owner without notice of the transfer. *People's Bank v. Gridley*, 91 Ill. 457. The court states that the statute making shares of stock subject to levy, sale, and execution contemplates that, as against a judgment creditor, the title to the stock can pass only by transfer on the company's books. The court says the cases in New York and New Jersey recognizing a doctrine not in harmony with the rule announced do not commend themselves to its approval.

In *Cheever v. Meyer*, 52 Vt. 66, the court says, without a record on the books of the corporation the public, purchasers, and attaching creditors will be exposed to frequent and extensive frauds. The record kept by the company, so far as the company itself is concerned, and, we think, so far as concerns the public, purchasers, and attaching creditors, furnishes the best evidence of ownership of the stock at any specified time. As regards the corporation and those who have a right to look to its records for the owners of the stock, the transfer of the certificate leaves the transaction incomplete.

In *Planters' & M. Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585, there is a *dictum* to the effect that a by-law requiring stock to be transferred on the books of the corporation was intended for the security of the corporation and of third persons, who in good faith, on a valuable consideration, may have in that mode acquired the stock without notice of prior equitable transfers, or of outstanding equities.

V. Provision of certificate requiring transfer on books.

The conflict which has been developed by the discussion thus far extends to the decisions giving effect to provisions in the certificate of ownership requiring transfers to be made on the books.

Thus, a transfer without registry is good as against a subsequent attachment, although the certificates state that the transfer must be
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made on the books of the company. *De Comeau v. Guild Farm Oil Co.* 3 Daly, 218.

But where the certificate stated that the stock was transferable only at the bank, a transfer without entry on the bank books was held by the Federal court not good against a title acquired by a purchaser at a subsequent sale under an attachment against the original owner, who obtained a transfer on the books. *Williams v. Mechanics' Bank*, 5 Blatchf. 59, Fed. Cas. No. 17,727.

VI. Requirement of record with county clerk.

Slightly outside of the main subject under discussion, but close enough to throw some light on it, are cases dealing with statutory provisions requiring transfers of stock to be registered with the county clerk.

Under a statute providing that no transfer of stock shall be valid against creditors of the transferor until recorded with the clerk of the county where the corporation has its office, a pledge, in another state, of stock in a local corporation, is not valid as against local attaching creditors until so recorded. And it is immaterial that such creditors have actual notice of the pledge. *Masury v. Arkansas Nat. Bank*, 87 Fed. 381.

But upon appeal the court held that that statute was not intended to apply to a mere pledge by indorsement and delivery of the stock certificate as collateral security, but must be confined to cases where the stockholder parts with his entire legal and equitable title by an absolute sale, the purpose of the statute being to afford a record for the benefit of the taxing authorities, or those interested in or dealing with the corporation, and who may be entitled to proceed against the corporation in case of insolvency, for which purpose a pledgee is not a stockholder. 35 C. C. A. 476, 93 Fed. 603.

And that case was followed in *Batesville Teleph. Co. v. Myer-Schmidt Grocer Co.* 68 Ark. 115, 56 S. W. 784.

And in *Scott v. Hout* (Ark.) 83 S. W. 1057, the court said that the act had objects and purposes beyond a registry act to prevent fraud by secret conveyance; and these objects are a part of the corporation system of the state. The dominant thought in the corporation system is publicity in all corporate affairs. As an integral and harmonious part of this system, all transfers of stock are to be certified, and the

rate stock are almost universally held by the courts to be property of that nature. *Thomp. Corp.* §§ 1070, 2587, 4571; *Cook, Corp.* § 12; *Clark & M. Priv. Corp.* § 377, p. 1147. If there were no adjudications upon the subject, there would be no reason to hesitate in saying that shares of stock are subject to attachment under these statutes. Although this court has not construed them, similar statutes have been passed upon in many of the states. In *Chesapeake & O. R. Co. v. Paine*, 29 Gratt. 502, shares in a railroad company were held liable under a statute which made the attachment a lien upon all the "estate" of the debtor. In delivering the opinion of the court, Moncure, P., said such shares were plainly within the letter, as well as the spirit, of the law. In

Union Nat. Bank v. Byram, 131 Ill. 92, 22 N. E. 842, it was held that the words "rights and effects" of the debtor in the general attachment law were broad enough to cover shares of stock. In *Curtis v. Steever*, 36 N. J. L. 304, the words "rights and credits" in the general attachment law were sufficient. It is now well settled by the authorities that, in the absence of any statutory provision to the contrary, shares of stock, although incorporeal in their nature, are personal property. *Clark & M. Priv. Corp.* § 376, pp. 1142, 1143. As our statute makes them personal property, and subjects apparently all forms of property to the process of attachment by giving a lien on the real estate, personal property, and choses in action and other securities of the

certificate deposited with and recorded by the county clerk, and no transfer shall be valid against creditors of a stockholder until it is so deposited; and, therefore, the fact that the creditor has notice of the transfer will not prevent his securing a title superior to that of the transferee.

The recording of a mortgage of shares of stock is not sufficient to perfect the right of the mortgagee against a subsequent purchaser without actual notice from the mortgagor, where the certificates are left in the possession of the mortgagor, and no transfer is made on the books of the company. *Spaulding v. Paine*, 81 Ky. 416.

But a recorded mortgage gives a prior equity to one who takes a pledge of the stock to secure an existing debt. *Schuster v. Jones*, 22 Ky. L. Rep. 568, 58 S. W. 595.

VII. Effect of effort to secure transfer.

The rights of the assignee may be protected by equity against a subsequent attaching creditor where the failure to effect the transfer is not due to the fault of the transferee, but occurred notwithstanding his honest, but ineffectual, effort to comply with the requirements of the statute. *Weber v. Bullock*, 19 Colo. 214, 35 Pac. 183; *Hastings v. First Nat. Bank*, 4 Colo. App. 419, 36 Pac. 618.

If the corporation has unjustifiably refused to transfer the stock a delivery of the certificates, properly indorsed, is good against a creditor of the vendor who attaches the stock as his property without notice of the transfer. *Merchants' Nat. Bank v. Richards*, 74 Mo. 77.

A by-law which limits the transfer of stock to be made only at the office personally, or by attorney and with the assent of the president, would be in restraint of trade and contrary to the general law of the commonwealth, which permits the right to personal property to be transferred in various other ways. And, in case the company is given notice of the transfer, and refuses to make it upon the books, the transfer will take precedence over a subsequent attempt by the company to attach the stock for its own claim. *Sargent v. Franklin Ins. Co.* 8 Pick. 90, 19 Am. Dec. 306.

If the transferee has presented his transfer at the office of the company, and demanded a transfer, which has been refused because of an

alleged lien in favor of the corporation, he acquires a good title as against a subsequent attachment creditor with notice. *Plymouth Bank v. Bank of Norfolk*, 10 Pick. 454.

In *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161, it was held that an assignment made in good faith and followed by a bona fide attempt to transfer the stock on the books, which failed through no fault of the assignee, was valid as against subsequent assignments; the court saying that the same circumstances would excuse failure to perfect the transfer as would excuse failure to take possession of chattels by a purchaser or assignee. The court says that the earlier cases in that state, being actions at law, conversant only with what at the time was considered the strict legal title to corporate stock, have necessarily no controlling force in a case depending upon equitable, instead of legal, principles.

The burden is upon the purchaser, who seeks to substantiate his claim against that of an attaching creditor, to show that he had done all in his power to comply with the statute, and this burden is not sustained by merely showing that he had requested a transfer of the stock to him without producing the certificates which at the time were in possession of a third person. *Isbell v. Graybill* (Colo. App.) 76 Pac. 550.

And in *Perkins v. Lyons*, 111 Iowa, 192, 82 N. W. 486, it was held that the fact that the stock book was within easy reach when the demand for transfer was made, and there was nothing to prevent an immediate transfer, it was not sufficient to leave the certificate with the clerk, who forgot to make the necessary entries.

Notice of the transfer to the custodian of the company's books is not sufficient to protect the stock against a subsequent attachment, if no demand for transfer is made. *Abels v. Planters' & M. Ins. Co.* 92 Ala. 382, 9 So. 423.

Under statutes providing that a transfer of stock without registration on the books of the corporation shall be void as to all bona fide creditors and subsequent purchasers without notice, if the only book kept by the corporation is its stock-certificate book with the stubs showing to whom the certificate was issued, it is sufficient to perfect the title of a pledgee against subsequent attaching creditors that the fact of the pledge is noted on the stub from which was detached the certificate issued to the pledgee, the attachment debtor. *Fisher v. Jones*,

debtor, it would be very difficult to find a plausible technical ground upon which to except them, and utterly impossible to say, in view of the vast amount of money and property represented by corporation stock and the extent of its use for purposes of credit, that the legislature did not intend that it should be subject to the attachment laws.

Nor can there be any doubt that, in the matter of procedure, the corporation itself may be made the garnishee. Whatever interest the shareholder has is in the custody and control of the corporation. A share of the capital stock of a corporation is the interest or right which the owner has in the management of the corporation, in its surplus profits, and, upon dissolution, in all of

its assets remaining after the payment of its debts. *Clark & M. Priv. Corp.* § 376, p. 1141. The certificate of stock representing the share of the owner may be in the hands of some person other than the debtor or the corporation, but the certificate is not the share itself. For most purposes it is not regarded as property, but only as evidence of the existence and ownership of the shares named and described in it. 10 Cyc. Law & Proc. 588. Where the proceeding to subject stock by attachment is under the general attachment laws, the corporation is made the garnishee. *Chesapeake & O. R. Co. v. Paine*, 29 Gratt. 502. Special statutes usually make the corporation the garnishee. *Drake, Attachm.* § 259.

In this case the stock, against which the

82 Ala. 117, 3 So. 13. The court says the purpose of the statute is obviously to give notice of the title to creditors and purchasers, so as to prevent fraudulent transfers, and to protect the corporation itself in determining the question of membership and other incidents of ownership. The court continues: There may be verbal transfers of stock certificates accomplished by delivery and creating equitable liens intended only for brief collateral security, which will not be susceptible of being registered in the form of a record, and are not capable of being recorded in a formal sense. The statute does not declare that stock may be transferred only on the books of the corporation, but simply that it is so transferable.

A memorandum made with a pencil on the stub of the stock book is sufficient. *Perkins v. Lyons*, 111 Iowa, 192, 82 N. W. 486.

An entry by the secretary of the corporation on the stock book that the shares had been assigned as collateral security is sufficient to defeat a subsequent levy of an execution upon them by creditors of the assignor. *Moore v. Marshalltown Opera-House Co.* 81 Iowa, 45, 46 N. W. 750.

The rights of the pledgee may be protected by entering the names of the pledgor and pledgee, the number or designation of the shares, and the date of the transfer, without the surrender and cancelation of the old shares and the issue of new ones. *Spreckels v. Nevada Bank*, 113 Cal. 272, 33 L. R. A. 459, 54 Am. St. Rep. 348, 45 Pac. 329.

But under a statute providing that no transfer of stock shall affect the title or rights of any attaching creditor until it is recorded on the books of the corporation, it was held that a memorandum of the transfer, entered on the stub of the certificate book, and brought to the notice of the attaching creditor when the attachment is levied, is of no avail to prefer the transferee to the attaching creditor. *Newell v. Williston*, 138 Mass. 240. The court says, the statute says that knowledge that no transfer had been made, and that there was no assignment which could be recorded, and that the transferee had no right unless that of equitable assignee with power to make a legal assignment and transfer, should not affect the rights of the attaching creditor, and by plain intentment makes it immaterial whether the attaching creditor knows of them or not. It gives him the same right as to stock thus attached 67 L. R. A.

that it would give as to other kinds of personal property which had been sold by a contract good as between the parties, but without delivery.

Where the statute provided that transfers should be entered on the books of the corporation, and should be signed by the persons making and accepting them, a transfer is good, as against execution creditors of the transferer, when it has been entered on the books and signed by the transferer, but not accepted by the signature of the transferee. *Woodruff v. Harris*, 11 U. C. Q. B. 490.

Where the statute permits the charging of stock standing in the name of a debtor in his own right, no charging order can be made against stock which he has sold, but which has not yet been transferred on the books of the corporation because of informalities in the certificates, although notice of the transfer has been given to the company. *Gill v. Continental Gas Co. L. R. 7 Exch. 332.*

VIII. Effect of notice to purchaser or creditor.

If the purpose of the statute is to prevent a fraud on purchasers and creditors, it would seem that its object was sufficiently complied with if one who contemplated dealing with the record owner had actual notice of the facts. And so it has been held by some courts. But other courts have taken the position that notice was immaterial; that the statute said an unrecorded transfer should be void, and void it should be, although the result was to work a fraud on a bona fide purchaser and deprive him of his property in favor of one who acted with full knowledge of his rights.

Where a resident of South Carolina had pledged shares of stock in a Louisiana corporation to a bank as security for a loan, and then made a general assignment for benefit of creditors, after which Louisiana creditors with full notice of the prior assignment attached the stock, the court held that a prior assignment of an equitable interest in stock superseded the rights of attaching creditors with notice, although the title had not been perfected by a transfer on the books of the corporation, as required by the local law to perfect a legal title. The point of the decision seems to be in the statement by the court that the creditors could not make a valid attachment when, to their knowledge, the property no longer belonged to

proceeding is, stands on the books of the company in the name of the debtor, but is claimed by a third party under an alleged purchase thereof from the debtor, made long before the order of attachment was served upon the company,—in fact, years before this suit was brought. Is the lien of the attachment superior to the title of the purchaser? The assignment of the shares was not made by delivery of share certificates, but by a mere written assignment of the shareholder to the purchaser, specifying the number of shares. It does not appear that any certificate had ever been issued, nor that any demand for the transfer of the stock from the seller to the buyer on the books of the company had ever been made. The circuit court found and held that for

the purposes of this suit the stock was the property of the debtor, and decreed it to be sold; but whether it did so upon the ground that the sale was fraudulent, or that an unregistered transfer of the stock is not good as against an attaching creditor, does not appear.

"The decided weight of authority holds that he who purchases, for a valuable consideration, a certificate of stock, is protected in his ownership of the stock, and is not affected by a subsequent attachment or execution levied on such stock for the debts of the registered stockholder, even though such purchaser has neglected to have his transfer registered on the corporate books, thereby allowing his transferrer to appear to be the owner of the stock upon which the

their debtor. The court further says that the provision that no transfer of stock shall be valid until entered upon the books is designed for the security of the corporation itself, and of third persons taking transfers of the stock without notice of any prior equitable transfer. It relates to the transfer of the legal title, and not of any equitable interest in the stock subordinate to that title. As between the vendor and vendee, a transfer not in conformity to such provisions is good, and passes the equitable title, and divests the vendor of all interest in the stock. *Black v. Zacharie*, 3 How. 483, 11 L. ed. 690; *Sibley v. Quinsigamond Nat. Bank*, 133 Mass. 315.

An unrecorded transfer is good against a subsequent attaching creditor with notice. *Bridge-water Iron Co. v. Lissberger*, 116 U. S. 8, 29 L. ed. 557, 6 Sup. Ct. Rep. 241.

A statute providing that no pledge of stock shall be valid, except as against the pledgee and his personal representatives, unless it is consummated by actual transfer of the stock, is intended to protect persons dealing upon the faith of the apparent ownership of the stock in ignorance of the pledge, and is not available to one who has actual notice of the pledge at the time his rights accrue. *Hotchkiss & U. Co. v. Union Nat. Bank*, 15 C. C. A. 264, 37 U. S. App. 86, 68 Fed. 76. The court says it is a widely prevalent doctrine that, notwithstanding the generality of the language of statutes declaring that former liens and conveyances shall be void if not registered in conformity with the provisions of the statute as against subsequent purchasers, yet, seeing that the whole object of such provisions was to guard the subsequent purchaser against the transfers of which he had no notice, if the object of the statute had been subverted by actual knowledge of the fact, the prior transferee would be protected. And the court adds there is no reason why this should not be so. Such laws are not designed to accomplish so unjust a result as that a person having knowledge of a man's equities may defeat them by an act of his own taken with such knowledge.

A transfer without registration is invalid only as to parties mentioned in the statute. It is the protecting of bona fide creditors and of subsequent purchasers the statute contemplates, and the protection of those only in the event there is want of notice of a prior transfer or lien. *Birmingham Trust & Sav. Co. v. Louisiana* 67 L. R. A.

Nat. Bank, 99 Ala. 379, 20 L. R. A. 600, 13 So. 112.

The transfer will take precedence of the rights of an execution creditor, who, at the time of levying his execution, had notice of the transfer. *Selma Bridge Co. v. Harris*, 132 Ala. 179, 31 So. 508.

Under a statute providing that no transfer of stock shall be valid, except as between the parties thereto, until it is entered on the books of the corporation, a pledge not so entered is valid as against a subsequent attaching creditor of the pledgee with notice. *Van Cise v. Merchants' Nat. Bank*, 4 Dak. 485, 33 N. W. 897. The court said this provision of the law contemplates a legal title and an equitable lien.

A transfer, although not on the books, is valid as against execution creditors with notice. *Rogers v. New Jersey Ins. Co.* 8 N. J. Eq. 167.

A provision in the by-laws that the stock shall be transferred only on the books of the corporation merely provides for notice to persons dealing with the stock; and, therefore, an attachment of the stock by one having notice that it had been pledged to another will give no rights as against him. *Cheever v. Meyer*, 52 Vt. 66.

Although to complete the transfer the statute requires its registry on the books of the company, an unregistered pledge is valid as against creditors with notice. *White River Sav. Bank v. Capital Sav. Bank & T. Co. (Vt.)* 59 Atl. 198.

Where the certificate provided that the shares were transferable only on the books of the corporation, and a transfer was made by the president of the corporation without any attempt to transfer the shares on the books, it was held that, since the evidence showed that the officers of the corporation had actual notice of the sale, the shares were not attachable by the corporation for the president's debt. *Scripture v. Frankestown Soapstone Co.* 50 N. H. 571. The court says that the ownership of the shares passes from the seller to the buyer by force of the contract of sale, and that the buyer's title, so far as the seller is concerned, attaches the moment this contract is fully consummated between them. The situation is similar to that of an unrecorded deed. It is difficult to suggest any reason for holding that actual notice of an unrecorded deed to a subsequent purchaser or attaching creditor shall be equivalent to a record, so far as the purchaser or creditor is concerned, which does not with equal force re-

attachment or execution is levied." Cook, Corp. § 487. This author says it is so held in New York, Pennsylvania, New Jersey, Michigan, Minnesota, Missouri, Delaware, Nebraska, Tennessee, Kentucky, Louisiana, Mississippi, Texas, and Washington, independently of any statute on the subject. In a large number of states the purchaser, in such case, is protected by statute. In still other states a purchaser does not acquire any right to the stock as against an attaching creditor of the debtor, unless it is transferred to him on the books of the company before levied upon. The difference in the decisions is attributable, for the most part, to the peculiar terms of the statutes of the several states bearing upon the question, and to differences in construction of like

and similar statutes by the courts of different states. Where there is no statute expressly or impliedly forbidding a sale of stock without registration, it is generally, if not universally, held that the purchaser takes the legal title without a transfer of the stock on the books. Even in those jurisdictions in which the statute declares that the stock shall be transferable only on the books of the corporation, it is held that an unregistered transfer or assignment gives the purchaser a perfect equitable title as between him and the assignor, and any person claiming under the latter.

The reasoning of the court in *Scripture v. Francestown Soapstone Co.* 50 N. H. 571, on this subject seems to be in perfect consonance with the rules and principles upon

quire a holding that actual notice to the attaching creditors of the shares of stock is equivalent, so far as his rights are concerned, to a transfer entered in due form on the books.

And that case was followed in *Piper v. Hillard*, 58 N. H. 198.

An attachment of stock not transferred on the books by one without notice, is good, but not if there was notice. *Warren v. Brandon Mfg. Co.* Cited in 52 Vt. 75.

In *Campbell v. Woodstock Iron Co.* 83 Ala. 351, 3 So. 369, the court, in considering the effect of a mortgage of stock without registering the transfer as between the parties, says that it may be void as against bona fide creditors or subsequent purchasers without notice.

To uphold the right of the transferee he must show that the attaching creditor actually had notice of the transfer. *Ditney v. First Nat. Bank*, 112 Ala. 391, 20 So. 476; *Wetumpka Bridge Co. v. Kldd*, 124 Ala. 242, 27 So. 431.

Statutory exception of person with notice.

The Alabama statute provides that when, by the charter or by-laws of a corporation, the transfer of stock is required to be made on the books of the corporation, no transfer of stock shall be valid as against bona fide creditors or purchasers without notice, except from the time such transfer shall be registered or made on the books of the corporation. Under that statute bona fide creditors are held to mean judgment creditors having a lien. So, when a sale is made under execution, the lien of which had attached before notice, actual or constructive, the purchaser, although having notice at the time of the purchase, will acquire a good title. *Jones v. Latham*, 70 Ala. 164.

Notice not effective.

In *Ottumwa Screen Co. v. Stodghill*, 103 Iowa, 437, 72 N. W. 669, where the certificates after transfer had been deposited with the bank, and the sheriff and attaching creditor had actual notice of the transfer when the attachment was levied, the court held that these matters were ineffectual to preserve the rights of the assignee. This ruling is placed upon the ground that the language of the statute is absolute, and that, no exception being made, the court can make none; and this ruling was followed in *Hafr v. Burnell*, 106 Fed. 280.

The Iowa court seems to have fallen into some inconsistency with itself in making that ruling, for, in *Des Moines Loan & T. Co. v. Des* 67 L. R. A.

Moines Nat. Bank, 97 Iowa, 668, 66 N. W. 914, it had held that a subsequent assignee with notice cannot take advantage of the fact that the former transfer was not regularly entered on the books of the company.

Where the object of a statute requiring transfers of corporate stock to be made with the county treasurer is to create publicity in corporate affairs, and to provide that no transfer shall be valid against creditors of a stockholder until it is so deposited, the fact that a creditor has notice of the transfer, which is not recorded, will not prevent his securing a title superior to that of the transferee. *Scott v. Houpt* (Ark.) 83 S. W. 1057. But it was held that such a statute was intended to deal with transfers, and not with pledges; and, therefore, that a creditor could secure no right as against the pledge. *Masury v. Arkansas Nat. Bank*, 35 C. C. A. 476, 93 Fed. 603, Reversing 87 Fed. 381, and Followed in *Batesville Teleph. Co. v. Myer-Schmidt Grocer Co.* 68 Ark. 115, 56 S. W. 784.

Notice to purchasers at sale.

The courts have, to some extent, failed to maintain the consistency of their theory in dealing with the effect of notice to purchasers at the execution sale. If the transfer without registry is void in favor of creditors without notice, it would seem that the moment when their rights attached was when their levy was made, and that notice after that time would be ineffectual as to their rights; and to preserve their rights, of course, anyone must be empowered to bid at the sale, whether he had notice or not. Yet some courts have held that notice to the attaching creditor, even after the levy, would prevent his proceeding with the sale.

In Colorado it was held that notice to an attaching creditor of an assignment and delivery of the certificates by the debtor to one who has neglected to procure a transfer on the books of the corporation, as required by statute, does not affect the rights secured by the attachment. *First Nat. Bank v. Hastings*, 7 Colo. App. 129, 42 Pac. 691.

That doctrine would seem to be consistent with the rule that an unrecorded transfer was void as against creditors without notice; but the majority of the courts have held the other way. From the inconsistency of such holdings it would seem that the courts must have felt

which contracts and rights of property stand. The court said, in part: "It seems too clear for argument that the ownership of the shares passes from the seller to the buyer by force of the contract of sale, and not by operation of law; and, if that be so, the buyer's title, so far as the seller is concerned, attaches the moment this contract is fully consummated between them. This kind of property, being an intangible right, somewhat akin to the right to receive money due upon a bond or other chose in action, is incapable of actual manual delivery. All the seller can do, that corresponds at all to the delivery of personal chattels in other cases of sale, is to hand over to the buyer his certificate, with a sufficient assignment, by deed or otherwise, to entitle him to a

transfer of the shares on the books of the company. When the seller has done this, his power and duty in the matter are ended, and it is at the option of the purchaser whether the transfer shall be recorded or not. If the purchaser omits to have the record made, he can claim no rights as a member of the corporation; and he also incurs the further risk of having his title defeated by a subsequent attachment or sale to a bona fide purchaser. It is difficult to see any substantial difference between the position of this plaintiff after the sale and assignment of the shares to him by . . . [the owner], and before a transfer was made on the books, and that of the grantee in a deed of land before his deed is recorded. In both cases the seller has parted with his

the injustice of the rule making the title depend on the record, and attempted to avoid it by giving effect to notice received after the creditors' rights, if there could be any, had attached.

A by-law requiring transfers of stock to be upon the books of the corporation does not prevent a transfer of stock without registration on the books from being good as against an attachment creditor who receives notice of the transfer before the judicial sale, although he had no such notice at the time the execution was levied. *Willson v. St. Louis & S. F. R. Co.* 108 Mo. 588, 32 Am. St. Rep. 624, 18 S. W. 286. The court says that the custom of the commercial world, which permits the transfer of title by mere indorsement and delivery of the certificates, should not be lightly disturbed by the courts.

An unrecorded transfer of stock conveys the interest of the holder, and is valid except as against persons having equities, and may be upheld as against a judgment creditor buying at an execution sale with notice of the transfer. *Newberry v. Detroit & L. S. Iron Mfg. Co.* 17 Mich. 141. Judge Cooley says the clause in the statute providing that transfers of stock shall not be valid, except as between the parties thereto, until duly entered upon the books of the corporation, is for the protection of parties having equities, and that it is very clear that a judgment creditor who buys with full knowledge can get by his levy and purchase nothing that the debtor himself could not claim.

And the correctness of that decision was recognized in *Van Norman v. Circuit Judge*, 45 Mich. 204, 7 N. W. 796.

One who purchases at an execution sale of stock with knowledge that it is pledged to a third person takes subject to the claims of the pledgee. *Weston v. Bear River & A. Water & Min. Co.* 6 Cal. 425.

One who purchases at execution sale with notice of a prior pledge of the stock acquires no title as against the rights of the pledgee. *People ex rel. Mead v. Elmore*, 35 Cal. 653.

A purchaser at execution sale with full notice of the defect in the title of the judgment debtor acquires no better title than his debtor had, and cannot compel a transfer of the stock against the protest of the true owner. *Blakeman v. Puget Sound Iron Co.* 72 Cal. 321, 13 Pac. 872.

A purchaser at execution sale of stock with notice that it has been pledged to a third per-

son takes subject to the rights of the pledgee, although the pledge has not been entered on the books of the company. *May v. Cleland*, 117 Mich. 45, 44 L. R. A. 163, 75 N. W. 129. The court says an execution creditor has no prior equities; nor are we able to see that he has any existing equities in consequence of his levy. He has parted with no interest or right, and is in no worse condition by the failure of the levy than he was before. If his debtor has no title he can acquire none by the levy and sale of land the title to which upon the record stood in the debtor, but with which he had parted, or by a levy and sale of personal property in his possession, but to which he had no title.

A pledgee's rights are superior to those of a subsequent purchaser at execution sale with notice. *George R. Barse Live Stock Co. v. Range Valley Cattle Co.* 16 Utah, 59, 50 Pac. 630.

Where a transferee presented his certificates with a request to transfer them on the stock books, and the company refused to make the transfer, but had the stock attached for a debt of the original owner, the question arose as to the rights of the transferee against the company; but in the course of the opinion the court says it is not easy to see how the purchaser at the attachment sale can be made a bona fide purchaser, or can have acquired any right in the property of the transferee by an attachment against the transferor. *Robinson v. National Bank*, 95 N. Y. 637.

In *Seligman v. St. Louis & S. F. R. Co.* 22 Fed. 30, the court, in overruling a demurrer to a bill which sought to protect from a transfer to purchasers at an execution sale stock in a corporation which was alleged to have been sold to a third person, said that, since it appeared that the judgment on which the execution had been issued had been improperly obtained, the bill sets out an equity which entitled complainants to be heard; but it further stated that it had not been inclined to pass upon the further question as to the rights of the execution purchaser, who purchased with knowledge that the stock had been transferred by the execution debtor.

IX. Persons not entitled to benefit of statutes.

The statutes requiring transfers of stock to be made on the books of the corporation are for the protection of bona fide purchasers and creditors, if of anyone besides the corporation it-

title, and, as to him, the buyer has acquired it. It is only third persons in either case whose rights or interests are affected by the omission. In the case of an unrecorded deed the grantor continues to be clothed with evidence of ownership after the conveyance, very similar to that which remains with the seller of shares before the transfer has been entered on the books. The record shows that he is still the owner of the land, when in fact he is not; and, so far as any interest a creditor can have in the matter is concerned, the same is precisely true in the case of shares in a corporation, sold, but not transferred on the books. The statutes which we hold require the transfer of shares to be entered on the books of the corporation kept for that purpose are certainly no

more explicit and absolute than that which requires the recording of deeds. The object of the law, so far as creditors are concerned, is the same in both cases. As between the parties the title passes by contract, and not by the record in both cases alike."

It is to be observed that the New Hampshire court holds that the statute making the stock transferable only on the books of the company is in the nature of a registration law for the benefit of purchasers and creditors, in consequence of which an unregistered purchase is not good against a subsequent attachment; but it does hold that, as between the parties, the equitable title passes, notwithstanding the statute. Many of the courts hold that under such a statute the legal title passes as between the par-

self. Therefore there are persons who cannot take advantage of a failure to record.

Heirs and representatives of the pledgeor.

A transfer by delivery of the stock certificates without registry on the books of the corporation is sufficient to vest title in the transferee as against the personal representatives of the transferor. *Reed v. Copeland*, 50 Conn. 472, 47 Am. Rep. 663; *Meredit Village Sav. Bank v. Marshall*, 68 N. H. 417, 44 Atl. 526.

So a transfer on the books of the corporation is not necessary to perfect a gift of stock as against the claim of the heirs of the donor. *Leyson v. Davis*, 17 Mont. 220, 31 L. R. A. 429, 42 Pac. 775.

And a writ of error to review that case was dismissed in 170 U. S. 36, 42 L. ed. 939, 18 Sup. Ct. Rep. 500.

But where a bankruptcy assignee, to whom the right to shares of the bankrupt passes, neglects to secure a transfer, and subsequently the executrix of the bankrupt secures a transfer to herself upon declaration of loss of the shares, and sells them to a bona fide purchaser, the bankruptcy assignee is held to have lost his right. *Re London & P. Teleg. Co.* 39 L. J. Ch. N. S. 419, L. R. 9 Eq. 653, 23 L. T. N. S. 237, 18 Week. Rep. 597.

Rights as between unrecorded titles.

To defeat an outstanding equitable title the legal title of a subsequent transferee must be perfected. *Roots v. Williamson*, L. R. 38 Ch. Div. 485; *Moore v. North Western Bank* [1891] 2 Ch. 599.

If the title can be transferred only on the books of the company one who takes title without such transfer holds subject to all equities of prior transferees who have not recorded their transfers. *Stebbins v. Phoenix F. Ins. Co.* 3 Paige, 350.

Where the statute provided that shares should be transferable only by deed duly entered on the registry of transfers, and a transfer as collateral security was made, after which the original owner executed a blank transfer of the stock without producing the certificates to another person, and the question arose as to the better right, it was held that, since the second transferee did not acquire a legal title because his transfer was not by deed, or registered, his equity was inferior to the prior transfer, and must, therefore, give way to it. The later transfer

having made the prior application for a transfer on the registry, the Earl of Selborne said the transfer was not accompanied by the certificates which, in corporations of this kind, are the proper (and, indeed, the only) documentary evidence of title in the possession of the shareholder, and which, according to the usual course of dealing with such shares, ought to come into the hands of the bona fide transferee for value. "The respondents, when they took their prior security, did obtain possession of those certificates; and on the face of each such certificate there was an engagement under the company's common seal that no transfer of any portion of the shares thereby represented should be registered without delivery of the certificate at the company's office." The later transferees knew they did not have the certificates, and that the corporation was entitled to insist on the production of them if they saw fit. They knew that their transfer was "of no value" for want of these certificates. Speaking of the equitable title, the Earl says the prior transferees "have the better equity, not on the ground of time alone, but on the merits of the case. They not only had the certificates, but they had the company's undertaking under seal that there should be no change of the registered title, unless those certificates were produced. What more could be necessary, on any reasonable or intelligible principle, to 'perfect' their equitable title, which they were under no obligation to convert into a legal title by registration?" *Société Générale De Paris v. Walker*, L. R. 11 App. Cas. 20.

And that case was followed in Ireland v. Hart [1902] 1 Ch. 522.

Rights of receivers and assignees for creditors.

Persons in whose hands the assets of a record owner are placed for benefit of his creditors are so closely limited to his actual property rights that the reason for the rule for making unregistered transfers void in favor of subsequent transferees has less application to their cases.

It has been held that, if the transfer is not entered on the books of the corporation as required by statute, the shares remain in the order and disposition of the pledgeor within the meaning of a statute making property in such condition pass to the assignee in bankruptcy. *Ex parte Lancaster Canal Nav. Co.* 1 Deacon & C. 411.

So in *Ex parte Boulton*, 1 DeG. & J. 163,

ties, while only an equitable title passes as against the corporation and bona fide purchasers. *Clark & M. Priv. Corp.* § 586, p. 1785. "In states in which an unregistered transfer conveys the legal title to the shares, and not merely an equitable title, an unregistered transfer will necessarily convey a good title as against subsequent attaching or execution creditor of the transferor, whether the latter has notice of the transfer before his levy or not, unless the circumstances are such as to estop the transferee to set up his title, or the transfer is fraudulent as against the creditors of the transferor. In those jurisdictions in which it is held . . . that the legal title remains in the transferor, the courts have not agreed as to the effect of an unreg-

istered transfer as against an attaching or execution creditor of the transferor." *Clark & M. Priv. Corp.* § 590, p. 1794. "If a transfer on the books of the corporation is not required by the charter or by-laws, nor by any general law, it is not necessary to give a transferee a perfect title. In such a case a transfer by delivery of the certificate of stock duly assigned, although not registered on the books of the corporation, will prevail in all jurisdictions over a subsequent attachment by a creditor of the transferor, whether he had notice of the transfer or not. And the same is true where registration of transfers is required by statute, not for all purposes, nor for the protection of creditors, but merely for the protection of the corporation and its credit-

where the shares of stock had been deposited with a creditor as collateral security, but no notice given to the corporation, it was held that the pledge was invalid as against a subsequent bankruptcy assignee. The statute provided for the transfer of the stock on the books of the corporation, but, except as to the rights of the corporation itself, did not make such transfer essential; but Lord Justice Turner said that in his opinion all the requisites which are essential to mortgages of other choses in action must be observed, and that notice to the corporation was therefore necessary.

So in *Nelson v. London Assur. Co.* 2 Sim. & Stu. 292, where the shares had been assigned to the corporation to secure a debt, but no steps had been taken to deprive the owner of his title or interfere with his dividends, it was held that the shares were within his order and disposition within the provision of the bankruptcy law subjecting to the dominion of the bankruptcy assignee property of third persons which was within the order and disposition of the bankrupt.

But in *Es parte Littledale*, 6 De G. M. & G. 727, notice of the transfer of shares in pledge was given to the corporation, but the statute required the transfer to be made in a particular manner, which was not done. The transfer was upheld as against the bankruptcy assignee of the transferor. The lord chancellor says that he cannot yield to the argument that the statute says that the transfer shall be made in a particular manner only, and therefore that an assignment in any other way gives no right at all. He compares the statute to the requirement that transfer of real estate shall be made only in a particular manner, but with regard to which an equitable transfer may be made good as against subsequent creditors. Lord Justice Turner says that, under the statute, in order to entitle the bankruptcy assignee to the property, it must have been in the order and disposition of the bankrupt; and he states that it does not seem to him that it can be said that a man is in the possession of property with the consent of the true owner when the true owner has taken every step which it is within his power to take for the purpose of divesting the property from the person who becomes bankrupt. The effect of the notice given to the corporation was to take away from them the capacity of dealing with these shares.

The pledgee of stock not transferred on the 67 L. R. A.

books of the corporation as required by its by-laws, has a title superior to a subsequent assignee in bankruptcy of the transferor. The assignee under the bankrupt act, except as to property conveyed for the purpose of defrauding creditors and in violation of the provisions of the act, takes no greater right in the property than the bankrupt had at the time of filing his petition. *Dickinson v. Central Nat. Bank*, 129 Mass. 279, 37 Am. Rep. 351.

In *Dudley v. Gould*, 6 Hun. 97, a purchaser under a pledge was protected as against the claim of a receiver of the pledgee.

In *Walker v. Detroit Transit R. Co.* 47 Mich. 388, 11 N. W. 187, the court, without discussing the effect of failure to transfer the stock on the corporate books, gave effect to a title acquired under a blank assignment as against one subsequently acquired by a sale under a general assignment for creditors by the one in whose name the stock stood on the books of the corporation.

Where stock stood in the name of a trustee, who had assigned it to the *cestui que trust*, and who became bankrupt, his assignee claimed the stock, but the court held that, as the statute vested in the assignee all the property of the debtor which he could have lawfully sold, assigned, or conveyed, or which could have been taken on execution upon a judgment against him, the statute did not apply to property held in trust by him. *Sibley v. Quinsigamond Nat. Bank*, 133 Mass. 515.

To perfect the rights of the assignee for creditors all steps required by law must be taken.

Thus, in *Richmondville Mfg. Co. v. Prall*, 9 Conn. 492, it appeared that, although a by-law had been adopted prescribing the method of transferring the stock, it had never been acted upon in practice, and the contention was that, therefore, a good title had been acquired by a customary transfer as against an execution creditor of the transferor. The court said that a good title had been acquired as against the company, but that it was not necessary to determine the validity of the transfer against execution creditors, since the transfer was part of an assignment for creditors which had never been recorded as required by the statutes, and was therefore invalid as against attaching creditors.

X. Estoppel of pledgee.

The pledgee may, although he has secured a

ors. 'It requires a clear provision of the charter itself, or of some statute,' said the Massachusetts court, 'to take from the owner of such property the right to transfer it in accordance with known rules of the common law. And by those rules the delivering of a stock certificate, with a written transfer of the same, to a bona fide purchaser, is a sufficient delivery to transfer the title as against a subsequent attaching creditor.'" *Clark & M. Priv. Corp.* § 590, p. 1798, Citing *Boston Music Hall Asso. v. Cory*, 129 Mass. 435. In the earlier Massachusetts cases, the contrary of this doctrine had been held, and, since the decision of the case just referred to, the legislature of that state has passed a statute conforming to the principles announced therein.

good title, estop himself by his conduct from asserting it against claims which subsequently accrue.

If the assignee permits an actual transfer on the books of the corporation under a title secured by execution sale against the assignor, he cannot recover damages against the corporation for failure to recognize his title. *Littell v. Scrantom Gas & Water Co.* 2 Luzerne Legal Obs. 82.

In *Cumming v. Prescott*, 2 Younge & C. Exch. 488, where shares were deposited as collateral security together with an order to transfer them to the name of the transferee, which was not used until after the death of the transferor, it was held that the claim was subordinate to that of creditors of the estate, on the ground that the circumstances were not sufficient to show an intention to create a lien on the shares. The court says, from the evidence it would be more consistent with the honor of the parties to conjecture that the pledgee was to hold the shares until something was to take place to give the pledgee a right to them. That no court of equity will, in the absence of all presumption consistent with a contract, interfere to conjecture a contract to be of such a nature that the parties intended that one of them should retain the possession and apparent ownership of property, and, when he becomes insolvent, the other should come forward to the prejudice of creditors and claim a specific security on the property by way of equitable mortgage.

In *Noble v. Turner*, 69 Md. 519, 16 Atl. 124, it is said that, as against third persons, an assignment of stock in pledge must be transferred on the books of the company. The transaction which became the basis of that controversy arose prior to the passage of the act of 1886. But the rights of the corporation were also involved in that case, since the shares had been transferred by the sheriff under an attachment levy, and the pledgee had permitted the transferee to act as stockholder for seven years without giving notice of his right. The court says, by reason of the laches of the pledgee, the corporation had been compelled to recognize the rights of the execution purchaser. As against the company the pledgee is clearly and conclusively estopped from asserting his claim. In equity a presumption exists against every stale claim. In this case there are no circumstances excusing or explaining the delay in asserting the pledgee's rights. There has been such delay

In *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. 369, holding that an unrecorded transfer of national bank stock will take precedence of a subsequent attachment in behalf of a creditor without notice, Lowell, J., delivering the opinion, discusses the question most lucidly and exhaustively, reviewing many of the authorities, both American and English. In speaking of the statutes concerning transfers of the shares upon the books of the company, he says: "No doubt it is sometimes intended as a record of persons liable for the debts of the company, and is so in the case of national banks; but the great weight of authority is that it is not intended for the benefit of creditors of the individual shareholders. Some of the courts hold that the unrecorded

that at law an action of replevin, trover, or assumpsit would be barred by limitation, and, in the absence of any explanation, the pledgee is not entitled to relief in equity.

XI. Statutory recognition of transfers of certificates.

The custom of dealing with stocks by transferring the certificates is so general, and the inconvenience of requiring each transfer to be recorded is so great, that the legislatures have in some instances, even where the courts have held registry to be necessary, interposed to afford relief.

By the Wisconsin act of 1891 a delivery of stock with a written transfer of the same is sufficient to transfer the title as against all parties. *H. W. Wright Lumber Co. v. Hixon*, 105 Wis. 153, 80 N. W. 1110, 1135.

The Virginia statute (Code 1887, § 1133) provides that a delivery of the certificate properly indorsed shall vest title in the pledgee so far as may be necessary to effect the purpose of the pledge as between the parties and against creditors and subsequent purchasers of the pledgee. *Downing v. Thompson* (Va.) 48 S. E. 506.

And the same statute is in force in West Virginia. *Donally v. Hearndon*, 41 W. Va. 519, 23 S. E. 646.

In 1884 (act 1884, chap. 229) the Massachusetts legislature provided that the delivery of a stock certificate to a bona fide purchaser or pledgee for value received, together with a written transfer of the same, or a power of attorney to transfer, should be a sufficient delivery to transfer the title as against all parties. The court says this enactment was a new departure, and a change of policy in the legislature of this commonwealth. Prior to that statute no purchaser of stock could be sure that his title was good against possible attachments without an examination of the books of the corporation; nor could he be protected against attachments that might be made subsequently, unless he recorded his transfer immediately. By the statute of 1884 the certificate is treated as evidence of title. The assignment is to be made by the owner of the certificate, and the transfer of the certificate transfers the title. The transfer of the certificate transfers the title as against all persons, including attaching creditors. *Clews v. Friedman*, 182 Mass. 555, 66 N. E. 201.

transfer passes only an equitable title; others, that it gives a legal title. I assume that by the decisions in the courts of the United States only an equitable title is acquired. That point is unimportant." Again, he says, at page 371: "It is a general rule that creditors, whether they proceed by an attachment on mesne process, seizure on execution, creditor's bill, or through an assignee in bankruptcy, must take their debtor's property subject to all equitable as well as legal charges, liens, or opposing titles. Willes, J. in giving judgment in the Queen's bench in 1868, in a case quite analogous to this, against the right of seizing shares of the apparent owner, said that it was a rule applied by that court more than a hundred years before, in the analogous case of the statutory execution under the bankrupt law, that the creditors can have no more than a debtor was entitled to in equity or at law. *Pickering v. Ilfracombe R. Co.* L. R., 3 C. P. 235, 231. It has been the law of the lord mayor's court in London, from the time of Richard I. that an equitable assignment of a chose in action should prevail against an attachment. *Westoby v. Day*, 2 El. & Bl. 605. This application of the rule obtains in Massachusetts, and in the United States generally, though a few courts hold otherwise." It is proper to say here that it is the rule in this state. *Neill v. Rogers Bros. Produce Co.* 41 W. Va. 37, 58, 23 S. E. 702; *Wall v. Norfolk & W. R. Co.* 52 W. Va. 485, 492, 64 L. R. A. 501, 94 Am. St. Rep. 948, 44 S. E. 294; *Baltimore & O. R. Co. v. McCullough*, 12 Gratt. 595.

Except in those cases in which a statute is held to have inhibited any transfer except on the books of the company, the delivery of the certificate with an assignment to the transferee passes either a legal or an equi-

table title to the shares; but, in this case no certificates appear to have been issued, and there was no delivery of any certificate between the parties. The only evidence of the assignment is a written instrument not under seal, purporting to make over, transfer, and assign, for a valuable consideration, the shares therein described. Is this sufficient to pass any title? The shares exist independently of any certificate. They are a species of incorporeal property. "A share certificate is merely the paper representative of an incorporeal right, and stands on a footing similar to that of other muniments of title. It is not in itself property, but is merely the symbol or paper evidence of property; hence the proprietary right may exist without a certificate." 10 Cyc. Law & Proc. 588. "This legal relation, and proprietary interest on which it is based, are quite independent of the certificate of ownership, which is mere evidence of title. The complete fact of title may very well exist without it." Mr. Justice Matthews, in *Cecil Nat. Bank v. Watsontown Bank*, 105 U. S. 217, 222, 26 L. ed. 1039, 1042. "Millions of dollars of capital stock are held without any certificate, or, if certificates are made out, without their ever being delivered. A certificate is authentic evidence of title to stock; but it is not the stock itself, nor is it necessary to the existence of the stock. [*Crumlish v. Shenandoah Valley R. Co.* 40 W. Va. 627, 22 S. E. 90.] It certifies to a fact which exists independently of itself. And an actual subscription is not necessary. There may be a virtual subscription, deducible from the acts and conduct of the party." Mr. Justice Bradley, in *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 234, 35 L. ed. 702, 704, 11 Sup. Ct. Rep. 984. Other cases to the same effect are *First Nat. Bank v. Gifford*, 47 Iowa, 575; *Brigham v.*

Under the Massachusetts act of 1884 a transfer of certificates with a written assignment thereon to the true owner, by one who had obtained the stock for a special purpose, is good as against a subsequent attaching creditor of the latter, in whose name the stock stands on the books of the company. *Andrews v. Worcester. N. & R. R. Co.* 159 Mass. 64, 33 N. E. 1109.

The Maryland statute of 1886, chap. 287, provides that all executions or attachments levied on the stock standing in the name of the debtor shall only affect the interest which defendant had in the stock at the time of levying the writ, and shall not affect the right or interest of any bona fide purchaser or pledgee for value who has received a delivery of the certificate representing the stock with a power of attorney to transfer the same. *Morton v. Grafflin*, 68 Md. 545, 13 Atl. 341, 15 Atl. 208.

After the amendment of the Illinois statute governing executions so as to provide that shares of stock should not be taken on execution when sold or pledged for a valuable consideration, the delivery of stock as collateral security

for a loan is good as against third persons having actual or constructive notice of the transfer, although the transfer is not entered on the books of the company. *Rice v. Gilbert*, 173 Ill. 348, 50 N. E. 1087. The court says the current of decisions in the commercial states is to make shares of stock as nearly negotiable as possible, and such was the intention of the legislature in changing the statute.

The court affirmed *Rice v. Gilbert*, 72 Ill. App. 649, where it had been said that a delivery of the certificates of stock in good faith to one who advances money on the security thereof is sufficient to protect the holder as against executions or attachments against the pledgee to the extent of the debt such stock is given to secure, even though there is no transfer on the books of the company.

A pledge of stock by delivery with notice to the company passes the title as against a subsequent execution levied upon it as the property of the pledgee. *Alderton v. Conger*, 78 Ill. App. 333.

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Mead, 10 Allen, 245; *Curtis v. Crossley*, 59 N. J. Eq. 358, 361, 45 Atl. 905; *Agricultural Bank v. Burr*, 24 Me. 256; *Rio Grande Cattle Co. v. Burns*, 82 Tex. 50, 56, 17 S. W. 1043.

A share of stock being an incorporeal right, incapable of manual delivery, and the certificate being nothing more than evidence of its existence and of title to the share in the holder, it is obvious it may be assigned without a certificate, and in the mode adopted by the defendant here and his transferee; but for this there is authority. "Subscription rights in a proposed corporation need not be evidenced by written instrument in any particular form, but may be established by parol. . . . A subscription right in a proposed corporation is assignable by parol, and ownership passes immediately on consummation of the sale, and by force thereof, and not by operation of law." *Manchester Street R. Co. v. Williams*, 71 N. H. 312, 52 Atl. 461. A certificate of stock is important for many purposes, but not for the purpose of a transfer as between parties. *Id.* 71 N. H. 315, 52 Atl. 464; *Brigham v. Mead*, 10 Allen, 245; *Field v. Pierce*, 102 Mass. 253, 261; *Rio Grande Cattle Co. v. Burns*, 82 Tex. 56, 17 S. W. 1043; *Baker v. Wasson*, 53 Tex. 150; *Agricultural Bank v. Burr*, 24 Me. 256, 267; *Curtis v. Crossley*, 59 N. J. Eq. 358, 361, 45 Atl. 905.

As, by the assignment or transfer from the debtor to his transferee, evidenced by the informal written instrument executed and delivered by the former to the latter, title to the stock, legal or equitable, passed, what is the status of that title as against the attaching creditor, assuming that it is only the equitable title? In addition to the authorities already noted as maintaining its superiority to the attachment lien, the following is quoted from that latest and invaluable work, *Cyclopedia of Law and Procedure*, vol. 4, p. 632: "The rights of a creditor to property attached must be determined by the state of the title at the time the attachment was made, and, in the absence of fraud and statutory regulations, he only obtains the rights which the debtor had in the property at that time, for the creditor is not in the position of a bona fide purchaser." The rule applies where the debtor holds title to property subject to a valid outstanding charge or lien, whether the lien arises by agreement of parties, by operation of law, or a prior garnishment. *Id.* 633. The only exception to the rule, independent of statute, is that of the participation of the adverse claimant in the fraudulent purpose of the debtor, in which connection it is to be noted that, in the case of a sale of personal property, retention of

possession by the seller is strong evidence of fraud, when the sale obstructs the rights of a creditor. *Id.* 635. It makes the sale *prima facie* fraudulent. *Davis v. Turner*, 4 Gratt. 422; *Forkner v. Stuart*, 6 Gratt. 198; *Danco v. Seaman*, 11 Gratt. 778; *Baltimore & O. R. Co. v. Glenn*, 28 Md. 287, 324, 92 Am. Dec. 688. What effect this rule of evidence is to have is an inquiry which more properly arises on the question of the validity of the sale, to be disposed of in a subsequent portion of this opinion.

As a rule, those courts which hold an unregistered transfer not good, as against the creditors of the transferor, do not put it upon the ground that the presence of the shares on the books of the corporation in the name of the transferor, after the sale, is tantamount to the retention of the possession of tangible personal property after sale, and is therefore evidence of fraud. The supreme court of New Hampshire, in *Pinkerton v. Manchester & L. R. Co.* 42 N. H. 424, and in *Scripture v. Francess town Soapstone Co.* 50 N. H. 571, puts it partially upon that ground. In the former case the court said that the legislature had made plain its intention that the entry upon the stock record should be the appropriate indication of ownership, as it had made provision in regard to returns of stock by the clerks or treasurers for the purposes of taxation, private liability, and attachment, and, in the case of manufacturing corporations, had ordained by express provision that a transfer of stock should avail nothing against an attachment until entered upon the corporation records. Whether, in the absence of such statute, the court would have arrived at the same conclusion, nobody can tell, but there is no reason to assume that it would. In 1887 the legislature of that state made an unregistered transfer good against an attachment. Laws 1887, chap. 16, p. 417. In Connecticut the original idea was that no title, either legal or equitable, could pass by a transfer unless recorded on the books of the corporation. *Marlborough Mfg. Co. v. Smith*, 2 Conn. 579; *Northrop v. Newton & B. Turnp. Co.* 3 Conn. 544; *Northrop v. Curtis*, 5 Conn. 246; *Oxford Turnp. Co. v. Bunnell*, 6 Conn. 552. This position, however, was abandoned in *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161, propounding the *quære* whether, by an unregistered transfer, an equitable title passed, and holding that, if so, it was not good against an attaching creditor unless the transferee did all he could to have the transfer made before the attachment was levied. The statutes of Connecticut seem not to have been so rigid in their requirements in respect to the registration of stock as those of New Hampshire. The

court, in the case last cited, after referring to the rule that possession of tangible property is an indication of ownership, says: "So, in respect to the assignment of ordinary choses in action, there must be notice of the assignment to the debtor,—the assignment conveying but an equitable interest in the thing, and notice to a trustee being in equity the ordinary and only practicable mode in which an assignee can protect his interest. And in the case of the purchase of stock in a corporation there must be such a transfer of it as the legislature in the charter or by statute prescribes; and notice of the assignment of choses in action, and the transfer required by statute of corporate stock, stand in lieu of the taking and retaining of the possession of personal chattels sold, being the only possession the nature of the property admits of." As to choses in action, this is good law when applied to the case of a subsequent purchaser for value and without notice. But is it good law as to a creditor whose rights rise no higher than those of his debtor? That it is not considered sound, even in Connecticut, is evidenced by later decisions of that court. In *Mowry v. Hawkins*, 57 Conn. 453, 18 Atl. 784, the court said: "In the absence of fraud, stock may stand in the name of one which belongs to another, without being liable to attachment for the debts of the nominal owner. This must be so as to all creditors who have not been misled or deceived by it, and as to those who are advised as to the true state of the title." This proposition was referred to in *Skiff v. Stoddard*, 63 Conn. 198, 21 L. R. A. 102, 26 Atl. 874, 28 Atl. 104, as established Connecticut law. In *New York Commercial Co. v. Francis*, 28 C. C. A. 199, 51 U. S. App. 663, 83 Fed. 769, the proposition is applied as sound Connecticut law; the court saying in its opinion: "It is one which we are satisfied is in accordance with the general rule and with the principles of justice, unless the equitable owner is prevented by an estoppel from showing the truth, or there has been some illegality or violation of a statutory requirement." In Alabama an unregistered transfer is not good against an attachment, because the statute expressly declares that the holder of stocks in corporations must have the same transferred on the books of the company within fifteen days, else the same shall be void as to bona fide creditors and subsequent purchasers without notice. In Arkansas the statute gives precedence to the attachment unless a certificate of transfer is filed with the county clerk. In California, Colorado, and New Mexico the statute declares that no transfer of stock shall be valid for any purpose whatever until entered on the corporate books. 67 L. R. A.

In Indiana the attachment prevails because the statute declares that stock shall be transferable on the corporate books, and not otherwise. In Iowa the statute says transfers shall not be valid, except as between the parties, until a registry is had on the corporate books. See *Cook, Corp.* § 49, note 5. In Vermont the statutes were much like those of New Hampshire when *Cheever v. Meyer*, 52 Vt. 66, was decided, and the decision was rested wholly upon statutory grounds, treating the statutes as registration laws for the protection of creditors and subsequent purchasers without notice. The early cases in Massachusetts, giving precedence to the attachment, rested upon the same ground. In *Fisher v. Essex Bank*, 5 Gray, 373, holding that shares in a bank whose charter provides that they shall "be transferable only at the banking house and on its books" cannot be transferred in any other way, so as to give the transferee a good title against a creditor of the vendor who attaches them without notice of the transfer, the decision was based wholly upon the statute. As before stated, this rule has been overturned in that state by a statute. Before the passage of the statute, the court, in *Dickinson v. Central Nat. Bank*, 129 Mass. 279, 37 Am. Rep. 351, in construing the United States statute concerning national banks, which did not say the stock was transferable only on the books of the bank, although the by-laws of the corporation did say so, held that an unregistered transfer must prevail over an attachment in favor of a creditor of the transferor.

The proposition asserted in *Colt v. Ives*, 31 Conn. 35, 81 Am. Dec. 161, the soundness of which has been hereinbefore questioned, is the doctrine asserted in *Dearle v. Hall*, 3 Russ. Ch. 1, and confirmed in *Foster v. Cockerell*, 3 Clark & F. 466, to the effect that, of two innocent purchasers of a merely equitable interest, he shall be preferred who first gives notice to the trustee or holder of the legal title. The Connecticut court seems to have treated a creditor as standing on the same footing as a purchaser for value without notice. The fallacy and unsoundness of it is clearly shown in the opinion in *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. 369, 375. Lowell, J., said: "(1) Though the corporation is for some purposes a trustee for the shareholders, the latter have an independent legal property in their shares which they can convey, and whether their actual conveyance is legal or equitable is of no consequence. (2) The doctrine applies in England only to purchasers, and not to creditors seizing or attaching, even though a statute gives a right to seize all shares standing in the debtor's name in his own right. This statute was

once held by the Queen's bench to mean that the creditor might seize what the register showed to be apparently the property of the debtor (*Watts v. Porter*, 3 El. & Bl. 743); but this has been overruled on the ground that the legislature cannot be supposed to have intended to take one man's property for another man's debt, without the most explicit statement of such a purpose; and therefore the 'right' refers to the equitable as well as legal right. *Dunster v. Glengall*, 3 Ir. Ch. Rep. 47; *Scott v. Hastings*, 4 Kay & J. 633; *Beaven v. Oxford*, 6 De G. M. & G. 524; *Eyre v. McDowell*, 9 H. L. Cas. 619; *Robinson v. Nesbitt*, L. R. 3 C. P. 264; *Pickering v. Ilfracombe R. Co.* L. R. 3 C. P. 235; *Gill v. Continental Union Gas Co.* L. R. 7 Exch. 332. A few courts in this country have carried the doctrine of *Dearle v. Hall* so far as to uphold the garnishment of a non-negotiable debt which had been equitably assigned without notice. We have already seen that this is not the law in England nor in Massachusetts. Neither is it the law of the United States generally. *Drake*, Attachm. chap. 24; *Cornick v. Rickards*, 3 Lea, 1. The supreme court of Tennessee in that case refused to extend the rule to shares of stock, though it applies in that state to choses in action. As shares are not choses in action, and as attaching creditors are not purchasers, *Dearle v. Hall* is not in point."

We have a statute on this subject, and it does not extend the principle so as to protect creditors. Assignees of choses in action are required to allow all just discounts, not only against themselves, but against the assignor, before the defendant had notice of the assignment. Code 1899, chap. 99, § 14. Discounts are not the debts of the assignor or assignee.

Another statute gives the right to any person to set up against an attachment any interest in, or lien upon, the property attached which he may have, without regard to notice. Code 1899, chap. 106, § 23; *First Nat. Bank v. Harkness*, 42 W. Va. 156, 32 L. R. A. 408, 24 S. E. 548; *Crim v. Harmon*, 38 W. Va. 596, 18 S. E. 753.

This inquiry as to the grounds upon which some of the courts give precedence to an attachment over an unregistered transfer results in the conclusion that they put it upon the statutes either authorizing or requiring transfer to be made on the books of the corporation, some of them adopting the view that, as there can be no visible change of the possession of a share, the legislature intended the record to take the place of visible possession, by way of analogy to the common-law rule relating to tangible property, and others adopting the view that the statutory provision is in the nature
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of a registration law for the protection of the public. It has been shown that, where the former theory was adopted, it has either been abandoned or displaced by statutes. Moreover, there never was any basis for the assumption of legislative intent to require recorded evidence of ownership of shares, when the statute did not make the record a public one. It might as well be assumed that some record ought to show who owns other choses in action, evidenced by notes, bonds, and other obligations. The latter has been almost universally condemned as imputing to the legislature an intent not warranted by the language of the statute or the nature of its subject-matter. Of it, *Thomp. Corp.* § 2411, says: "But this view, which makes the stock and transfer books public records, open to the inspection of the public, is plainly untenable unless the statute law (as it does in some states) obliges the corporation to expose such records to the inspection of the public. Otherwise, they are strictly private records, sustaining no analogy to the records of transfers of title required to be made and kept in public recording offices; and even these last records import no notice except in those cases where the statute law expressly so provides."

Our statute, viewed in the light of the foregoing authorities and principles, affords no ground for a conclusion that an attachment in favor of a creditor of a transferrer will prevail over the title, be it legal or equitable, of a transferee, when the transfer is not entered upon the transfer book of the corporation. It does not say the stock shall be transferable only on the books of the corporation. It is silent as to what shall constitute a transfer. The provisions relating to transfer are found in §§ 21, 22, and 35-38, of chapter 53, of the Code of 1899. The last-mentioned section has no important bearing upon this question, and the others read as follows:

"21. A transfer book shall be kept by the corporation in which the shares shall be assigned under such regulations, if there be any, as may have been prescribed by the by-laws.

"22. No share shall be transferred without the consent of the board of directors, until the same is fully paid up, or security given to the satisfaction of the board for the residue remaining unpaid. And where bond and security have been given to the corporation for any sum remaining unpaid upon stock, no transfer shall affect the validity of such bond and security."

"35. The board of directors may cause to be issued, if demanded, to any person appearing on the books of the corporation to be the owner of any shares of its stock, a

certificate therefor, under the corporate seal to be signed by the president and such other officer, if any, as the board may direct; which certificate shall show the amount paid on each share.

"36. A stockholder to whom such certificate has been issued shall not be allowed to transfer the shares therein mentioned, or any part thereof, without delivering up the said certificate to the corporation to be canceled, unless the same be lost or destroyed, or sufficient cause be shown to the satisfaction of the board of directors why it cannot be produced.

"37. If any person, for valuable consideration, sell, pledge, or otherwise dispose of any shares belonging to him to another, and deliver to him the certificate for such shares, with a power of attorney authorizing the transfer of the same on the books of the corporation, the title of the former shall vest in the latter so far as may be necessary to effect the sale, pledge, or other disposal of the said shares, not only as . . . against the creditors of, and subsequent purchaser from, the former, but subject, nevertheless, to the provisions contained in the 19th section of this chapter."

It is to be observed that no certificates of stock are required to be issued unless demanded by some person appearing on the books of the corporation to be the owner of the shares. While a certificate, when issued, is generally deemed by the courts to be a muniment of title, our legislature, not deeming it essential to the existence of the shares, nor expedient on the ground of public policy, has failed to require corporations to issue them, unless demanded. The demand may be made by any person appearing on the books of the corporation to be the owner of the shares. He is an owner before he acquires a certificate. The certificate is clearly only evidence of title, which exists without it and independently of it. He may exercise his own pleasure about taking a certificate. If he does accept one, however, then he is placed under restrictions as to the mode of transfer, imposed by § 36, and his transferee is given special protection by § 37. These two sections will be further discussed later on. They clearly do not inhibit a transfer without a certificate, for they only relate to stockholders who have taken certificates, and a stockholder is not bound to take a certificate in order to complete his title. They clearly do not cover the whole subject of transfer. Section 22 imposes no conditions upon the exercise of the right to transfer, except that, if a share is not fully paid up, no transfer of it shall be made without the consent of the board of directors, unless security for the residue remaining unpaid, 67 L. R. A.

satisfactory to the board, be given. If the board of directors consent, it may be transferred, although not paid up nor any security given. If it is paid up, consent of the board of directors is not necessary, and the owner of it may sell it at his pleasure.

Section 21 requires the corporation to keep a transfer book "in which the shares shall be assigned under such regulations, if there be any, as may have been prescribed by the by-laws." This, no doubt, means that the names of the shareholders, together with the number of shares owned by them, respectively, shall be recorded in the book kept for that purpose, but it does not mean that the entry in that book shall be necessary to pass the title. It does not say so, and nothing but a strained construction of it could make it mean that. Nowhere in our corporation laws does it appear that any of the records required to be kept are in any sense public records. Section 43 of chapter 53 requires a list of the stockholders, showing the number of shares and votes to which each is entitled, to be hung up in the most public room at the principal office or place of business of the corporation, for one month before every annual meeting of the stockholders. Section 47 of the same chapter declares that the funds, books, correspondence, and papers of the corporation shall be at all times subject to the inspection of the board of directors or committee thereof, appointed for the purpose, or of any committee appointed for the purpose by a general meeting of the stockholders. No provision appears to give to the individual stockholder, much less a creditor of his, a creditor of the corporation, or a wholly disinterested person, the right of inspection at all times or at any time. The board of directors is required by § 46 of chapter 53 to make a report to the stockholders at the annual meeting, showing the condition of the corporation, and then declares that "the board shall furnish to each stockholder requiring it, a true copy of such report, together with a list of the stockholders and their places of residence." By § 47 of chapter 53, every stockholder has a limited right of inspection. It is only for thirty days before the annual meeting of stockholders, and extends, not to the "property and funds, books, correspondence, and papers of the corporation," but only to "the minutes of the resolutions and proceedings" of the board of directors.

Not a word appears in any of the provisions just discussed from which it can reasonably be inferred that they were intended by the legislature to vest in the general public, as creditors or otherwise, any rights by which the transfer of shares is in any way impeded or restricted. But when §§

35, 36, and 37 of chapter 53 apply, it may be different. Whether Condon ever took any certificates for the shares in question does not appear. As he could hold the shares and transfer them without certificates, the court cannot assume that he held them otherwise. However, as the construction of these sections may be deemed to have some bearing upon the question now under consideration, certain purposes which they seem to have been intended to serve will be mentioned. Judge Holt, speaking for this court in *Donnelly v. Hearndon*, 41 W. Va. 519, 23 S. E. 646, after quoting §§ 19 and 37 of chapter 53, said: "The manifest purpose of the statute is to permit the corporation to go by its books in ascertaining who is the owner of stock, and not require it to go out on the street and hunt them up.

. . . Evidently, one of the objects of our statute cited above was to free banks and other corporations from the danger of such loose and unreliable evidence of notice of ownership of stock, by authorizing them, in their multitudinous details of affairs, to go by their books in determining the ownership of stock, in paying dividends, so long as they are acting in good faith and with reasonable care."

Sections 36 and 37 do not apply unless a certificate has been issued. That certificate is evidence against the corporation of the existence of the share and its ownership. As long as it is out of the possession of the corporation, it is a continuing affirmation by the corporation of the title and interest of the person to whom it was issued. 10 Cyc. Law & Proc. 590. A transfer made on the books of the corporation of the shares represented by the outstanding certificate might operate as a fraud upon the rights of an innocent purchaser of the stock. They are assignable, and are sometimes said to be quasi negotiable instruments, though they are not really negotiable in the true sense of the term. 10 Cyc. Law & Proc. 590. Nor are they generally held to be securities in the legal sense of the term (10 Cyc. Law & Proc. 590); but they are largely so used, and our statute (§ 37) makes them evidence of complete title as between the parties to the sale and of a valid pledge when they are so used. To allow a transfer on the books of the company, inconsistent with the rights evidenced by the outstanding certificate, would produce confusion and open the door to fraud. To this extent the legislature may have intended to protect the public against fraudulent transfers on the books when certificates are outstanding; but the corporation and all its stockholders, whether holding certificates for their shares or not, have a deep interest in the subject. "The corporation has a dangerous duty to

perform when stock has been attached or sold under levy of execution, and a registry is requested by the purchaser at such sale or by a purchaser of the outstanding certificate of stock. Cook, Corp. § 489.

Whether intended for the protection of the public as well as the corporation, or not, it seems clear that § 36 inhibits only a transfer upon the books of the corporation without a surrender of the certificate, and does not further restrict the power of the owner of the shares over them. It compels the officers to keep the record of shares consistent with the outstanding certificates of shares, so that neither the corporation, holders of stock, nor purchasers of shares can be prejudiced or endangered by any evidence of title made by the corporation itself.

The holder of a certificate being thus protected from any injurious action at the office of the company, his transferee of that certificate, whether purchaser or pledgee, is also protected both from the acts of the corporation by said § 36, and also from the acts of the transferor and all persons claiming under him, whether as purchasers or creditors, by the provisions of § 37, declaring that, if any person sell, pledge, or otherwise dispose of, any shares belonging to him to another, and deliver to him the certificate for such shares, with a power of attorney authorizing the transfer of the same on the books of the corporation, the title of the former shall vest in the latter so far as may be necessary to effect the sale, pledge, or other disposal of said shares, not only as between the parties themselves, but also as against the creditors of, and subsequent purchasers from, the former. Is there a word in the three sections by which any intent to confer any new rights upon the creditor of a stockholder is manifested? Because § 37 says the delivery of the certificate, together with a power of attorney, shall effect a complete sale or pledge as between the parties, and as to subsequent purchasers from, and creditors of, the transferor, does it follow that, without such delivery, the transferee, under a purchase for value and without fraud, would not have a title superior to the claim of a creditor of the transferor under a subsequent attachment or execution, or of a subsequent purchaser who has not himself acquired the certificate? Suppose the certificate is lost or destroyed, or not within reach when the owner of the shares represented by it wishes to pledge or sell them, and the purchaser or pledgee is willing to part with his money on the faith of a simple instrument of writing, purporting to assign the shares; can this not be done, subject to the rights of any third party who may obtain the certificate? Not a word in the statute as-

serts the contrary. Is it to be implied? Restrictions upon the right to make contracts are not, often so established. The statute only declares what shall be the effect of making a transfer in a particular manner, leaving the parties to be governed by the general principles of law and equity, if they make it in any other way. If the transfer be made in the manner indicated, the transferee need show nothing but the certificate and power of attorney to establish a perfect title as against everybody, but the corporation. Without the certificate and power of attorney he would be required to show when, under what circumstances, and for what sum of money or other valuable consideration, he became the owner. It is obvious that, unless § 36, or some other provision of the statute, is to be regarded as a registration law for the protection of the public, who have no access to the books of the company, these sections are intended only to protect the corporation and those who claim under the certificates of stock. That neither § 36 nor any other section of chapter 53 is a public registration statute is made plain by what has been said in former parts of this opinion. That being true, the mode of sale mentioned in § 37 relates only to the matter of registering the transfer on the books of the corporation, for its protection and that of holders of the certificate. These observations on §§ 35, 36, and 37 of chapter 53 are only made for the purpose of showing that nothing in them conflicts with the conclusion reached respecting the status of an unregistered transfer, under our statutes, when no certificate is involved, and are not to be taken as constituting a binding judicial construction of the provisions of said sections. Shares of corporation stock can only exist by virtue of a statute. Our statute, as shown, makes them property, and vests the subscribers with title before any certificate is issued, and does not require one to be issued. Owning the share without a certificate, he may sell it without one, or with one, at his election. The sale in this case was of stock for which no certificate had been issued. The *jus disponendi* is an incident of ownership. 10 Cyc. Law & Proc. 577. And it may be exercised in any way not prohibited by the law. As our statute does not prescribe any mode of sale when no certificate has been issued, the owner may dispose of his share in such manner as would suffice to pass his title to any other chose in action or intangible property. The delivery of a written instrument assigning the property is clearly a symbolic delivery, if any delivery is necessary in such case.

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for materials, for rent, or for any other chose in action, not evidenced by writing or acknowledgment of the debtor, may be assigned by a writing such as was signed and delivered in this case, purporting to assign the shares in question. Why is it not sufficient in this case? There can be no substantial, nor even a plausible, technical reason, as has been shown by authorities as well as by the provisions of the statute, making possible the existence of this kind of property.

In *Fisher v. Essex Bank*, 5 Gray, 373, holding that the statutory mode of transfer was exclusive, the statute having said shares were transferable only on the books of the bank and at the banking house, the court said: "Before any method was established by positive law, how, by what mode, or by what precise and definite act, such property should be considered as ceasing to be the property of the seller and becoming the property of the purchaser, courts of justice might well resort to the common-law modes of transferring similar incorporeal interests, and hold that a delivery of the only muniment of title held by the owner, with the execution and delivery of an assignment of his interest, by indorsement on the certificate or otherwise, should by analogy be held to be a valid transfer, and, when notified to the bank, should be considered as having taken effect at the date of such delivery."

As before demonstrated, the notice is only required as against subsequent purchasers.

Having no doubt about the sufficiency of the transfer to vest title in the transferee, nor as to the superiority of that title, equitable though it may be, over the attachment lien, if acquired for value and without fraud, nothing remains to be determined but the question whether the purchase was for value and in good faith.

At a sale under a decree made by the circuit court of the United States for the district of West Virginia, in May, 1890, Levi Z. Condon became the purchaser of 66,000 acres, or more, of wild lands, situated in Randolph and other counties, which sale was confirmed July 1, 1890. On the 20th day of December, 1894, it appearing to the court that Condon had theretofore paid into the registry of the court the balance of purchase money, and had by deeds dated March 25, 1892, and April 1, 1892, conveyed to the Condon Lane Boom & Lumber Company, a corporation, the said lands, it was ordered that the same be conveyed to said company, and it was accordingly done. At about the time of Condon's conveyance to the Condon Lane Boom & Lumber Company, or shortly before that time, he owned

a mill on Dry Fork river, at Bretz, some miles below the timber lands and was trying to devise some way of getting the timber down to that point, and desired to sell the hemlock bark on the lands, and with the proceeds construct, or aid in constructing, a railroad up said river to these lands. H. Stowell says Condon employed him in June, 1902, to find a purchaser for the bark, agreeing to pay him \$5,000 for his services upon the consummation of the sale, and that afterwards, in February, 1894, a sale of the bark to the United States Leather Company, at the price of \$65,000, was effected as a result of his services in exploring the land, estimating the value of the bark, and furnishing information to the purchaser. The sale was made in February, 1894, and Stowell assigned his claim for the \$5,000 to P. Lipscomb, who in December, 1898, proceeded against Condon in equity as a nonresident, serving the order of attachment on the Condon Lane Boom & Lumber Company, as garnishee, and that company answered, admitting that according to its books Condon was the apparent owner of 1,300 shares of common stock and 1,250 shares of its preferred stock. Later, Albert N. Horner filed his petition, claiming to have purchased and paid for all of said stock long before the service of the order of attachment, and to have owned it at the time of said service, and still to be the owner of it. Jeff Lipscomb, administrator of P. Lipscomb, in whose name the suit was revived, said P. Lipscomb having died after instituting the suit, filed an answer denying that there had been any valid purchase of the stock by Horner, and charging that no valuable consideration passed from him for the stock; that the same was placed in the hands of Horner by Condon "for the sole and express purpose of hindering, delaying, and defrauding the said plaintiff" out of the collection of said debt, as well as other creditors. He was informed and believed that no assignment or transfer of the stock had been made until after the sending out of the attachment, and that then Condon and Horner conceived and executed a plan to defeat the collection of the debt, by transferring the stock after the service of the writ, and dating the transfer back, "in order to give the said pretended transfer a semblance of having been done for a valuable consideration," all of which said transaction was intended to hinder, delay, and defraud the creditors of the said Condon, and especially "this plaintiff."

As no replication to this answer was filed, and no depositions were taken on the subject-matter thereof after it was filed, it is insisted, upon the authority of *Snyder v. Martin*, 17 W. Va. 276, 41 Am. Rep. 670; 67 L. R. A.

Bierne v. Ray, 37 W. Va. 571, 16 S. E. 804; and *Findlay v. Smith*, 6 Munf. 142, 8 Am. Dec. 733,—that the allegations of fraud on the part of Horner, contained in the answer to his petition, must be taken as true. Counsel for appellant, Horner, deny the correctness of this position, saying that no answer was required. For this they rely upon the language of § 23 of chapter 106 of the Code, under which the petition is filed. This section, after authorizing the filing of the petition, says: "The court, without any other pleading, shall impanel a jury to inquire into such claim."

Though originally there might have been difference of opinion as to the application of this statute to suits in equity with attachment, the question seems to have been settled in favor of it. In *Chapman v. Pittsburg & S. R. Co.* 26 W. Va. 324, the court seems to have approved the ruling in *Anderson v. Johnson*, 32 Gratt. 558. That was a suit in equity founded upon an attachment, and the court held as follows: "Where persons claiming the property attached, or some interest in it, are admitted as parties in the cause, their claim is to be tried by a jury impaneled for the purpose, as provided by the statute, Code of 1873, chap. 148, § 25; and it is error for the court to pass upon the claim without the intervention of a jury." *Chapman v. Pittsburg & S. R. Co.* was also a suit in equity with an attachment, and Judge Johnson, in discussing it in view of said section of the statute, said: "If the petition shows a prima facie right in the petitioner to the property in the petition, a title better than that of the defendant, then the court should impanel a jury to inquire into the claim."

Although the inquiry now is not as to the right to a trial by jury, but as to what pleadings are necessary in a case of this kind, the two decisions just referred to and others apply the statute in question to all attachment suits, whether in equity or at law. There can be no doubt of its applicability in actions at law, and these cases foreclose any question as to the intent of the legislature to apply it to suits in equity.

That it is competent for the legislature to require jury trials in equity proceedings cannot be doubted. In many instances it has authorized and required courts of equity to direct issues out of chancery to the law side of the court for the determination of questions of fact proper for ascertainment by a jury. The statute governing attachment proceedings requires a trial by jury of the issue made on a plea in abatement, denying the existence of the ground upon which the attachment is sued out. Whether the proceedings are entered in the chancery order book or the law order book of the

same court is more a matter of form than substance, though it is sometimes error not to enter it in the latter. *State ex rel. Pelton v. Irwin*, 30 W. Va. 404, 4 S. E. 413. In § 23, providing for intervention by third parties, the legislature may have intended a direction of an issue and trial by jury in all cases, whether the title set up was legal or equitable in its nature. But if it were an open question it might well be doubted whether the legislature did so intend, and whether it was intended, when the proceeding is in equity, to alter the rules of pleading, and limit the pleadings to the petition alone.

The statutory provision in question appears for the first time in the Code of 1849. The object of the amendment is stated by the revisers in their report (p. 761) as follows: "This section, as altered from the present law, will close the question whether a suit in equity is not necessary when a party claims under a subsequent attachment." Up to that time the statute had made no provision for any third party who desired to dispute the validity of the plaintiff's attachment, or who desired to assert a lien on the attached property under any other attachment or otherwise. The provision was as follows: "Whenever the goods and chattels, taken by virtue of any attachment, shall be claimed by any person, other than such debtor, the court shall immediately (unless good cause be shown by either party for a continuance) direct a jury to be impaneled to inquire into the right of property." Code 1819, chap. 123, § 16. That chapter relates to both foreign attachments in equity and attachments at law; but the distinction between the two kinds of proceedings seems to be very clearly marked, and said § 16 seems to be applicable to the latter only.

The doubt and uncertainty alluded to by the revisers is exemplified in *Erekin v. Staley*, 12 Leigh, 406, and *Moore v. Holt*, 10 Gratt. 284. Both of these cases arose before the amendment of the attachment statute adverted to, and their nature is indicated by point 1 of the syllabus in *Moore v. Holt*, which reads as follows: "Process in a foreign attachment is served upon a garnishee having property of the absent debtor in his hands, and afterwards other creditors sue out attachments at law against the same party as an absconding debtor, which are served upon the same garnishee, and, before the foreign attachment is ready for a hearing, they obtain judgments and an order for the sale of the property in the hands of the garnishee. The plaintiff in the foreign attachment may amend his bill and enjoin the sale." In that case the court very clearly points out

the difference between foreign attachment in equity as it existed in Virginia at that time, and the statutory attachment in equity and at law which now obtains in Virginia and this state. In foreign attachment, the process, with an indorsement on it in the nature of an attachment, created a lien, although no affidavit at all had been filed; but to authorize the officer to take the effects out of the hands of the garnishee, or require him to give security to have the same forthcoming, an affidavit was necessary. For the amount and nature of the claim, reference was had to the bill. The bill and process with the indorsement give a lien. Hence the title was drawn into the main suit. The bill asked for subjection of the property to satisfaction of the debt, and brought it within the jurisdiction of the court. In an action at law the property came into the case by reason of the levy of the attachment only. All this suggests the *quære* whether the legislative object was not merely to enable a lien-holder, by execution or otherwise, and the person claiming an equitable title to the attached property in a proceeding at law, to assert his claim in a court of law,—a thing which he could not do, or to do which his right before the amendment was doubtful,—and not to work any change whatever in the rules governing the pleadings, when the suit in which the attachment is sued out is in equity. It is to be observed that Judge Moncure's discussion of the subject in *Anderson v. Johnson* is limited to a single paragraph of about a half dozen lines, and makes no reference whatever to the history of the subject or reason of the amendment. Nor does Judge Johnson enter upon any examination of it. Moreover, I see no good reason why it may not here be held that the parties, by going into equity, have waived the right to a trial at law, since fraud, the real core of the controversy, is always a matter of equity cognizance. Though not free from doubt as to the proper construction of the section, I yield to the views of the other members of the court, who are satisfied with the interpretation which the Virginia court has given the statute, and which this court has approved, as already stated.

Under a misapprehension of the law, superinduced by the action of the parties, the court treated the petition of Horner as a cross bill, and heard the matters in difference between him and the attaching creditor upon it and the answer thereto, and upon the depositions taken and filed by the parties. In bringing the case on to be heard, the decree contains the usual recitals, except that it refers to the agreement between the parties, upon which, also, it was

heard. This is an agreement entered into between Horner and the plaintiff, authorizing the filing of Horner's petition with the clerk of the court in vacation, and the answer of the plaintiff to the petition within forty days from the date of the agreement, and providing that thereafter the parties might go on "and take their proof upon said petition just as if the same had been filed in court, and mature the same for hearing; but either party shall have a right to object to any pleading or proof just as if the same were filed in court." In an effort to be more explicit the parties repeated the agreement in the following terms: "All legal objections which either party may have to any pleading or evidence are reserved for the consideration of the court, and the hearing of said petition shall be had just as though the same and the bond of the plaintiff and the answer of the plaintiff had been tendered in open court for the action of the court; and it is further agreed that the parties may take such legal and proper proof upon legal notice as they have a right to take."

Assuming either that the statute did not contemplate a trial at law of the matters in difference between the petitioner and the plaintiff, or that, if it did, they might elect to try according to the rules of equity procedure, depositions were taken and filed, and the court disposed of the case as one in equity. Considered as a trial at law by the court in lieu of a jury, how does the case stand? No witnesses were produced and examined to prove the contention of either party. No ground is shown for the use of depositions instead of oral testimony of witnesses. Had objection been made, the depositions could not properly have been used, and there was no evidence before the court. However, counsel for appellant now insists that the action of the court shall be treated as a trial at law, and the depositions to prove his petition as having been properly admitted. The court, erroneously treating the proceeding as governed by the rules of equity practice, regarded the allegations of fraud in the answer as true, and entered a decree for the plaintiff. This operated a complete surprise upon the petitioner. To permit him now to turn the proceeding into one at law, and give him the benefit of his depositions, would work an equally great surprise upon the plaintiff. Hence it is plain that, under a misconception of the nature of the proceeding, there has been a mistrial, operating injustice to both parties. The plaintiff has had no opportunity to interpose objections to the introduction of petitioner's evidence irregularly taken and

introduced. The petitioner has been unwittingly drawn into a trap which denies him the benefit of his evidence on merely technical grounds. The principle announced in *Echols v. Tracewell*, 52 W. Va. 614, 44 S. E. 164, and in *Armstrong v. Grafton*, 23 W. Va. 50, is well adapted to situations of this kind, and its application will enable the parties to have a fair trial under proper rulings by the court. On the theory of a misconception of the case by both counsel and the court, in consequence of which there had been no fair trial, the appellate court reversed the decrees in those two cases, and remanded them. Viewed from this point of observation, the vice of the proceeding is the adoption of a wrong mode of trial, and the application to the trial of improper rules of procedure.

That the case was heard on the agreement does not relieve from the effect of this irregularity. The parties reserved the right to make all proper objections to the pleadings and evidence, and, under the rules governing the mode of trial adopted, no objections would have been entertained. Hence it was useless to make any. We cannot assume that the appellee would have relied upon the want of a replication, or failed to object to the introduction of depositions, without grounds therefor having been shown, had he been informed that the trial was at law instead of in equity. He agreed that proof might be taken under the apprehension that the proceeding was governed by the rules of equity pleading and practice. This is manifest from the terms of the agreement. Therefore he cannot be said to have consented to the use of the depositions on a trial at law, and in fact, as well as in law, the record shows there never was any such trial.

The position of counsel for appellant is open to another serious objection. The record does not show any express waiver of a jury by the appellee. The decision is in his favor. Appellant would reverse the decree, and then have the court render, against the appellee, a new decree, such as, in the opinion of counsel for appellant, the court below should have entered. While an adjudication in favor of the appellee, without the waiver of a jury, might stand, because he cannot be prejudiced thereby, one against him might be fatally erroneous for want of such waiver. In decreeing against him this court is bound to notice and protect his rights. That a jury may be waived is beyond doubt, but the legislature has seen fit to prescribe the manner in which such waiver shall be shown, namely, by consent of the parties or their counsel entered of record.

Section 29 of chapter 116 of the Code of 1890. This statute was put in the Code of 1849 upon the recommendation of the revisers, at a time when the constitutional guaranty of jury trial was in a form different from that in which it now appears; but the alteration in its language makes it no less sacred, and our lawmakers have not exercised their discretion to dispense with the statutory requirement as to the manner in which such waiver shall be evidenced. Through all the mutations of our organic and other laws, they have suffered the statute to remain wholly unaltered, and its provisions have been uniformly observed down to the present time, so far as the reported decisions of this court disclose. For more than half a century the statute has stood, working no inconvenience, and yet effectually guarding this most important and sacred right of the citizen against inadvertent and inconsiderate waiver. In view of all this, it would be clearly contrary to legislative intent, and a violent innovation upon our settled practice, to permit any form of waiver different from that prescribed by the statute. None of our decisions seem to countenance any authority in the court to try civil and misdemeanor cases except when the record shows a waiver by consent. *King v. Burdett*, 12 W. Va. 688; *Ramsburg v. Erb*, 16 W. Va. 777; *Bank of Ravenswood v. Hamilton*, 43 W. Va. 75, 27 S. E. 296. In some jurisdictions there is a presumption of waiver when the record is silent on the subject (17 Am. & Eng. Enc. Law, pp. 1103, 1109); but, where the mode of waiver is prescribed by statute, that mode is generally held to be exclusive. 17 Am. & Eng. Enc. Law, p. 1099.

In a trial upon the petition it will be competent for a jury, or the court trying in lieu of a jury, to inquire into the bona fides of Horner's purchase. Fraud, if proved, will vitiate the sale, and it is within the legislative power to dispense with a plea or other specification setting it up by way of defense on the question of title. "It is as competent for a jury to investigate fraud as a chancellor. The evidence to sustain actual fraud must be the same, in substance and effect, in one form that it is in the other." *Baltimore & O. R. Co. v. Lafferty*, 2 W. Va. 104; *Baltimore & O. R. Co. v. Lafferty*, 14 Gratt. 478; *Jones v. Wood*, 16 Pa. 25; *Wilson v. York & M. R. Co.* 11 Gill & J. 58.

For the reasons aforesaid, *the decree must be reversed* and the cause remanded for trial upon the petition of the appellant, Horner, in accordance with the principles herein stated, and, further, according to the rules and principles of equity.

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Thomas GARTLAN *et al.*

v.

Willie HICKMAN, *Plff. in Err.*

(.....W. Va.....)

- *1. **The owner of land executes a lease thereon for oil and gas purposes**, by which it is agreed that the lessees shall have the privilege at any time to remove therefrom all machinery and fixtures placed on said premises. Under this lease, the lessees and their assignees, for the purpose of exploring for oil and gas, placed on the land an engine, wooden oil-well rig, wooden oil tanks, casing, pipes, rubber belt, and other appliances of like character, necessary for the prosecution of that work. Afterwards the lease was forfeited and terminated for the nonpayment of rental. *Held*, that said machinery and fixtures did not become parts of the freehold, and that said lessees, or the owners of the machinery and fixtures, had a reasonable time after the termination of said lease in which to remove said property from the land.
2. **What is a reasonable time for the removal is to be determined from all the facts and circumstances of the case.**

(October 25, 1904.)

ERROR to the Circuit Court for Harrison County to review a judgment in favor of plaintiffs in an action brought to recover the value of certain chattels which had been placed upon defendant's property while plaintiffs were in possession of it under a lease, and to which defendant had asserted title. *Affirmed*.

The facts are stated in the opinion.

Mr. Edward Grandison Smith, for plaintiff in error:

The things sued for are fixtures.

Jones v. Shufflin, 45 W. Va. 729, 72 Am. St. Rep. 848, 31 S. E. 975; *Childs v. Hurd*, 32 W. Va. 66, 9 S. E. 362.

Things affixed to realty remaining attached after the termination of the lease cannot be removed.

Graves, Real Prop. chap. 2, p. 9; *Morey v. Hoyt*, 62 Conn. 542, 19 L. R. A. 611, 26 Atl. 127; *Shellar v. Shivers*, 171 Pa. 569, 33 Atl. 95; *McFadden v. Crawford*, 36 W. Va. 671, 32 Am. St. Rep. 894, 15 S. E. 408.

*[Headnotes by MILLER, J.]

NOTE.—For other cases in this series as to effect of agreement to prevent fixtures from becoming a part of realty, see *Muir v. Jones*, 19 L. R. A. 441, and *note*; *McFadden v. Allen*, 19 L. R. A. 446; *German Sav. & L. Soc. v. Weber*, 38 L. R. A. 267; *Fuller-Warren Co. v. Harter*, 53 L. R. A. 603; *Anderson v. Creamery Package Mfg. Co.* 56 L. R. A. 555; *Schellenberg v. Detroit Heating & Lighting Co.* 57 L. R. A. 632; *Peaks v. Hutchinson*, 59 L. R. A. 279; *Schmaltz v. York Mfg. Co.* 59 L. R. A. 907; and *Beeler v. C. C. Mercantile Co.* 60 L. R. A. 283.

A lessee's property in fixtures, remaining on the leased premises, terminates with the lease.

Childs v. Hurd, 32 W. Va. 66, 9 S. E. 362; *Jones v. Shufflin*, 45 W. Va. 729, 72 Am. St. Rep. 848, 31 S. E. 975; *Graves*, Real Prop. chap. 2, p. 15.

By the common law, a leasehold interest in land is personal property. Trade fixtures put up by the lessee, although real estate as between lessor and himself, while annexed to the land, yet may, during the term of the lease, be severed by the lessee, or by one deriving title from him, and thus reconverted to their original condition as chattels.

Freeman v. Dawson, 110 U. S. 264, 28 L. ed. 141, 4 Sup. Ct. Rep. 94; *United States v. Stowell*, 133 U. S. 1, 33 L. ed. 555, 10 Sup. Ct. Rep. 244; *Sampson v. Camperdown Cotton Mills*, 64 Fed. 939; *Morey v. Hoyt*, 62 Conn. 542, 19 L. R. A. 611, 26 Atl. 127.

When Gartlan voluntarily declined to pay the November rental, leaving these fixtures on the leased premises, he must be held to have knowingly and deliberately abandoned his property in the lease and in the fixtures at the same time.

There is one line of decisions holding that fixtures may not be removed after the termination of the lease and possession thereunder, whether it is terminated suddenly by forfeiture, by death, or the happening of some other uncertain event or not, and whether the control of such event is within or outside the power of the lessee.

Childs v. Hurd, 32 W. Va. 66, 9 S. E. 362; *Jones v. Shufflin*, 45 W. Va. 729, 72 Am. St. Rep. 848, 31 S. E. 975; *Graves*, Real Prop. chap. 2, p. 9; *Taylor*, Land. & T. § 551; *Morey v. Hoyt*, 62 Conn. 542, 19 L. R. A. 611, 26 Atl. 127; *Kutter v. Smith*, 2 Wall. 491, 17 L. ed. 830; *Friedlander v. Hewitt* (*Friedlander v. Ryder*) 9 L. R. A. 700, and *note*, 30 Neb. 785, 47 N. W. 83.

There is another line of decisions which announces the contrary doctrine, as *obiter dictum* in oil cases, that in a certain excepted class of cases the tenant may remove fixtures after the termination of the lease, within a reasonable time.

Cassell v. Crothers, 193 Pa. 359, 44 Atl. 446; *Shellar v. Shivers*, 171 Pa. 569, 33 Atl. 95.

The contingency which terminated the lease in the two Pennsylvania cases was beyond the power of the lessees to control. At bar the lease was not so terminated and the lessees never had an estate either by sufferance or at will, and therefore the incidents of such estates never attached.

2 McAdam, Land. & T. 716; 2 Minor, Inst. chap. 9, 4th ed. p. 199; 1 Tucker's Bl. 67 L. R. A.

Com. bk. 2, *82; *Sampson v. Camperdown Cotton Mills*, 64 Fed. 939; *Friedlander v. Hewitt* (*Friedlander v. Ryder*) 9 L. R. A. 700, and *note*, 30 Neb. 785, 47 N. W. 83.

The contract does not extend the time of removal of fixtures beyond the life of the lease.

Shellar v. Shivers, 171 Pa. 569, 33 Atl. 95.

If a doubt arises on the lease, that doubt must be resolved in favor of Hickman.

Thornton, Oil & Gas, § 219, p. 249.

The "reasonable time" dictum of *Shellar v. Shivers* cannot cover any time of idle waiting, much less two hundred and forty-six days of absolute idleness before beginning to remove fixtures.

Burk v. Hollis, 98 Mass. 55.

Messrs. Jackson & Patton and *John Bassel* for defendants in error.

Miller, J., delivered the opinion of the court:

Miranda A. Hickman and Willie Hickman, her husband, executed to John F. Phillips and J. Perry Thompson a lease bearing date on the 29th day of May, 1900, on a tract of 112½ acres of land in Harrison county, for oil and gas purposes. By successive assignments of the lease, W. S. Morris, Thomas Gartlan, and the Southern Oil Company acquired an interest therein. The lease stipulates, among other things, that the parties of the first part "do grant, demise, lease, and let unto the parties of the second part, their heirs, executors, administrators, or assigns, for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, and of building tanks, stations, and structures thereon to take care of said products, all that certain tract of land," etc. (describing it). In another clause thereof "it is agreed that this lease shall remain in force for the term of five years from this date [the date of the lease], and as long thereafter as oil or gas, or either of them, is produced therefrom by the said parties of the second part, their successors and assigns. . . . Provided, however, that this lease shall become null and void, and all rights herein shall cease and determine unless a well shall be completed on the said premises within ninety days from the date hereof, or unless the lessees pay at the rate of \$125.00 quarterly in advance for each additional three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed; and it is agreed that the completion of such well shall be and operate as a full liquidation of all rentals under this provision during the remainder of the term of this lease. . . . It is agreed that the

second parties shall have the privilege . . . at any time to remove all machinery and fixtures placed on the premises."

It is admitted by the parties to this action that Mowris, Gartlan, and said oil company went upon the land under the lease and drilled one well for oil and gas, which was completed about the middle of January, 1901, and shot by them on the 13th day of February of the same year; that the parties last mentioned paid the rental under the lease on the 29th day of August, 1901, for the quarter ending on the 29th day of November, 1901, which rental was accepted by Hickman and Mrs. Hickman, the then owners of the land, but no other rental provided for in the lease appears to have ever been paid.

On the 31st day of December, 1901, said Willie Hickman commenced his suit in chancery in the circuit court of Harrison county against Mowris, Gartlan, the Southern Oil Company, Phillips, and Thompson, and on the 7th day of January, 1902, presented his bill to the judge of said court, in which he sets up said lease and the several assignments thereof, and filed therewith copies of the same, and, in substance, alleges therein that Mowris and the oil company, claiming to be equal owners of the lease, had drilled one well on said land, marked on the plat filed as "No. 1," which was completed by them about the middle of January, 1901; that it was afterwards shot, and declared by them to be a dry hole, and not worth cleaning out; that said lease had been abandoned by the said defendants, and active operations thereon for oil and gas continuously discontinued ever since the middle of January, 1901, until the 31st day of December, 1901; that the defendants have paid no rental on said land since the 29th day of August, 1901; that on the 31st day of December last aforesaid, they again entered upon said land with screw, circle, water barrels, bailer, stern, and cable, hauled the same to the well, and proceeded to lay pipe for the purpose of furnishing fuel to said well from another well on a neighboring farm. The bill then charges that the said lease and assignments thereof are null and void, and constitute and are a cloud upon plaintiff's title to said land, and prays that said lease, and the several assignments thereof, be declared forfeited and canceled as such cloud, and that defendants, and each of them, be restrained and enjoined from entering upon said land, and from doing any and all things under said lease, or any of the assignments thereof.

The injunction was granted as prayed for. The bill was filed at rules, and the cause regularly matured for hearing, and on the 22d day of May, 1902, the court made and 67 L. R. A.

entered its decree therein in the words and figures following, to wit: "This cause came on this day to be heard upon the plaintiff's bill and exhibits therewith filed, and was argued by counsel. Whereupon it appears to the court that this cause was regularly matured at rules, and the summons duly served on all the defendants, and the plaintiff's bill taken for confessed, and cause set for hearing at March rules, 1902; and it further appears to the court that the plaintiff is entitled to the relief prayed for in his bill. It is adjudged, ordered, and decreed that the lease therein described as the Phillips and Thompson lease, bearing date on the 29th day of May, 1902, and all assignments thereof, and contracts thereunder, and a subsequent lease of the 3 acres around the buildings in said Phillips and Thompson lease reserved, are forfeited and constitute a cloud upon the plaintiff's title to the land therein described, and are hereby canceled, and the said defendants are ordered to surrender to the plaintiff the said lease and all assignments thereof."

Hickman on the 14th day of July, 1902, sent by registered mail to the several persons to whom it is addressed, copies of the following notice: "To Thomas Gartlan, The Southern Oil Company, a corporation, J. Perry Thompson, John F. Phillips, and W. S. Mowris: You are hereby notified that the oil-well rig, at well No. 1, casing and all fixtures and machinery of every kind or character, and all property now on my farm on Indian Run, in Harrison county, West Virginia, belong to me and are my property; and you are further notified not to remove the same or any part thereof; and you are still further notified not to trespass upon my said farm or any part thereof for any purpose whatever,"—which copies appear to have been received by them, respectively, from the 14th to the 28th days of July, 1902. It is also proved that this notice was the first claim of ownership that Hickman had made to the property in controversy, and was the first knowledge that the defendants, or any of them, had of the determination of the said chancery cause or of such claim.

On the 1st day of August, 1902, an action in detinue was commenced in the circuit court of Harrison county by said Gartlan, Mowris, the Southern Oil Company, Phillips, and Thompson against Hickman for the recovery of sundry goods and chattels, to wit: 2,777 feet of 6½-inch casing (National Tubeworks manufacture), value, \$1,041.73; 200 feet 10-inch casing (National Tubeworks manufacture), of the value of \$192; 1 12x12 Eureka Engine (Boiler Works of Oil City manufacture), of the value of \$232.50; 1 wooden oil-well rig, val-

ue \$200; 1 250-barrel wooden oil tank, of the value of \$30; 1 rubber belt, 6x12, 95 feet long, of the value of \$50; 1 6½-inch T, cast iron, of the value of \$3.32; 3 6½-inch L's, cast iron, of the value of \$6.98; all of said property being of the value of \$1,846.53; said property being in the possession of the said Willie Hickman,—and \$1,000 damages for the detention of the same, and being the machinery and fixtures placed by them on the leased premises. Whereupon, the affidavit and bond as required by law having been filed by the plaintiffs in the case at the commencement of the action, the sheriff was directed to seize and take into his possession the property mentioned, which he did, and delivered the same to plaintiffs. A declaration having been filed, there was a trial of the action to a jury, a verdict in favor of plaintiffs for the property sued for, a motion by defendant to have said verdict set aside, which was by the court overruled, and a judgment that the plaintiffs should retain possession of the said property mentioned and described in the verdict of the jury, and that the plaintiffs should also recover their costs expended. Upon petition of Hickman, a writ of error to said judgment was allowed by a judge of this court. He complains that the court refused to set aside the verdict of the jury and grant to him a new trial of the action, that a certain instruction was given to the jury on motion of plaintiffs, and that certain other instructions were refused, all of which rulings of the court, he asserts, were and are erroneous and prejudicial to him.

In addition to the facts hereinbefore stated, the following agreed statement was read to the jury as evidence on the trial of said action: "It is admitted by the parties: That the plaintiffs placed the property in controversy upon the land of the defendant embraced in the lease of May 29, 1900, for the purpose of drilling and operating for oil and gas under the lease. That one well was drilled in by the plaintiffs and completed about the middle of January, and shot by the plaintiffs on the 13th of February, 1901. The plaintiffs paid the rental under the lease on the 29th day of August, 1901, for the quarter ending November 28, 1901, which rental was accepted by the then owners of the property, the defendant and his wife, Mrs. Miranda Hickman. The well in question was drilled to a depth of 3,208 feet, and the casing inserted to the proper depth, to wit, about 2,100 or 2,200 feet. That a derrick was built over the well for the purpose of drilling, or running the drilling tools in the usual way, and constructed in the usual manner, to the usual height,—about 82 feet,—and that iron tubing or cas-

ing was inserted in the well, which is described in the declaration. That the engine sued for was set or placed in an engine house, and connected with the derrick with drilling tools in the usual way, and the tanks described in the declaration were set or placed about 75 feet from the derrick, or south of the well, for the purpose of receiving the oil. That the derrick is described in the declaration as one wooden oil-well rig. The T's and L's were used for the purpose of connecting the well with the tank,—in other words, the piping leading from the tank to the well. That all the property sued for in the declaration was connected in the usual way and manner of connecting said property for the drilling and operating of the well, and was necessary for that purpose, and used for that purpose. That shortly after the 28th day of November, 1901, the defendant posted notices in writing upon all the outer gates of the land embraced in the lease, notifying the plaintiffs, or anyone acting under them, to keep off the property, and that the defendant claimed that the lease had been forfeited for the failure to pay rent; neither the plaintiffs nor any of their agents at that time being on the property. That the same notice and claim were given verbally by the defendant to Clint Cothrop and other of the agents of the plaintiffs at the same time. That no rental was paid after the 28th of August, 1901, as before stated. That on the 31st day of December, 1901, the employees of the plaintiffs, and by authority of the plaintiffs, after the notice aforesaid had been given, went upon said property, and by warrant sued out on the 1st day of January, 1902, were arrested as trespassers, taken before a justice of the peace, and the cause continued at the instance of the defendants in the warrant, and before trial an injunction was granted in the chancery suit of Willie Hickman against Thomas Gartlan and others, then pending in the circuit court of Harrison county. Thomas Gartlan and others were then not prosecuted further under said warrants, but the same were dismissed. That on the 13th day of February, 1901, the employees of the plaintiffs, by authority of the plaintiffs, went upon the land and shot the well, and on the 15th of January, 1902, by authority of the plaintiffs, again went upon the property and shot the well a second time. It is admitted that the property in question is of the value made in the declaration, that the property in controversy was taken by the plaintiffs at the time of the institution of this suit by giving bond, and that the same was not replevied by the defendant. It is admitted that a demand was made upon the defendant for the property in controversy shortly before the in-

stitution of this action, he exact date being July 26, 1902, which demand in writing is filed as a part of this statement, marked 'Demand.' That the lease under which the plaintiffs entered and placed the property upon the land of the defendant was in the following words and figures: . . . That all the property in controversy remained in place as it was at the time said well was drilled and operated until delivered to plaintiff by the sheriff in this suit. The record of the chancery cause of Willie Hickman against Thomas Gartlan, the Southern Oil Company, J. Perry Thompson, John F. Phillips, and W. S. Mowris, instituted in the circuit court of Harrison county on the 31st day of December, 1901, is filed as a part of this statement, marked 'Exhibit Record.' The amount of the defendant's damages in the event the verdict and judgment shall be for the defendant shall be \$100. It is further agreed that, of the 2,200 feet of casing in the well originally, possession of only 950 feet was taken by the sheriff and delivered to the plaintiffs. Four hundred and twenty-five dollars being the value of that casing at the same rate averred here and agreed upon, the same is not involved in this suit."

The instruction given on motion of the plaintiffs is in the words and figures following: "The jury is instructed that the plaintiffs were not deprived of the right to remove the property demanded in the declaration, under the evidence offered to the jury, if, from such evidence, the jury shall believe said property was placed upon the leased premises for the purposes of drilling or operating for oil and gas, by reason of the fact that a decree was entered by the circuit court of Harrison county on or about the 27th day of May, 1902, in an equity suit brought by the defendant against the plaintiffs for such purpose, and that the plaintiffs would be entitled to a reasonable time after the termination of the suit in equity to remove said property from the leased premises."

The instructions asked for by the defendant and refused by the court are in the following words and figures: "(1) The court instructs the jury that if they believe from the evidence that the property sued for by the plaintiffs was placed by the plaintiffs on the property of the defendant during the existence of an oil or gas lease, giving the plaintiffs the right to explore thereunder for oil and gas; and if the jury further believe that said property, or any part of it, was so placed upon the said Hickman's land as to give it the character of fixtures, or trade fixtures; and if the jury further believe from the evidence that the said oil and gas lease expired, or became forfeited, or was in any

wise terminated, and the possession of said plaintiffs under said lease was lost, before said fixtures were removed from said land,—then the jury should find for the defendant. (2) The court instructs the jury that, after the expiration of an oil or gas lease by forfeiture or otherwise, the lessee cannot remove fixtures attached to the realty during the continuance of said lease. Such fixtures become a part of the realty, and go to the person entitled thereto after the expiration of the lease. (3) The court instructs the jury that, as between lessor and lessee, fixtures erected by the latter, and which he is entitled to remove, must be removed during the term of the lease. After the expiration of the term of the lease, and the loss of possession thereunder, the tenant can neither remove said fixtures nor recover their value from the lessor. (4) The court instructs the jury that a lessee may remove fixtures which he has put on the leased premises at any time during the lease, or while he continues tenant, but after the expiration of the lease, and the surrender of the premises to the lessor, he cannot enter on the premises and remove any fixtures, for, when he quits the premises, leaving his fixtures behind him, it will be presumed he intended to abandon them. (5) The court instructs the jury that, if they believe from the evidence that said Phillips and Thompson lease was on the 28th day of November, 1901, for the nonpayment of rent, or for any other reason, forfeited; and if the jury further believe from the evidence that the plaintiffs, Thomas Gartlan, and others, were then, or at any subsequent time in the month of December, prior to the 31st day of December, 1901, out of possession of the premises described in said lease for oil and gas purposes, and that the plaintiff, Willie Hickman, was then in possession thereof; and if the jury further believe from the evidence that the property here sued for was at the time of the forfeiture of said lease not severed and removed therefrom for more than six months thereafter—then the jury should find for the defendant, Willie Hickman. (6) The court instructs the jury that, if they believe from the evidence that the plaintiffs, Thomas Gartlan and others, after the completion of said well No. 1, paid on February 12, 1901, \$125, on May 28, 1901, \$125, on August 28, 1901, \$125, as rental, and that on the 28th day of November, 1901, annual rental fell due and was not paid; and if the jury further believe from the evidence that, for nonpayment of rental or any other reason, said Phillips and Thompson lease has been judicially ascertained to be, and decreed to be, forfeited and canceled; and if the jury

further believe that at the time of such forfeiture and cancelation, and thereafter, the plaintiffs, Thomas Gartlan and others, were out of possession of the premises described in said lease, and that the said defendant, Willie Hickman, was in possession thereof; and if the jury further believe from the evidence that at the time of such ascertainment judicially of such forfeiture, and at the time of said cancelation, the property here sued for was attached to the real estate described in said lease, and was not severed therefrom until after the institution of this suit, by virtue of an order made in this suit, and without the consent of the said Hickman, and against his protest,—the jury should find for the defendant, Willie Hickman. (7) The court instructs the jury that, if they believe from the evidence that the property sued for was at the time of the institution of this suit so attached to the realty of Willie Hickman as to be trade fixtures, and if the jury further believe from the evidence that at the time of the institution of this suit the Phillips and Thompson lease had been canceled, then the jury should find for the defendant, Willie Hickman.”

Hickman contends, first, that the things sued for were and are fixtures; second, that they remained attached to the realty after the termination of the lease; third, that, these fixtures being so attached at the time and after the lessee lost title to the lease, they cannot be removed from the land; and, fourth, that the lease ended on November 29, 1901, by forfeiture for the nonpayment of rental by the lessees, and did not terminate by reason of the decree of the court on the 22d day of May, 1902.

For the defendants in error it is urged, first, that the things sued for were and are chattels; second, that they retain their character as personalty, and are not fixtures; third, that they may be removed by the lessees within a reasonable time after the expiration of the lease; fourth, that the lessees are not precluded from the exercise of that right by the trial of the question of the forfeiture of the lease. By the express terms of the lease the second parties have the right to remove all machinery and fixtures placed on the premises in the prosecution of their exploration and search for oil and gas. There can be no question as to what property may be removed, unless the right of removal has been lost to the lessees or their assigns. The lease says that the second parties shall have the privilege of removal at any time.

The parties have agreed that the lease shall become null and void if the rental be not paid as stipulated. The authorities cited in the case of *Guffy v. Hukill*, 34 W. 67 L. R. A.

Va. 49, 8 L. R. A. 759, 26 Am. St. Rep. 901, 11 S. E. 754, seem to be full and clear that default in the performance of the condition of the lease by the lessee *ipso facto* terminates and forfeits the lease, and all of his rights thereunder. In the chancery suit it was adjudicated that the causes of forfeiture existed as alleged, and therefore, the lease was canceled. The said forfeiture, however, by the terms of the lease and the decree of the court, extends no further than to the lease, which “vested no present title in the lessees, except the mere right of exploration for oil and gas.” *Steelsmith v. Gartlan*, 45 W. Va. 27, 44 L. R. A. 107, 29 S. E. 978; *Urpman v. Lowther Oil Co.* 53 W. Va. 501, 505, 97 Am. St. Rep. 1027, 44 S. E. 433. The completion of a nonproductive well vested no title in the lessee. *Ibid.* Therefore the defendants in error forfeited only the right to further search for oil and gas on the land. There is nothing in this lease declaring that upon its termination the machinery and fixtures placed upon the land by the lessees shall be the property of the lessor. The lessor has written in the contract the considerations and conditions upon which the lessees may search for oil and gas upon the land. The lease is of uncertain duration. The right of the lessees thereunder is dependent upon the completion of a well by them within a specified time, the payment of rentals, or the production of oil or gas from the land in paying quantities. In order to complete the well, the lease allows the lessees ninety days from the date thereof. They are entitled to prosecute their search for the full ninety days with their machinery and fixtures, but at the end of ninety days, the well being unfinished, the lease would forfeit, unless the rental for the next quarter be paid in advance. It is untenable to contend that, default being made as aforesaid, the lessees would not be permitted to remove their machinery and fixtures. So, if the time of search should be extended by payment of rental, the lessees would be entitled to the whole period for the purpose of their exploration.

The object in placing the machinery and fixtures on the land was to enable the lessees to develop the leased premises. It was for the benefit of the lessees, and not to enhance the value of the land by permanent improvements thereon. Engines, derricks, oil tanks, casing, and pipes, of the character described above, are not placed on farms, as farming implements, or to be used in connection with agriculture. “The chief test by which to determine whether an article is a fixture is to inquire whether the party annexing it intended it to be a permanent accession to the freehold.” *Edwards & B*

Lumber Co. v. Rank, 73 Am. St. Rep. 514, 518, note, (57 Neb. 323, 77 N. W. 765); *Fisfield v. Farmers' Nat. Bank*, 148 Ill. 163, 39 Am. St. Rep. 166, 35 N. E. 802. In *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Kan. 23, 4 L. R. A. 284, 16 Am. St. Rep. 471, 21 Pac. 809, it is held that "whether a chattel becomes a fixture depends upon the character of the act by which it is put into its place, the uses to which it is put, the policy of the law connected with its purpose, and the intention of those concerned. . . . Before personal property can become a fixture by actual physical annexation to land, the intention of the parties, and the uses to which it is put, must combine to change its nature from that of a chattel to that of a fixture." *Thomson v. Smith*, 111 Iowa, 718, 50 L. R. A. 780, 82 Am. St. Rep. 541, 83 N. W. 789; *Donahue, Petroleum & Gas*, 72. In *Johnson v. Wiseman*, 4 Met. (Ky.) 360, 83 Am. Dec. 475, cited in 17 Am. Dec. 693, note, it is said: "The question whether chattels are to be regarded as fixtures depends less upon the manner of their annexation to the freehold than upon their own nature and their adaptation to the purposes for which they are used." *Cooper v. Johnson*, 143 Mass. 108, 9 N. E. 33. *Thornton on Oil & Gas*, at § 567, says: "When the parties immediately concerned, by an agreement between themselves, manifest their purpose that the property, although it is annexed to the soil, shall retain its character as personalty, then, except as against persons who occupy the relation of innocent purchasers without notice, the intentions of the parties will prevail, unless the property be of such a nature that it necessarily becomes incorporated into and a part of the realty by the act and manner of annexation." The machinery and fixtures, as they are called, were placed on the land for the sole purpose of enabling the lessees to explore for and produce oil and gas thereon. Should the lessees fail in their search, or oil and gas, or either, be found and exhausted, this property would not be necessary for the use and enjoyment of the land by the owner as a farm. The land could be used for its former purpose—farming—without this machinery better than with it remaining thereon, an impediment, instead of an advantage. In the light of the authorities cited, we are of opinion that the machinery and fixtures placed on the leased premises did not become permanent fixtures, nor parts of the freehold, and that the plaintiffs' right and title thereto did not vest in Hickman by the forfeiture of said lease, as aforesaid.

The time for the removal of the property is not definitely fixed, by express terms, 67 L. R. A.

with reference to the termination of the lease. We have shown that the lessees could not be required to effect the removal before or at the moment the lease was terminated. Certainly they would not be required to make such removal during the pendency of the chancery suit, brought for the very purpose of determining whether or not the lease had been terminated. *Thornton on Oil & Gas*, at § 576, says: "Contingencies may arise that will not require the lessee to remove his fixtures at the expiration of the lease, or even within what would have otherwise been a reasonable time. Thus, where there arose a dispute between the lessor and lessee as to when the lease expired, and the controversy was taken into the courts and was decided against the lessee, it was held that the lessee could remove the fixtures at the termination of the suit, although the lease had long before expired, and, if the lessor had refused to permit the lessee to so remove them, he was liable in damages." "Where anything is to be done, as goods to be delivered, or the like, and no time is specified in the contract, it is then a presumption of law that the parties intended and agreed that the thing should be done in a reasonable time." 2 *Parsons, Contr.* §§ 535, 651; *Hammon, Contr.* § 444; *Poling v. Condon-Lane Boom & Lumber Co.* (W. Va.) 47 S. E. 279. In the case of *Shellar v. Shivers*, 171 Pa. 569, 572, 33 Atl. 95, 96, where the right of removal of machinery and fixtures was involved, the language of the lease was that the lessee should have the right to remove "at any time" any or all machinery. The court there denied the right of entry for the purpose of such removal four years after the lease had expired, and five years and six months after the well had been completed and found to be of no use as an oil or gas well. After construing the lease, the court says: "If this construction is correct, then the rule of law as to removal of fixtures would be as in cases where the tenancy is uncertain in duration, as when it depends upon a contingency, and that is that the removal must be made within a reasonable time, or, in other words, the law in such cases allows the tenant a reasonable time for the removal of fixtures." *Thornton on Oil & Gas*, at § 574, says: "Thus it was decided in New York that trade fixtures did not cease to be the tenant's property by reason of the mere fact that he did not remove them during his term, and that he could 'remove them after his term expired without subjecting himself to any damages for such removal, even though he be liable to an action for trespass for an entry on the premises demised.' . . . In Illinois it was held that the ten-

ant had a reasonable time within which to remove trade fixtures, and what was a reasonable time was a proper question for the jury, under the instructions of the court." The author cites *Berger v. Hoerner*, 36 Ill. App. 380; *Nigro v. Hatch*, 2 Ariz. 144, 11 Pac. 177. The same author says at the same section: "This is undoubtedly true where a forfeiture of the lease takes place; and, if the tenant is denied the right after the forfeiture to remove them, he may bring an action therefor, especially if the lease contain an agreement giving him the right to make such removal." *Sattler v. Opperman*, 30 Pittsb. L. J. N. S. 205; *Potter v. Gilbert*, 177 Pa. 159, 35 L. R. A. 580, 35 Atl. 597. What is a reasonable time for the removal of the chattels is a question to be determined from all the facts and circumstances of the case. *Kuhlmann v. Meier*, 7 Mo. App. 260. In this case plaintiffs evidently had not abandoned the lease. Hickman alleges in his bill in the chancery cause that on the 31st day of December, 1901, the

agents of Mowris, Gartlan, and others entered upon said land with certain machinery and appliances, and proceeded to work on and about said well No. 1. It is agreed that they shot the well on January 15, 1902. It is proved that the notice to plaintiffs by Hickman on or about July 14, 1902, was the first knowledge they or any of them had of the determination of said chancery cause, the cancelation of the lease, or the claim of Hickman to the property in controversy. On July 26, 1902, demand was made upon Hickman by defendants in error for the property, and on August 1st thereafter action was commenced therefor as aforesaid.

It seems to us that defendants in error proceeded within a reasonable time to assert their rights to the machinery and fixtures in controversy, and that the Circuit Court did not err in giving the one instruction and refusing the others. We therefore affirm the judgment.

GEORGIA SUPREME COURT.

ATLANTA & WEST POINT RAILROAD
COMPANY, *Plff. in Err.*,

v.

Willis WEST, Admr., etc., of Simmie L.
West, Deceased.

(.....Ga.....)

- *1. To create the relation of master and servant there must be some contract or some act on the part of one person which expressly or impliedly recognizes another as his servant.
2. One into whose service another volunteers without his assent, express or implied, is not under the duties of a master toward a servant, or required to anticipate or discover the peril of such volunteer, but is only bound, relatively to such volunteer, to use care not to injure him after notice of his peril.
3. Where a defendant has been guilty of no breach of any duty owing to the plaintiff, there can be no legal liability.
4. Where a volunteer engages in work undertaken in compliance with an unauthorized request of an employee of the defendant, the latter owes him none of the obligations of a master toward a serv-

ant, but is only bound to use care not to injure him after notice of his peril. The fact that the volunteer is of tender years, and without sufficient mental capacity to appreciate the danger, while it might be an element of notice to the defendant of the peril of the volunteer, cannot change the relations of the parties, or impose upon the defendant any duty not ordinarily imposed by law relatively to volunteers.

5. If the defendant had been negligent, and relied upon the concurrent negligence of the plaintiff to defeat or diminish the recovery, then the infancy of the plaintiff would be material to the determination of his diligence; but plaintiff's infancy cannot change the relations of the parties, or supply the place of negligence on the part of the defendant.

(January 26, 1905.)

ERROR to the City Court of Newnan to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of his intestate. *Reversed.*

The facts are stated in the opinion.

Messrs. Dorsey, Brewster, & Howell, for plaintiff in error:

Deceased was a volunteer.

Rhodes v. Georgia R. & Bkg. Co. 84 Ga. 320, 20 Am. St. Rep. 362, 10 S. E. 922.

If the evidence shows that a volunteer was not authorized to perform, as a servant, the work in question, the party for whom the work was done owed him no obligations as a master.

*Headnotes by SIMMONS, Ch. J.

NOTE.—As to assumption by volunteer of risks of service, see also, in this series, *Evarts v. St. Paul, M. & M. R. Co.* 22 L. R. A. 663, and *note*; *O'Donnell v. Maine C. R. Co.* 25 L. R. A. 658; *Cincinnati, N. O. & T. P. R. Co. v. Flnnell*, 57 L. R. A. 266.
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2 Labatt, Mast. & S. p. 1858, § 631; *Kentucky C. R. Co. v. Gastineau*, 83 Ky. 119; *Everhart v. Terre Haute & I. R. Co.* 78 Ind. 292, 41 Am. Rep. 567; *Church v. Chicago, M. & St. P. R. Co.* 50 Minn. 218, 16 L. R. A. 861, 52 N. W. 647.

The want of capacity, due to the immaturity age of the injured party, cannot supply the essential element of negligence on the part of the master.

Sherman v. Hannibal & St. J. R. Co. 72 Mo. 62, 37 Am. Rep. 423.

One man should not be held liable for the acts of another without his participation, his privity, or his authority.

Flower v. Pennsylvania R. Co. 69 Pa. 210, 8 Am. Rep. 253; *Everhart v. Terre Haute & I. R. Co.* 78 Ind. 292, 41 Am. Rep. 567.

The age of the volunteer does not impose liability on the master.

Hot Springs R. Co. v. Dial, 58 Ark. 318, 24 S. W. 500; *Snyder v. Hannibal & St. J. R. Co.* 60 Mo. 413; *Frauenthal v. Laclede Gaslight Co.* 67 Mo. App. 1; *Sherman v. Hannibal & St. J. R. Co.* 72 Mo. 62, 37 Am. Rep. 423; *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112, 12 Am. Rep. 356; *Everhart v. Terre Haute & I. R. Co.* 78 Ind. 292, 41 Am. Rep. 567; 2 Labatt, Mast. & S. § 636, and notes.

When an individual reaches the age of fourteen he is presumed to have sufficient capacity to be responsible for his conduct, both civil and criminal.

Rhodes v. Georgia R. & Bkg. Co. 84 Ga. 322, 20 Am. St. Rep. 362, 10 S. E. 922; *Sparks v. East Tennessee, V. & G. R. Co.* 82 Ga. 156, 8 S. E. 424; *Central R. Co. v. Phillips*, 91 Ga. 526, 17 S. E. 952; *Nagle v. Allegheny Valley R. Co.* 88 Pa. 35, 32 Am. Rep. 413; *Benedict v. Minneapolis & St. L. R. Co.* 86 Minn. 224, 57 L. R. A. 639, 91 Am. St. Rep. 345, 90 N. W. 360; *Tucker v. New York C. & H. R. R. Co.* 124 N. Y. 308, 21 Am. St. Rep. 670, 26 N. E. 916.

Messrs. W. G. Post and *H. A. Hall* also for plaintiff in error.

Messrs. W. C. Wright and *J. B. S. Davis* for defendant in error.

Simmons, Ch. J., delivered the opinion of the court:

An action for damages for personal injuries was brought by Simmie L. West, a minor, by his next friend, against the Atlanta & West Point Railroad Company. Pending this action Simmie L. West died, and his duly appointed and qualified administrator was made a party in his stead. To the petition as originally filed the defendant had demurred. Subsequently the petition was amended in several particulars. The defendant renewed its grounds of demurrer, and also filed other demurrers to 67 L. R. A.

the petition as amended. The court overruled the demurrers, and the defendant excepted. The petition, after amendment, set up the following facts: On the morning of June 14, 1901, a freight train of the defendant became uncoupled because of a defective or broken coupling. For the purpose of repairing such coupling, and while the repairs were being made, a portion of the train stood upon and obstructed the crossing. One of the tools used by the train hands in repairing the coupling was an iron crowbar weighing about 50 pounds. While the repairs were in progress, young West, who came thither on his way to perform an errand for his father, after waiting for some time for the crossing to be cleared, went to the caboose or cab of the train to inquire when the crossing would be clear. When he approached the caboose, one of the brakemen on the train came up with a lot of tools which had been used to repair the coupling, among them the above-mentioned iron crowbar, and requested West to ascend the platform of the caboose and open the door so that the tools could be laid in the caboose. West, seeing no danger to himself in complying with this request, ascended the platform, and was proceeding to unbolt and open the door, when the brakeman handed him the crowbar, standing it up endwise, and letting one end rest on the platform, and requested West to take hold of it. West took hold of the crowbar, and was supporting it with one hand, the other being upon the door knob, and West being in the act of opening the door, when "suddenly and violently, and without warning signal, and without warning to" West, the train was coupled together, the section attached to the engine coming in contact with the other section, of which the caboose formed a part, "with great force, and said train was then suddenly and quickly jerked and put in motion and with a sudden jerk, by reason and on account of which sudden coupling and contact and sudden starting and jerking of said train" West was thrown back and down, the door slammed upon his right hand, and the crowbar fell upon and broke his right leg. West suffered great pain in his hand and leg. The injury to the leg resulted in necrosis, and the leg had finally to be amputated. When West was requested by the brakeman to ascend the platform and open the door of the caboose and take hold of the crowbar, both sections of the train were perfectly still, and he had no reason to suppose or presume that they would be suddenly coupled together with great force and jar, and the train put in motion with a jerk, without notice to him. The brakeman was a man of long experience, and apparently about fifty years of age,

while West was only fifteen years and two months of age, and "without mental capacity, knowledge, and experience to know or comprehend that there was any danger" in complying with the request of the brakeman, "and without sufficient knowledge, mental capacity, and experience to avoid any danger" to which so doing might subject him. On account and by reason of West's tender years and inexperience he did not know, while he was on the platform, that the train might be coupled together suddenly and violently, and without warning, and put in motion with a sudden jerk. At the time of the injury "West did not have the mental capacity, knowledge, and experience of an ordinary boy fourteen years old." West was without fault, and in the exercise of due care, diligence, and circumspection, and his injuries were due wholly to the carelessness and gross negligence of defendant, its officers, agents, and employees. The petition charged that "defendant was negligent on account of its said employee requesting [West] to ascend the platform of said cab and open said door, and in handing said iron crowbar up to [West] with the request that [West] take hold of same; and especially was defendant, its agents, officers, and employees, grossly negligent in suddenly, violently, and with great force and jar coupling said sections of said train, and causing them to come in contact as aforesaid, and then suddenly putting said train in motion with a jerk while petitioner occupied the position hereinbefore described, and in so coupling and starting said train without signal, and without any notice or warning to [West]." Damages were laid in the sum of \$15,000.

The defendant's demurrers were based upon several grounds. It demurred generally, and on the ground that the petition failed to show that on the occasion when West was injured defendant owed him any duty, or that the acts and doings of the defendant were any breach of any duty owing by the defendant to West. The other grounds of demurrer it is unnecessary here to mention.

1. It is virtually conceded that West was a volunteer, and not a servant of the defendant. There was no contract of employment, nor any act on the part of any authorized agent of the defendant which expressly or impliedly recognized West as the servant of the company. *Rhodes v. Georgia R. & Bkg. Co.* 84 Ga. 320, 20 Am. St. Rep. 362, 10 S. E. 922. "A person cannot be subjected, without his own consent or that of his agent, to the obligations which the law has attached to the contract of hiring." 2 Labatt, Mast. & S. § 630.

2. One who, without any employment

whatever, or at the request of a servant who has no authority to employ other servants, voluntarily undertakes to perform service for the master, is a mere volunteer, and not entitled to that degree of diligence on the part of the master which the latter is bound to exercise with reference to his servants. There are a great many cases which state that such a volunteer stands in the place of a servant, but in each such case which we have examined this position was taken in order to defeat the claim of the volunteer. In other words, the court held that the volunteer certainly stood in no better position than that of a servant, and that, conceding he stood in the position of a servant, he could not recover. Such cases not infrequently arise where, if the volunteer had been a servant, he could not recover because injured by the negligence of a fellow servant in the course of their common employment. A number of such cases will be found in the note to § 631 of Labatt on Master and Servant, vol. 2. In Georgia the rule as to the liability of the master for the negligence of fellow servants had been abrogated in railroad cases, and the claim of a volunteer cannot be defeated by treating him as though he were a servant. It is necessary to assign him to his true position. He is not a servant, and cannot charge the defendant with the obligations of a master. The defendant does not, as master, owe the volunteer any duty whatever. The obligations of master and servant do not arise between them. The defendant is only bound not to injure the volunteer wilfully, and to use care not to injure him after notice of his peril. See *Church v. Chicago, M. & St. P. R. Co.* 50 Minn. 218, 16 L. R. A. 861, 52 N. W. 647; *Everhart v. Terre Haute & I. R. Co.* 78 Ind. 292, 41 Am. Rep. 567.

3. The petition clearly does not make out a case of injuries inflicted wilfully, or because of a want of care after notice of West's peril. There is no allegation that the defendant's agents or employees who coupled and moved the train knew anything of West's danger or of his position. Even the brakeman who requested West to get upon the platform does not appear to have had any notice that West's mental capacity was less than that usually possessed by boys of his age. The train was at a public crossing, but it does not appear that West could not get by it, or that this had anything to do with his compliance with the brakeman's request to assist him. The brakeman does not appear to have had any authority to make West or anyone else the servant of the defendant. There is no allegation that the brakeman had any authority, and his request cannot be imputed to the defendant. The brakeman had no

authority to invite West to get upon the platform, and the defendant was under no duty to anticipate that he would do so, or to see that no injury resulted. Leaving out of consideration the minority of West, the case is simply that of a volunteer who places himself in a position of danger, and who is injured by acts of the defendant, which, relatively to a volunteer, do not constitute negligence. So far as appears from the petition, the defendant was guilty of no breach of any duty which it owed West, and therefore cannot be liable. Legal liability arises only upon the breach of some legal duty.

4. We think enough has been said to show that, had West been an adult, the defendant would not have been liable. West voluntarily engaged in work undertaken in compliance with the unauthorized request of the brakeman, and the defendant owed West none of the obligations which grow out of the relation of master and servant. The defendant was bound, through its agents and employees, to use care not to injure West after notice of his peril, and was bound not to injure him wilfully, but no breach of this duty appears. Defendant in error, however, contended that the demurrers were properly overruled because of the allegations as to the minority and mental deficiency of West, relying upon the case of *Rhodes v. Georgia R. & Bkg. Co.* 84 Ga. 320, 20 Am. St. Rep. 362, 10 S. E. 922. After examining that case, and also many decisions by other courts, we think this contention unsound. Infancy or want of mental capacity on the part of the plaintiff is often very material where the defense calls in question the plaintiff's own diligence. In other words, where the defendant has been negligent, and claims that the plaintiff could, by the exercise of due care, have avoided the injury, or that the plaintiff did not use due diligence to lessen the damages, or that plaintiff's negligence contributed to the injury, then the plaintiff's infancy or mental capacity is material. Whenever the plaintiff's diligence is under investigation, his mental capacity is relevant, as will be seen in many decisions in this and other states. In investigating the diligence of the defendant, the plaintiff's infancy or

evident lack of mental capacity may sometimes become relevant as an element of notice to defendant of the plaintiff's peril. But in determining the relations of the parties the infancy of the plaintiff is not material, nor can it supply the place of negligence on the part of the defendant. West was a mere volunteer. His age and mental capacity could not change this. If young and mentally deficient, he was no less a volunteer, relatively to the defendant, than if old and experienced. The defendant did not, as master, owe him any duty. The defendant was not guilty of a breach of any duty which it did owe him. The infancy of West could not supply the place of negligence on the part of the defendant, and there can be no recovery. The *Rhodes Case*, 84 Ga. 320. 20 Am. St. Rep. 362, 10 S. E. 922, seems to conflict with this view, though the headnote recognized that there could be no recovery unless the defendant had been negligent. The decision in that case is by but two judges, and not binding, and, in so far as it conflicts with what is here ruled, will not be followed. It has more than once been criticized by able law writers (3 Elliott, Railroads, § 1305; 2 Labatt, Mast. & S. § 636), and is, we think, unsound. We are clear in the present case that West's lack of mental capacity did not change his relations toward the defendant, or impose upon it any of the obligations which ordinarily arise from the relation of master and servant; that the petition showed no breach of duty toward West as a volunteer; that West's infancy cannot supply the place of negligence on the part of the defendant; and that the court below erred in overruling the defendant's demurrer. See, in relation to the relevancy of the volunteer's infancy, *Flower v. Pennsylvania R. Co.* 69 Pa. 210. 8 Am. Rep. 251, and the numerous cases cited in the notes in the two text-books last above cited.

Under the above view of the case it will not be necessary to notice all of defendant's special demurrers.

Judgment reversed.

All the Justices concur.

WISCONSIN SUPREME COURT.

Joseph M. BOSTWICK, *Respt.*,

v.

MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK, *Appt.*

(116 Wis. 392.)

1. Acceptance of the policy tendered, and waiver of the fraud in tendering one not in accord with the expectation of the applicant and representations of the agent, are effected by receiving the policy and retaining it for several months without complaint, in ignorance of the fraud because of failure to examine the policy, where the substitution is plainly apparent on its face.

On Rehearing.

- *2. A person who, in a business deal with another, signs a written instrument, is conclusively presumed, as to that other and all persons claiming under him

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through such instrument, to know the contents thereof, no fraud or deceit being used by such other or by anyone for whose conduct he is responsible, reasonably calculated to, and which does, induce such person to become a party to such instrument without reading it.

3. If a person, by the fraud of another, or of someone for whose conduct he is responsible, becomes a party to a written instrument without reading it or personally knowing the contents thereof, he is not precluded thereby from obtaining judicial redress, in some form of action, for any injury which may be thereby caused to him through such instrument not being what he supposed it to be.

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I. Introduction.

The position of the court in *Bostwick v. Mutual L. Ins. Co.*, stated briefly, is that the principles of *caveat emptor* apply to the sale of an insurance policy with as much rigidity as in the case of a sale of merchandise; that the insured is under obligation to inspect it within a reasonable time after receipt, to ascertain whether or not it corresponds to his "order," to wit, his application; that, if a fraud or mistake in the preparation of the policy has occurred, rendering it different in terms from that ordered, and is discoverable upon a reasonable inspection, the insured must immediately rescind or draw the insurer's attention to it; that retention after receipt is "evidence of assent, regardless of the fraud, or, if not such, of inexcusable negligence, waiving judicial remedies for fraud;" that the only circumstance which will excuse such retention is a misleading statement or representation on the part of the insurer at the time of the delivery of the policy, reasonably justifying the insured in a failure to inspect it; that the ground of the rule is a public policy, "not based upon any consideration for the party who has been guilty of the false representations, to whom no duty is owing, but upon the conviction that the interests of society are best served by the applica-

lying upon positive false statements on the part of that other, or of someone for whose conduct he is responsible, as to its import, applies only where the deceit is practised at the time, and in the transaction, of such signing.

6. If a person contracts with another for an article to be delivered, or gives an order therefor, and thereafter a thing is delivered to him ostensibly in compliance with the order or fulfilment of the contract, unless, at the time thereof or within a reasonable time thereafter, he notifies such other that such article will not be accepted as satisfying the contract or order, he will be conclusively presumed to have waived all departures therein from the thing bargained for which are obvious to the senses by ordinary exercise thereof. This is subject to what follows.

7. The reasonable time mentioned in

the foregoing rule commences to run from the time the person receiving the article has reasonable opportunity to observe its defects, unless the opposite party, by fraud or deceit, prevents such person from examining it, or induces him not to do so; but such person cannot successfully refer merely to deception practised upon him at the time of his giving the order or entering into the contract, to excuse failure to observe obvious departures in the thing delivered from that bargained for, at or within a reasonable time after the delivery.

8. Upon the reception of an article by a person under the circumstances stated in the two foregoing rules, nothing occurring then for which the opposite party is responsible, reasonably preventing him from using, or inducing him not to use, his senses so as to discover obvious departures therein from the thing bargained

tion of the rule, *Vigilantibus, et non dormientibus, succurrunt iura.*"

It should be noted at the start that the rule is applied to a case in which the fraud appears to have been in regard to the provisions or terms of the policy. A subsequent case from this jurisdiction, *Welch v. Fire Assn.* 120 Wis. 456, 98 N. W. 227, makes it clear that the same rule will not be applied to defeat the insured where the mistake or fraud appears in connection with facts concerning the risk which have been disclosed to the insurer's agent. Another principle, *viz.*, estoppel, is here applied to prevent the company from denying, not only the imputed knowledge of the fact disclosed, but also that the policy was not issued in accordance with known facts. And this will be applied although the policy contains terms clearly inconsistent with such facts, states that no waiver is binding unless indorsed, and the policy comes into the hands of the insured some time before loss.

The latter case does not discuss the question of waiver of the fraud or mistake by the insured, although the facts clearly show a retention of the policy by him with the error apparent upon its face. The majority of cases in which fraud or mistake appears either grant or refuse relief to the insured in similar manner upon some independent theory without discussing the effect of retention, although that fact appears in the case.

Perhaps the largest number of such cases apply the principle of the estoppel of the insurer through the knowledge of its agent, of which the *Welch* Case, above mentioned, is an example. Other illustrative cases are *Ellenberger v. Protective Mut. F. Ins. Co.* 89 Pa. 464; *O'Brien v. Home Ben. Soc.* 117 N. Y. 311, 22 N. E. 954; *Sternaman v. Metropolitan L. Ins. Co.* 170 N. Y. 13, 57 L. R. A. 318, 88 Am. St. Rep. 625, 62 N. E. 763; *Royal Neighbors of America v. Boman*, 177 Ill. 27, 69 Am. St. Rep. 201, 52 N. E. 264; *Continental Ins. Co. v. Pearce*, 39 Kan. 396, 7 Am. St. Rep. 537, 18 Pac. 291; *Mallhoit v. Metropolitan L. Ins. Co.* 87 Me. 374, 47 Am. St. Rep. 336, 32 Atl. 989; *North American F. Ins. Co. v. Throop*, 22 Mich. 146, 7 Am. Rep. 638; *Hartford Ins. Co. v. Haas*, 87 Ky. 531, 2 L. R. A. 64, 9 S. W. 720; *German-American Ins. Co. v. Yeagley (Ind.)* 71 N. E. 897.

Relief is frequently given in equity simply upon proof of fraud or mistake. Examples of this class of cases are, *Snell v. Atlantic F. & M. Ins. Co.* 98 U. S. 85, 25 L. ed. 52; *Maryland* 67 L. R. A.

Home F. Ins. Co. v. Kimmell, 89 Md. 437, 43 Atl. 764; *Phoenix Ins. Co. v. Owens*, 81 Mo. App. 201; *Rockford Ins. Co. v. Hildreth*, 45 Ill. App. 428; *Delouche v. Metropolitan L. Ins. Co.* 69 N. H. 587, 45 Atl. 414; *Longhurst v. Star Ins. Co.* 19 Iowa, 364; *Fisher v. Metropolitan L. Ins. Co.* 160 Mass. 386, 39 Am. St. Rep. 495, 35 N. E. 849.

On the other hand, the parol-evidence rule is frequently applied to hold the insured to his policy, regardless of fraud or mistake affecting its terms, although the effect of retention, in this connection, is not discussed. Prominent cases in this large group are, *Northern Assur. Co. v. Grand View Bldg. Assn.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133 (see same case on subsequent suit to reform, *infra*, IV., a, 3, (a)); *German-American Ins. Co. v. Davis*, 131 Mass. 316; *Hartford F. Ins. Co. v. Webster*, 69 Ill. 392; *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568, 29 Am. Rep. 271; *Western Assur. Co. v. Rector*, 85 Ky. 294, 3 S. W. 415.

It is clear, then, that a discussion of the mere effect of retention by the insured upon mistake or fraud in connection with the policy will not fully present the attitude of the courts toward fraud or mistake in an insurance policy, where the element of its retention by the insured is present. The note is, however, confined to cases throwing light upon this single phase of the question, and does not attempt to include those in which the element is present, but not adverted to or discussed.

Neglect of the insured to read his application before signing, though a kindred subject, is not within the scope of the note. See *Ryan v. World Mut. L. Ins. Co.* 41 Conn. 168, 19 Am. Rep. 490; *Germania L. Ins. Co. v. Lunkenheimer*, 127 Ind. 536, 26 N. E. 1082.

The question of agency likewise, though an important one, is outside the scope of the note, and is omitted, except where the insertion of the "agency clause" is treated as a fraud, and the retention of the policy as a waiver thereof is discussed.

II. Time of misrepresentation.

It may be deduced from the opinion in *Bostwick v. Mutual L. Ins. Co.* that the insured signed applications calling for such policies as they received, but that their negligence in signing the applications without reading and ascertaining their contents was excused by the fact that they were induced to do so by the misrep-

for, the rule applies that the law requires men, in their dealings with each other, to exercise proper diligence and apply their attention to those particulars which may be supposed to be within reach of their judgment, and not to close their eyes to means of information which are accessible to them. *Vigilantibus, et non dormientibus, jura subveniunt.*

9. The rule that contributory negligence is not a defense to an intentional wrong does not apply to a situation where negligence is so inexcusable as not to be really a contributing cause, but to be really a cause intervening between the wrong and the injury as the real producing cause thereof.

10. He who is inexcusably negligent in a business transaction forfeits the right to judicial remedies for relief, and not because of any favor or indulgence which

the law extends to the wrongdoer, but because of failure on the part of the injured person to exercise that care for his own protection which the policy of the law requires as a condition of its protection, such policy being to aid only those who exercise some reasonable care to guard their own interests.

11. Negligence of a person in not asserting his right as against another by whom he has been defrauded in a business transaction, is not a defense, strictly so called, to an action on the former's part for redress, but is evidence of submission to or waiver of the wrong, more or less strong according to the circumstances, and may be conclusive evidence thereof; or it may be so gross as to forfeit such person's right to judicial redress; or, in connection with some injury to the wrongdoer, it may operate to estop such person from claiming redress for the wrong first inflicted.

representations as to their contents made by the agent at the time of such signature. Their subsequent negligence, however, in failing to inspect the policies upon receipt, and thereby to ascertain whether they conformed to the agreement with the agent, is deemed inexcusable,—with the exception of the one case in which the agent made a representation at the time of the delivery of the policy, which had the effect of misleading the insured and inducing him, as a reasonable man, to believe that his policy conformed to the oral agreement. It is thus seen that the only fraud which the court regards as sufficient to justify a failure to inspect a policy on receipt is one which accompanies the delivery.

In few of the cases dealing with the question in hand does the circumstance of fraud or misrepresentation at the delivery of the policy appear. The underlying principle is well brought out, however, in *McKenzie v. Planters' Ins. Co.* 9 Helsk. 261, where the court, in an action by the insured upon a policy in which no allowance had been made for the additional insurance disclosed to the agent at the time of application, instructed the jury that, "If you are satisfied from the testimony that the plaintiff made the statement to the agent of the company, that he intended to take out other insurance, when this insurance was being effected, and the agent agreed to this, and the policy was issued upon this understanding, and that by the misstatements and misrepresentations of the agent afterward, acting within his apparent authority, the plaintiff was kept in ignorance of the provisions of the contract in this respect, the company will now be estopped from setting up these stipulations of the policy. On the contrary, if the agent made no such misstatements, and the policy was delivered to plaintiff, he was bound to know its provisions, and, if he negligently failed to open it, he would be bound to know its provisions; and, if you find this state of facts, you will find for defendant."

The appellate court sustained this instruction as unexceptionable, and further stated that "It is clear that this parol evidence was incompetent to alter or contradict the written contract, but it is equally clear that it was not offered or admitted for such purpose. It was offered to show that he was induced to apply for the policy by the fraudulent misstatements and omissions of the agent, and that he was kept in ignorance of the existence of the stipulations in the policy by fraudulent conduct and statements of the

agent, which induced him not to open and read the policy, . . . and were clearly competent for the purpose for which they were offered."

In *Keller v. Equitable F. Ins. Co.* 28 Ind. 170, where the insurer's agent represented to an illiterate applicant, both at the time of the application, and at the delivery of the policy, that there would be no further liability after the payment of the first premium, whereas the application contained a further premium note, in consideration of which the policy was expressly issued, the court says: "The agent of the appellee not only falsely stated the contents of the instrument, but, by a fraudulent pretense, prevented its examination. In this case there can be no question of delay. If the party was excusable in receiving the policy, believing it to be what he had contracted for, there was no requirement that he should thereafter examine it, until, by the notice of assessment, his suspicions were excited." More than two years had elapsed between the issuance of the policy and the levy of the assessment.

So, in *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 11 Am. St. Rep. 121, 20 N. E. 77, it is stated by the court to be "doubtful whether even the delivery of the policy to him was notice of its contents, when that fact is taken in connection with his inability to read it, and Milne's [agent's] assurance that it was drafted in accordance with the contract." The policy was reformed by the insertion of a thirty-days' vacancy clause, pursuant to the agreement with the soliciting agent at the time of application.

On the contrary, a representation by a soliciting agent on delivery of a policy, that "It was all right," is held in *Steinberg v. Phoenix Ins. Co.* 49 Mo. App. 255, to be insufficient excuse for the insurer's failure to examine the policy and discover that allowance had not been made for additional insurance disclosed to the agent. Four and a half months retention without objection would bar a rescission under the authority of *American Ins. Co. v. Nelberger*, 74 Mo. 167, *infra*, III., b, 6; much less would reformation after loss be then granted. And the agent's statement on delivery does "not affect the question one way or the other."

It appears that a misrepresentation at the time of the delivery of the policy occurred in the following cases, but that this fact plays no part in the decision, and they are noted in their appropriate sections within: *Mutual Reserve*

12. If a person, in a business transaction with another, is deceived by the latter to his injury, such person may rescind the transaction within a reasonable time after he discovers, or has reasonable opportunity to discover, the fraud, constructive knowledge thereof being just as effective as actual knowledge to set the time for rescission running and to mark its limits.

13. If a person receives a policy of insurance ostensibly in response to an application therefor, which he signed and parted with in the belief, induced by the fraud of the agent taking the same, that it called for a policy different from that which it called for in fact, he is bound, as a matter of law, to examine the policy within a reasonable time after it comes to his hand, and to discover obvious departures therein from the one which he supposed he was to get, and promptly, upon discovering the same,

to rescind the transaction, give the company due notice thereof, and do all on his part which justice requires to restore the former situation, or he will be held to have accepted the policy as satisfying his application, so as to be precluded from rescinding the same.

14. The reasonable time for discovering that the policy differs from the one supposed to have been applied for in the circumstances stated in the foregoing rule commences to run immediately upon the reception of the paper, nothing occurring then to reasonably excuse the applicant for omitting to examine his contract. In such circumstances four and one half months' delay in discovering the fraud and exercising the right of rescission is, as a matter of law, too long a time.

15. If, in the situation stated in the last foregoing paragraph, the element be added of the applicant for insurance be-

Fund Life Asso. v. Stephens, 115 Ga. 192, 41 S. E. 679, *infra*, IX.; Michigan Mut. L. Ins. Co. v. Reed, 84 Mich. 524, 13 L. R. A. 349, 47 N. W. 1106, *infra*, IV., b, 1, (c); Travelers' Ins. Co. v. Ebert, 20 Ky. L. Rep. 1008, 47 S. W. 865, *infra*, III., b, 1; Wyman v. Gillett, 54 Minn. 536, 56 N. W. 167, *infra*, III., c; McCarty v. New York L. Ins. Co. 74 Minn. 530, 77 N. W. 426, *infra*, III., a; Avery v. Equitable Life Assur. Soc. 117 N. Y. 451, 23 N. E. 8, *infra*, V.; Fidelity & C. Co. v. Teter, 136 Ind. 672, 36 N. E. 283, *infra*, VIII., c; J. W. Gillum & Co. v. Fire Asso. 106 Mo. App. 673, 80 S. W. 283, *infra*, VIII., c; Zallee v. Connecticut Mut. L. Ins. Co. 12 Mo. App. 111, *infra*, III., a; McMaster v. New York L. Ins. Co. 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10, *infra*, III., b, 2; Ijams v. Provident Sav. Life Assur. Soc. (Mo.) 84 S. W. 51, *infra*, III., a.

The effect of misrepresentation after delivery, upon objection by the insured to the terms of his policy, is noted *infra*, VIII., c.

It is clear from these cases, and from the many others noted herein in which relief is given against fraud or mistake where there is no misrepresentation at the time of the delivery of the policy, that the distinction made in *Bostwick v. Mutual L. Ins. Co.* between misrepresentations at the time of application and at the time of delivery of the policy as justification for failure to inspect the same and become acquainted with its contents, even if sound, has not yet been generally noticed, much less established.

III. Mistake or fraud as to terms of policy.

a. Character of policy.

If the principle *caveat emptor* is to be applied to insurance policies, it is certainly most applicable under circumstances such as those appearing in *Bostwick v. Mutual L. Ins. Co.*, *etc.*, where the misrepresentation is as to the qualities of the article to be delivered,—the terms of the policy. It most nearly corresponds to the obligation of a vendee of chattels to inspect them upon delivery for the purpose of ascertaining whether they fulfil his order, and to reject them if they do not. Retention without objection may be presumed to be an acceptance as fulfilling that order, or as evidence that the vendee waives the variance and accepts them as sent. This would be conclusive after the lapse of a reasonable time within which to

make objection. A failure to object by reason of ignorance of the variance, due to omission of inspection, is chargeable to inexcusable negligence.

This is the attitude of *Bostwick v. Mutual L. Ins. Co.* The authorities are not all one way, but the decision has much support.

Thus, in *Massey v. Cotton States L. Ins. Co.* 70 Ga. 794, the right to rescind and recover premiums, or to compel the issuance of a paid-up policy, is held to have been lost by the insured where he retained the policy delivered and paid premiums thereon for ten years, although at the time of the application it was represented to him by the agent that in ten years the policy would become paid-up, whereas in fact the policy issued was merely an ordinary life policy. The retention is said to have worked an acceptance of the policy issued and a waiver of the mistake. "The question in this case is," says the court, "Could the plaintiff, by ordinary diligence, have discovered the truth as to the representations of defendant's agent? If he could, then he is too late with his bill. The policy which he received put him upon notice as to its character and whether it was an ordinary life policy or a ten-years' paid-up policy. Code, § 3126. 'If a party, by reasonable diligence, could have had knowledge of the truth, equity will not relieve.' Nothing but gross negligence could have kept the plaintiff in ignorance of the truth in this case, and in such case the inference is, the plaintiff acquiesced in the action of the defendant and accepted this policy as it is, and waived the policy which he originally wished to have issued to him." It will be noted, however, that the statutory provision played an important part in the decision of that case, so that its weight would be lessened in a jurisdiction where such a statute did not exist.

A subsequent case from the same jurisdiction, *Leigh v. Brown*, 99 Ga. 258, 25 S. E. 621, is to like effect. The lapse of "some months" after the receipt of a policy of a different style from that for which applicant contracted is said to prevent the insured from setting up the mistake in defense to an action upon his premium note. He should have offered to return the policy within "a reasonable time."

Like in principle, though it is found that the rescission was made within a reasonable time, is *Jones v. Gilbert*, 93 Ga. 604, 20 S. E. 48. An application for a ten-year endowment policy being filed by a ten-payment life policy,

ing fraudulently deterred from examining his policy by something occurring at the time of the delivery thereof to him, four and one half months' delay in discovering the fraud is not, as a matter of law, so long as to forfeit the right of rescission.

16. The existence of a cause of action at law to recover the consideration parted with upon a contract, on the ground of fraud, presupposes the actual termination of the contract because of the fraud, and that requires a repudiation of such contract by the insured person *in toto*, or so far as justice may require, and an unconditional offer on his part, so far as justice may require, to restore the wrongdoer to his former situation, or a waiver of such offer by such conduct on the latter's part as to clearly indicate that a tender to him of that which he parted with in the transaction would be useless because he would not accept it.

It was there held that the insured had not lost his right to rescind by retaining the policy six weeks without objection, where he thereupon sought to return the same. After such a repudiation he was not liable to the agent on a note for the amount of the premium advanced by the latter, although the policy had remained in his possession thereafter through such agent's refusal to accept it.

An instruction was asked by the company in *Equitable Life Assur. Soc. v. Maverick* (Tex. Civ. App.) 78 S. W. 500, that, "if the plaintiff failed to avail himself of the means at hand of ascertaining the truth or falsity of the . . . [defendant's] representations, he was estopped to complain of their untruth." The insured sought to rescind the policy upon the ground that the policy received by him did not correspond to that which the agent had promised at the time of the application and the giving of the premium note. In upholding the refusal of the lower court to give the instruction demanded, the court states that, "if the plaintiff knew the truth of the matter, he could not claim that he was deceived. But, if he did not know it, and relied on the statement of the agent at the time, but could have informed himself of it by means of information at hand, he is not necessarily estopped. This would depend upon whether or not he was inexcusably negligent in not informing himself." This is the basis of the decision in *Bostwick v. Mutual L. Ins. Co.* What will be regarded as sufficient to excuse inspection does not seem to have been yet decided in Texas.

Three months is held, in *Kling v. Mayes*, 3 Ind. Terr. 362, 58 S. W. 573, to be sufficient time within which the insured should make himself acquainted with the terms of his policy. Thereafter he is estopped to deny an acceptance thereof in spite of misrepresentations of the agent at the time of the application concerning it.

The insured was induced by the insurer's agent in *Zallee v. Connecticut Mut. L. Ins. Co.* 12 Mo. App. 111, to surrender a previous forfeitable policy and apply for one which was represented to him to be nonforfeitable after the payment of two premiums. The new policy was delivered by the agent with the remark: "Here is your nonforfeiting policy." It appeared that premiums were forfeitable, no matter how many had been paid, unless surrender was made within the year following the last payment, but 67 L. R. A.

17. If a judgment in an equity case or an action at law tried by the court be reversed on appeal to this court, and there is an unsolved question of fact that must be determined before final judgment can be rendered, and there are conflicting reasonable inferences as to how such issue should be solved, rendering it doubtful which way is the right of the matter, lest injustice may be done by the exercise of jurisdiction to decide the issue here as an original matter, the court will remand the cause to the trial court to determine such issue and then to apply the law to the case as directed.

(*Cassaday, Ch. J., dissents in part.*)

(March 11, 1902.)

A PPEAL by defendant from a judgment of the Circuit Court for Rock County

that this provision of the policy was not drawn to insured's attention, and, by reason of his omission to read the policy, he did not discover it during the ten years for which it was held. Failing to surrender the policy within the required time, and the company refusing thereafter to issue a paid-up policy, relief was sought in equity by way of rescission, but was refused. "The plaintiff was guilty of the grossest laches in reading neither his policy nor his premium receipt," says the court. "It was his plainest duty, when the policy was presented to him, as the consummation of the previous talk between himself and the agent, to read it. After he had accepted it and acted on it for years, it is too late to apply to a court of equity for relief grounded upon his recollection of a conversation between himself and the agent of the company, the particulars of which that agent has, very naturally, forgotten."

An application for a policy on which the premiums should be payable at a "level rate" was filed in *Ijams v. Provident Sav. Life Assur. Soc. (Mo.)* 84 S. W. 51, by a policy in which the premiums were to remain the same so long as the application of dividends would keep them down; if the dividends were insufficient the premiums were to be higher. It was not clear that the agent did more than explain the system to the insured at the application, or that there was any further fraud or misrepresentation at the time of delivery of the policy when the agent handed it to the insured with the statement, "Here is your level rate policy," and pointed to the phrase in the policy. But the insured claimed that he had been deceived into believing that his application was for a policy in which the premiums would be absolutely uniform, and that his policy conformed to this application. While the court denied the existence of any fraud, it says that, even assuming a misrepresentation by the agent, "that did and would not relieve plaintiff from the responsibility of examining for himself to ascertain if the policies, when delivered to him by the company, did or did not contain provisions contrary to his understanding of the explanation of the plan of 'level rate insurance' as same was made to him by said agent . . . hence, since no fraud or deceit was practised, or attempted to be practised, upon plaintiff to induce him to accept or receive the policies without examination to ascertain what were their provisions and terms, and since he has taken them and en-

in plaintiff's favor in an action brought to recover back premiums paid upon life-insurance policies which were alleged to have been different from those called for by the contract. *Reversed.*

Statement by **Marshall, J.:**

Action to recover money paid to defendant for three insurance policies. Plaintiff claimed that George S. Parker, Arthur H. Barrington, and himself were each fraudulently induced to sign an application for an insurance policy of a different character than he intended; that each, as soon as he discovered the fraud, repudiated the transaction; and that Parker and Barrington thereafter, and before the commencement of this action, assigned to plaintiff

joyed the protection they afforded for seven years without complaint, the trial court was right . . . in giving its instruction that upon the testimony offered plaintiff was not entitled to recover."

See also *Dwinnell v. Felt*, 90 Minn. 9, 95 N. W. 579, and *Susquehanna Mut. F. Ins. Co. v. Swank*, 102 Pa. 17, *infra*, III., b. 5.

The contrary view, however, that the insured may rely upon the insurer to supply the character of policy agreed upon with its agent, and is not chargeable with negligence through failure to inspect the same upon delivery, finds support in respectable authority.

Thus, the insured, in *Mowat v. Provident Life Assur. Soc.* 27 Ont. App. Rep. 875, applied for a policy the premium on which should not be changed during its life. A special slip written by himself and attached to the application made special provision for this style of policy. The policy issued in apparent compliance with this request reserved to the company the right to alter and increase the rate when necessary. This provision was not drawn to insured's attention, and the latter retained the policy, paying the premiums thereon at the agreed rate for seven years. The eighth premium was raised by the company. Discovering then, for the first time, the clause in the policy reserving to the company such right, the insured objected to payment. He asserted the fraud, and sought to recover the premiums previously paid. "He had no actual notice of the contents of the policy," says Osler, J. A., "and, unless the defendants brought to his notice that it was delivered to him as a counter proposal, there could, it seems, be no imputed knowledge of the contents, inasmuch as there was no obligation binding on him to read it. . . . Delivered to him as it was, without any statement that the annual premium would not, or might not, be the same throughout the plaintiff's life, he might well assume that it was a policy in accordance with the special terms which he had stipulated for in that respect. It will hardly be denied that, if the plaintiff had immediately, or within a year after payment of the first premium, discovered what the terms of the policy really were, he might have repudiated it, and have brought an action to recover back the premium he had paid. I do not see that the subsequent lapse of time places him in a different position, except so far as it suggests the probability that he might have ex- 67 L. R. A.

their claims for the return of the money paid to the defendant. The answer put in issue all the allegations constituting the alleged fraud. There was evidence tending to show that defendant's agent and plaintiff negotiated, from time to time for several days, in respect to the latter taking a \$10,000 policy of life insurance in the defendant company; that the agent strongly recommended what he called a "5-per-cent debenture policy;" that plaintiff, from first to last, insisted that he did not want a policy that could not be paid up in ten years; that he would take a ten-payment policy and no other,—one that would be fully paid in ten years; that the agent, from first to last, continued to recommend a 5-per-cent debenture policy, but did not say that such

examined the policy and discovered the error. The evidence rebuts the force of this suggestion." Moss, J. A., was of the same opinion. "There was nothing *dehors* the policy," he says, "to draw his attention to the fact that the defendants were not assenting to his application, and, instead, were sending him a new proposal; and under the circumstances it was not unreasonable for him to suppose that it was a policy answering the terms of the application. It imposes no hardship upon an insurance company to require of it that if, in answer to a written application, it sends a policy not intended to be in terms of the application, it shall notify the applicant of the particulars wherein they differ. . . . I think the plaintiff was, under the circumstances, excused from any charge of negligence or laches in not reading the policy, for he might reasonably assume that it was according to the application. That being so, he cannot be charged with any subsequent negligence or laches."

Six weeks elapsed in *McCarty v. New York L. Ins. Co.* 74 Minn. 530, 77 N. W. 428, between the delivery of the policy and its inspection by the insured. It was then at once discovered that the agent had misrepresented its character, and the insured immediately rescinded and attempted to recover his premium. To the company's defense, based upon insured's delay in rescission, the court makes a decided response. "The next contention is," it says, "that, if the plaintiff was deceived by the representations of the agent, it was the result of his own folly or negligence. For, if he had taken the least pains to examine or read the application when he signed it, or the policy when he accepted it, he could and would have readily discovered the falsity of the representations. If there is anything well settled by the decisions of this and other courts, it is that, as between the original parties to the contract, one who has intentionally deceived the other to his prejudice is not to be heard to say, in defense of the charge of fraud, that the innocent party ought not to have trusted him. It does not lie in the mouth of the party guilty of making the false representations to say to the other party, 'You were a fool, or negligent, in believing and relying upon my statements.'"

This decision was before the court in *Boswick v. Mutual L. Ins. Co.*, and was there stated to have recognized the rule of *caveat emptor* contended for. The basis for this statement ap-

policy would require annual payments for life; that finally the agent said he would obtain for plaintiff what the latter wanted, and made out an application, representing that it was in accordance with the latter's wishes; that plaintiff had the paper in his possession for a considerable length of time, and had ample opportunity to read and understand it, but did not do so, relying entirely upon the belief that the agent had written it in accordance with the understanding which had been reached; that the policy was received about April 1, 1897, accompanied by a letter, the opening lines of which were to the effect that it was a 5-per-cent debenture annual-premium-payment policy, such as the agent had urged plaintiff to take; that the letter further ex-

plained that the payment upon the policy would be \$2 less per year than had been talked, and that \$2 had been credited to plaintiff because he had given his paper for \$1,064 when \$1,062 was the proper amount; that when plaintiff received the policy he threw it into his drawer and did not examine it or pay any attention to it to discover whether it was according to his understanding or not; that circumstances led him to examine the policy some time thereafter, and that about August 22, 1897, he discovered that it was entirely different from the policy he was to obtain; that he thereupon notified defendant's agent of such fact and demanded an explanation; that considerable correspondence was subsequently had between plaintiff and the agent,

appears in an extract from the first portion of the opinion: "It is not claimed that there was any unreasonable delay after plaintiff actually discovered the fraud, but the claim is that, if he had exercised reasonable diligence in examining his policy, he would have discovered it much sooner. The rule as generally laid down in the books is that the right of rescission accrues only after discovery of the fraud, and that delay is not imputable against the party defrauded, until he makes that discovery. But we have no doubt that there may be cases where the party is so grossly negligent in failing to use means of knowledge within his possession, which he was bound to avail himself of, that delay would be imputable to him, even before he actually discovered the fraud. Hence, perhaps a more accurate statement of the rule is that delay is not imputable to the party defrauded until he has sufficient knowledge of the fraud to make the delay material, or such means of knowledge as he was bound to avail himself of." This is deemed a question for the jury, even where the facts are undisputed, so long as reasonable minds may come to different conclusions.

But it should be borne in mind that the court had before it a case in which the insured had been compelled to pay his premium note to an innocent purchaser for value, and was seeking the aid of the court to secure reimbursement of its amount from the insurer.

Perhaps the court intended its expression to be taken as applying only to cases in which the rights of third parties were in litigation, or where the rights of third parties had intervened. Some weight is given to this explanation by the wording of the expression first quoted,—"as between the original parties to a contract." At any rate, the attitude upon the subject of retention, first quoted, has received affirmance in a later case, *Otte v. Hartford L. Ins. Co.* 88 Minn. 423, 97 Am. St. Rep. 532, 93 N. W. 608, *infra*, IV., b, 1, (a), where the court had both *BOSTWICK V. MUTUAL L. INS. CO.* and the *Fletcher Case*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837, *infra*, IV., b, 1, (a), before it in counsel's brief.

b. Various provisions of policy.

1. Risks insured against.

A misrepresentation on the part of an agent as to the risks insured against by a policy is 67 L. R. A.

held in *Travelers' Ins. Co. v. Henderson*, 16 C. C. A. 390, 32 U. S. App. 536, 69 Fed. 762, to give the insured no rights outside of the terms of the policy as properly construed, where such terms are clear and unambiguous. In this case the agent had told the insured that the policy would cover a death under any circumstances, even at the hands of an assassin. The policy contained a provision expressly excepting liability in such case. Death resulting from such cause, the court held that no recovery could be had on the policy. "If Kepler [the agent] acted under a mistake," says the court, "it is evident that it consisted in failing to comprehend the class of risks that were covered by the policy; but a mistake of that kind, accompanied, though it may have been, by some misleading statements as to the risks covered by the policy, is surely not sufficient to warrant a reformation of the policy,—especially where no fraud was practised, or intended to be practised, upon the assured. It frequently happens that knowledge of material facts communicated to the agent of an insurance company by the assured, either prior or subsequent to the issuance of a policy, has the effect of waiving particular provisions found therein, or of estopping the company from claiming the benefit of such provisions; but where the class of risks intended to be insured against is clearly described in the policy, and the assured has a full and fair opportunity to read the instrument, the company will not be bound by representations made by its agent, in good faith, that the policy covers risks that are not in fact within its provisions. . . . In construing the provisions of a written agreement, and in determining its legal effect, the parties thereto act at arm's length if the agreement is couched in plain language and no fraud or deceit is practised. It is the duty of a person, when he becomes a party to a written contract, to examine its provisions, and determine for himself what obligations and what liabilities it imposes, and, if need be, to seek legal advice on that subject. This duty is equally imperative when a policy of insurance is taken out; and courts of equity cannot undertake to reform such an instrument merely because the legal effect of its provisions was misunderstood by the assured. Nor even on the ground that an agent of the insurer erroneously represented that the policy covered risks which the language of the instrument clearly shows that it did not

resulting in an absolute repudiation of the policy by plaintiff on March 19, 1898. The evidence tended to show that Parker desired the agent to obtain for him a ten-payment policy; that he signed an application without reading it, supposing the agent had written it according to his request; that when his policy came he put it away without reading it, and did not examine the paper, or discover that it was not in accordance with his understanding, till about five months after it was received; that he then rescinded the insurance contract as far as it was possible for him to do so. The testimony as to Barrington was substantially the same. The evidence on the part of defendant was to the effect that the several applications for insurance were made in ac-

cordance with the understanding between the applicants and the agent, and that the policies were issued accordingly. The court decided that the application made by plaintiff was written by the agent and signed by plaintiff without his reading it, though he was perfectly competent to do so and to understand it, and that he had ample opportunity therefor; that the reason why he did not do so was because he relied upon the agent to write it in accordance with his request; that plaintiff desired the agent to write the application for a ten-year annual-payment policy, which he agreed to do; that he received the policy about April 1, 1897; that it was an annual-premium policy, but that he did not discover that fact till August 22, 1897; that within a reasonable

cover, if the agent acted honestly, without artifice or any intent to defraud."

And in *Cornelius v. Farmers' Ins. Co.* 113 Iowa, 188, 84 N. W. 1037, an actual fraud by the agent was deemed waived. The applicant, an ignorant foreigner, unable to read English, requested a policy covering his property if it should become vacant. The soliciting agent explained that he could not insure it as vacant, but pretended to alter the application so as to call for a policy covering the property as a store-house or granary, and required an additional premium for this risk. No alteration had been made in the application in fact, and the policy covered the property only as an occupied dwelling. The retention of this policy was deemed an acceptance of its terms; and "the assured cannot now complain."

An opinion to the contrary, by the same court, on the rehearing of *Dryer v. Security F. Ins. Co.* (Iowa) 82 N. W. 494, a case on practically identical facts, is stated by the reporter in a footnote to the *Cornelius* case, 113 Iowa, 187, 84 N. W. 1037, to have been withdrawn and superseded by this decision, which must be taken as the present law of Iowa.

Exception is made in *Travelers' Ins. Co. v. Ebert*, 20 Ky. L. Rep. 1008, 47 S. W. 865, in regard to accident insurance "tickets" issued in the hurry of travel. It appeared in this case that, in apparent compliance with an application by a woman for an accident policy insuring against loss of time as well as against death, the agent of the insurer, through fraud or mistake, issued a ticket expressly excepting women from insurance against loss of time. The acceptance of this ticket without examination, in the hurry of travel, was held to be no bar to a recovery on the policy for loss of time. "The face of the receipt clearly shows that the agent knew that the insured was a female, and he specifically insured her against loss of time, and it would be a harsh and unreasonable rule that would require her or her son, who acted to some extent for her, to examine the ticket fully to see whether it was a palpable contradiction of the contract entered into verbally and also reduced to writing. No such diligence should be required of a person in the hurry of travel."

2. Duration of insurance.

The case of *McMaster v. New York L. Ins.* 67 L. R. A.

Co. 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10, upon the authority of which the decision in *Bostwick v. Mutual L. Ins. Co.* was modified on rehearing, was twice fought through to the United States Supreme Court. It appeared in this case that at the time of the application the company's agent represented to the insured that payment of a single premium would carry the insurance for not only a year, but for an additional month of grace, which was given for the payment of the second premium. The policy as drawn made the second premium payable in less than a year from its date, in pursuance of a request of the agent, indorsed upon the application after it had left the hands of the insured, that it should be dated from the date of the application. The insured died after the expiration of the policy as written, but within the time which would have been covered had the policy been correctly dated. Pending an action upon the policy, the beneficiary filed a bill in equity to have it reformed so as to express the correct date. On appeal from the opinion of Shiras, J., of the district court, granting such reformation, the circuit court of appeals, Sanborn, J., writing the opinion, unanimously reversed the lower court's decision, and stated that "no representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations, as to the terms or legal effect of the resulting written agreement, can be permitted to prevail, either at law or in equity, over the plain provisions and just interpretation of the contract, in the absence of some artifice or fraud which concealed its terms, and prevented the complainant from reading it." 50 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 71. The Supreme Court refused a writ of certiorari to review this decision. 171 U. S. 687, 18 Sup. Ct. Rep. 944. In spite of this adverse ruling of the superior courts, the complainant pursued his action at law upon the policy as it stood, and proved the additional fact that the agent, at the time the policy was delivered, replied, in response to a query from the insured whether it covered thirteen months, that it did. Regarding the case at law as controlled by the decisions on the equity side of the court, Shiras, J., while reasserting his previous opinion that the company was liable, nevertheless rendered judgment in favor of the company. 90 Fed. 55.

The opinions in the circuit court of appeals, on the appeal from this decision, 40 C. C. A.

length of time thereafter he tendered the policy back to defendant and demanded a restoration of his money and notes. The circumstances as to Parker and Barrington are of the same character. Before the commencement of this action they assigned their claims for restitution to plaintiff. The conclusion of law reached was that plaintiff was entitled to recover of the defendant the money paid on the several policies, aggregating \$1,401.50, with interest upon each such payment from the time it was made with costs. Judgment was rendered accordingly.

Messrs. Fethers, Jeffris, & Mouat, for appellant:

A person is bound by his written con-

tract in all cases where he can and has an opportunity to read the same before signing.

Chamberlain v. Prudential Ins. Co. 109 Wis. 4, 83 Am. St. Rep. 851, 85 N. W. 128; *Dowagiac Mfg. Co. v. Schroeder*, 108 Wis. 109, 84 N. W. 14; *Albrecht v. Milwaukee & S. R. Co.* 87 Wis. 105, 41 Am. St. Rep. 30, 58 N. W. 72; *Jackowski v. Illinois Steel Co.* 103 Wis. 448, 79 N. W. 757; *Sanger v. Dun*, 47 Wis. 615, 32 Am. Rep. 789, 3 N. W. 388; *Prince v. Overholser*, 75 Wis. 646, 44 N. W. 775; *Lumley v. Wabash R. Co.* 71 Fed. 21; *Fuller v. Madison Mut. Ins. Co.* 36 Wis. 599; *Mamlock v. Fairbanks*, 46 Wis. 415, 32 Am. Rep. 716, 1 N. W. 167; *McCormack v. Molburg*, 43 Iowa, 561; *Maine Mut. Marine Ins. Co. v. Hodgkins*,

119, 99 Fed. 864, are diverse, and contain, perhaps, the best discussion of the subject in hand pro and con to be found in the reports. Sanborn, J., restated his opinion on the former appeal, regarding the additional fact proved as immaterial. "The statement of the terms or effect of a written agreement," he says, "which one has in his hands and is about to make, and which he may read at his will, is not calculated to deceive, and is not an artifice or a fraud that will excuse his ignorance of its contents, because he has the patent means to verify the averment at his command. It is the written contract, itself, and not anyone's statement of its contents or of its effect, which binds the parties; and the law charges every party to an agreement with knowledge of this fact. In view of it, it is the duty of every man to see to it that every writing he signs or receives fairly and fully expresses his contract. He owes this duty to the other party to the contract, who generally acts, and often changes his position, in reliance upon it; and he owes it to the public, which, as a matter of policy, treats the writing as proof of the terms of the agreement. If he fails to discharge this duty,—if he fails to read his contract,—his ignorance of its contents is the result of his own negligence; and, in the absence of fraud or mutual mistake, he is thereby estopped from showing that its terms are other than those expressed by the writing. . . . The statement of the legal effect of the policies made by the agent of the insurance company when they were delivered does not abrogate or modify the terms or the meaning of the contracts." Thayer, J., concurred in the conclusion, finding no intentional fraud by the agent. But Caldwell, J., who had not been a member of the court on the former appeal, rendered a strong dissenting opinion (p. 135, 40 C. C. A., p. 872, 99 Fed.). After objecting to the application to insurance policies of "rules as harsh and technical as any that would be applied, under the rule of *caveat emptor*, to a trade between two horse jockeys," he reviews the facts and proceeds (p. 141, 40 C. C. A., p. 879, 99 Fed.): "When the policies were tendered under these circumstances, the insured would have been entirely justified in paying the premiums, and accepting the policies without reading them. He had a right to presume that the period of insurance named in the policies conformed to the agreement and to the stipulations and conditions of his appli-

cation; and to that effect are the authorities, as we shall presently see. When the period of insurance has been agreed upon, it is the almost universal usage for business men to pay the premium and accept their policies without reading them. . . . The question is not whether the finding of facts establishes the mistake or fraud, but whether, the mistake or fraud being conclusively established by the finding of facts, the court will declare that the insured is estopped from availing himself of the truth by the mere receipt of the policies and putting them away without reading them, in reliance upon the truth of the agent's answer and the stipulations of his applications. It must not be forgotten that there is no claim or pretense that the policies in fact expressed the contract of the parties. The finding of facts precludes any such claim. The contention is that, by receiving the policies under the circumstances mentioned, the insured is 'conclusively presumed' to have assented to all their provisions, and will not be heard to say to the contrary. The rule for the application of estoppels is thus inverted and applied in favor of the company when it is obvious that it is the company that is estopped from setting up the defense relied on. Estoppels are invoked to prevent and relieve from fraud, not to shield and protect it. . . . It will be perceived at a glance that the estoppel in this case applies to the insurance company, and not to the insured. The insured made no representation to the company, and the company parted with no money or other valuable thing on the faith of any false statement that he made. Nor did it do, or omit to do, anything on account of the insured putting away the policies without reading them. . . . It is undoubtedly true that a written contract is presumed to express the agreement of the parties, but this is not a conclusive presumption, and the exceptions to the rule are as well understood and clearly defined as the rule itself. No writing, however solemn, can be made a vehicle for fraud, or convert a mistake into a verity. The case at bar, upon the facts found, falls within the well-defined exception to the rule as shown by all the authorities."

On the final appeal to the Supreme Court (183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10), judgment was rendered against the company, in spite of its refusal on the prior appeal, to grant a certiorari to review the lower court's opinion. "Bearing in mind that Mc-

66 Me. 109; *Ryan v. World Mut. L. Ins. Co.* 41 Conn. 168, 19 Am. Rep. 490; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; *Dolliver v. St. Joseph F. & M. Ins. Co.* 131 Mass. 39; *Fidelity Mut. Life Asso. v. Harris*, 94 Tex. 25, 86 Am. St. Rep. 813, 57 S. W. 635; *Union Cent. L. Ins. Co. v. Phillips*, 41 C. C. A. 263, 102 Fed. 19; *Union Cent. L. Ins. Co. v. Hook*, 62 Ohio St. 256, 56 N. E. 906.

If a party has the right to rescind the contract he must act with reasonable diligence in so doing, or he loses that right.

Norton v. Gleason, 61 Vt. 474, 18 Atl. 45; *American Ins. Co. v. Neiberger*, 74 Mo. 167; *Susquehanna Mut. F. Ins. Co. v. Oberholtzer*, 172 Pa. 223, 32 Atl. 1105, 1108;

Master had made no request of the company in respect of antedating the policies, and was ignorant of the interpolation of the agent, and ignorant in fact, and not informed or notified in any way, of the insertion of December 12, as the date for subsequent payments, he had the right to suppose that the policies accorded with the applications as they had left his hands, and that they secured to him, on payment of the first annual premiums in advance, immunity from forfeiture for thirteen months. And the agent assured him that this was so. The situation being thus, we are unable to concur in the view that McMaster's omission to read the policies when delivered to him, and payment of the premiums made constituted such negligence as to estop plaintiff from denying that McMaster, by accepting the policies, agreed that the insurance might be forfeited within thirteen months from December 12, 1898."

This was a unanimous opinion with the exception of Brewer, J., who did not hear the argument and took no part in the decision.

It is hard to believe that the proof of the single additional fact of the agent's misrepresentation at the delivery of the policy influenced this decision by the supreme court. It is not adverted to except in the single short sentence at the end of the first paragraph quoted. And the preceding sentence seemingly contains the elements of the fraud and the justification for the insured's acceptance of the policy without examination, upon which the court relies. For, after detailing these circumstances, it is said that the insured "had the right to suppose that the policies accorded with the applications as they left his hands." And the statement of the agent at the delivery of the policy seems to be mentioned by the court merely as an afterthought. It should be noted, also, that proof of this additional fact is not regarded by Shiras, J., whose judgment on the equity side of the case was reversed, as sufficient to turn the scales in the subsequent trial at law, and it is treated as immaterial by Sanborn, J., who wrote the prevailing opinion on both appeals to the circuit court of appeals.

3. Limitation of time for action on policy.

While no fraud on the part of the company in inserting a limitation-of-action clause in the policy is asserted by the insured in *Barnes v. McMurtry*, 29 Neb. 178, 45 N. W. 285, a de-
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Fennell v. Zimmerman, 96 Va. 197, 31 S. E. 22; *New York L. Ins. Co. v. McMaster*, 30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 63, 40 C. C. A. 119, 99 Fed. 856; *Wilcox v. Continental Ins. Co.* 85 Wis. 193, 55 N. W. 188; *Wilson v. National L. Ins. Co.* 31 Misc. 403, 65 N. Y. Supp. 550.

Messrs. Ruger & Ruger, for respondent:

Conduct of one, induced by the fraud of another, cannot be relied upon by the latter as an estoppel.

11 Am. & Eng. Enc. Law, 2d ed. pp. 426 et seq.; *Fay v. Tower*, 58 Wis. 290, 16 N. W. 558; *Brothers v. Bank of Kaukauna*, 84 Wis. 396, 36 Am. St. Rep. 932, 54 N. W. 786; *Kingman v. Graham*, 51 Wis. 246, 8 N. W. 181; *Prieue v. Wisconsin State Land*

murrer to an answer based on its violation is sustained, the court treating the clause as a fraud upon the insured where his attention had not been drawn to it. Mere retention of the policy is not deemed to work an assent to the condition, or to render it binding. A special consideration for this portion of the contract is said to be necessary. The premium which the insured pays, is paid, says the court, for insurance, and "he may reasonably suppose that, having paid the ordinary rates, the company in case of loss, will pay the same promptly after proof thereof is duly made. If it fails to do so he may reasonably expect that the time to bring an action against the company is the same as upon any other written contract where there has been a breach thereof. The policy is issued, and, he believing the company to be honorable, and to have based its policy on the application, the policy is not read, but placed among his valuable papers, and only after a loss occurs is it examined. Every person familiar with the subject well knows that such is the ordinary course. In very many cases at least. If it is sought to impose conditions or restrictions of this kind, they should be set forth in the application, or be brought to the attention of the insured, when the premium is paid; otherwise, unless there is a consideration shown for them, they will not be sustained."

4. Existence of options at maturity.

In *Fennell v. Zimmerman*, 96 Va. 197, 31 S. E. 22, the insured agreed with the agent for a policy offering several alternative options to the insured at the expiration of the period for which it was to run. The policy as delivered bore the slip on which such options were printed, but unsigned, and therefore inoperative. After retaining the policy in this condition for twenty months without observing the defect, the insured defended an action upon his premium note on the ground of the variance between the policy delivered and the policy applied for. He was held liable, however, the court saying: "It was the imperative duty of the defendant, upon the receipt of the policy, to examine it promptly, and see if the printed slip was attached thereto and signed by the secretary of the company, if he meant to claim that this was a part of the contract, and, if not so signed, to return the policy and the slip within a reasonable time to the company, or to the plaintiff, that it might

& Improv. Co. 103 Wis. 551, 74 Am. St. Rep. 904, 79 N. W. 780; *McCarty v. New York L. Ins. Co.* 74 Minn. 530, 77 N. W. 428; *Shakman v. United States Credit System Co.* 92 Wis. 366, 32 L. R. A. 383, 53 Am. St. Rep. 920, 66 N. W. 528.

Every man has a right to act on the belief that every other person will perform his duty and obey the law; and it is not negligence to assume that he is not exposed to a danger which can only come to him through a disregard of law on the part of some other person.

Kellogg v. Chicago & N. W. R. Co. 26 Wis. 223, 7 Am. Rep. 69; *McClellan v. Scott*, 24 Wis. 86; *Central R. Co. v. Kisch*, L. R. 2 H. L. 99; *Warder, B. & G. Co. v. Whitish*, 77 Wis. 430, 46 N. W. 540; *Gunther v.*

Ulrich, 82 Wis. 222, 33 Am. St. Rep. 32, 52 N. W. 88; *Porter v. Beattie*, 88 Wis. 22, 59 N. W. 499; *Beetle v. Anderson*, 98 Wis. 5, 73 N. W. 560; *Montreal River & Lumber Co. v. Mihills*, 80 Wis. 540, 50 N. W. 507; *Redgrave v. Hurd*, L. R. 20 Ch. Div. 1; *Reese River Silver Min. Co. v. Smith*, L. R. 4 H. L. 64; *Builer v. Regents of University*, 32 Wis. 124; *Schultz v. Chicago & N. W. R. Co.* 44 Wis. 638; *Knott v. Tidyman*, 86 Wis. 164, 56 N. W. 632; *McCarty v. New York L. Ins. Co.* 74 Minn. 530, 77 N. W. 426; *Kansas Mill-Owners' & Mfrs. Mut. F. Ins. Co. v. Central Nat. Bank*, 60 Kan. 630, 57 Pac. 524; *Temminck v. Metropolitan L. Ins. Co.* 72 Mich. 388, 40 N. W. 469; *Van Houten v. Metropolitan L. Ins. Co.* 110 Mich. 682, 68 N. W. 982; *Royal Neigh-*

be so signed and attached, and, if not done, to demand that the contract be rescinded and his notes returned to him. . . . In cases of this nature great diligence is required of the parties, and the delay for twenty months to examine if the printed slip was signed, as he testified that he had specially stipulated should be done, cannot be sanctioned. His negligence was inexcusable; the delay unreasonable. He began to receive the benefit of the policy from the day of its date, and every day that he delayed to notify the company of the omission now complained of, after he discovered it, or by the exercise of due diligence might have discovered it, was a wrong to the company, if his plea that the policy 'was never accepted by him as a compliance with the contract, or in lieu thereof,' were allowed to prevail. The company kept his life insured, and carried the risk during the entire year, for which he gave his notes for the premium, and furnished a consideration that cannot be restored. By his alliance he left the company bound, so far as it knew, and, if he had died, it might have paid the policy without a suspicion that the defendant claimed that there was no binding contract. By his acts and unreasonable delay he lost the right to rescind the contract, to avoid the note sued upon, and to recover back what he had paid, which was the only damage attempted to be proved."

The representation of a "special agent," who was not the agent of the company, that, after payment of premiums for ten years on an "instalment-bond" policy, insured could convert it into a paid-up policy, was held, in *Wilson v. National L. Ins. Co.* 31 Misc. 403, 65 N. Y. Supp. 550, to be no ground for a reformation of the policy in this regard, where neither the application, which had been signed by the insured in ignorance of its terms, nor the policy itself, allowed such an option, and the policy had been retained for ten years without objection. "The plaintiff was clearly guilty of inexcusable negligence, which does not commend his claim to the equitable consideration of the court. . . . The fact that the plaintiff, for over ten years after the receipt of the instrument or policy in question, has chosen to retain it without complaint or objection, paying the instalments or premiums as they accrued thereon, and without taking any steps for its reformation, deprives the case of any equitable features, and seriously assails the good faith of 67 L. R. A.

the plaintiff in his attempt to charge the defendant with a liability inconsistent with the terms of its contract."

5. Liability to assessment.

In a mutual company the equities of subsequent members, who have taken out policies presumptively in reliance upon the strength of the company, as shown by its previous membership, seem to impose upon the insured an especial diligence in discovering a mistake or fraud and taking immediate action to obviate the same. Thus, in *Mansfield v. Cincinnati Ice Co.* 11 Ohio Dec. Reprint, 617, it appeared that the agent who solicited the insurance from the insured secured the application through a false representation that there would be no further liability to assessment after the first premium had been paid. The policy showed clearly upon its face that the insured was liable to such subsequent assessment. Having retained this for a year and a half without objection, the insured was deemed estopped to set up the agent's fraud. "Such false statement, if it induced insurance, would make the policy voidable only, and, a reasonable time having elapsed with full opportunity to the member to discover the fraud, the defense ought not now to prevail as against losses to innocent members relying on the defendant's various policies being satisfactory to it. . . . When the

[insured has held] policies of the character sued upon for so long a time . . . without disclaiming the express terms thereof or seeking any relief therefrom, it has permitted the rights of innocent parties to intervene. It has held out to other policy holders and members that the contracts of insurance in question were either true and correct, or acquiesced in by the defendant. On the facts pleaded, it does not appear that the agent did or said anything to prevent the defendant from examining the policies and terms of the written contracts. No excuse whatever appears for such neglect by the defendant's officers, and, therefore, the defendant company having slept so long on their rights for reformation of these policies, thereby inducing other members to rely on them as correctly stating the several contracts of insurance, it is too late to maintain a defense against an assessment for losses by fire to such other mutual policy holders."

The policy issued in *Susquehanna Mut. F. Ins. Co. v. Swank*, 102 Pa. 17, showed upon its face

bors of America v. Boman, 177 Ill. 27, 69 Am. St. Rep. 201, 52 N. E. 264; *Bennett v. Massachusetts Mut. L. Ins. Co.* 107 Tenn. 371, 64 S. W. 758; *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40; *Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.* 4 N. D. 219, 37 L. R. A. 593, 59 N. W. 1067; *C. Aultman & Co. v. Olson*, 34 Minn. 450, 26 N. W. 451; *West v. Wright*, 98 Ind. 335; *Wenzel v. Shulz*, 78 Cal. 221, 20 Pac. 404; *Brooks v. Matthews*, 78 Ga. 739, 3 S. E. 627; *Wilson v. Higbee*, 62 Fed. 723; *Linington v. Strong*, 107 Ill. 295; *Trimble v. Ward*, 97 Ky. 748, 31 S. W. 864; *Iowa Economic Heater Co. v. American Economic Heater Co.* 32 Fed. 735; *Erickson v. Fisher*, 51 Minn. 300, 53 N. W. 638; *Gardner v. Trenury*, 65 Iowa, 646, 22 N. W. 912; *Speed*

v. Hollingsworth, 54 Kan. 436, 38 Pac. 496; *Kerr, Fraud & Mistake*, p. 79; *Bigelow, Fr.* 1st ed. 67, 525; 14 Am. & Eng. Enc. Law, 2d ed. p. 122, ¶ 11; 21 Am. & Eng. Enc. Law, p. 31; *Moak's Underhill, Torts*, p. 538; *Rogers v. Phenix Ins. Co.* 121 Ind. 570, 23 N. E. 502; *Phenix Ins. Co. v. Golden*, 121 Ind. 524, 23 N. E. 503; *Peters v. United States Industrial Ins. Co.* 10 App. Div. 533, 42 N. Y. Supp. 348; *Jacobs v. Northwestern Assur. Co.* 30 App. Div. 285, 51 N. Y. Supp. 967; *Dwelling House Ins. Co. v. Bailey*, 39 Ill. App. 488; *Dwelling House Ins. Co. v. Downey*, 39 Ill. App. 524; *Donnelly v. Cedar Rapids Ins. Co.* 70 Iowa, 693, 28 N. W. 607; *Redgrave v. Hurd*, L. R. 20 Ch. Div. 1; *Steckel v. First Nat. Bank*, 93 Pa. 376, 30 Am. Rep. 758; *Fine v. Stuart* (Tenn. Ch.

that it was issued upon the assessment plan, and not upon the annual interest plan, which the insured had applied for and had been assured by the agent that the policy to be issued would adopt. Two or three months after its issue an assessment which was levied upon the insured was paid under protest, and the policy soon after was sent to the agent with an objection to the payment of assessments thereon. The agent neglected to return the policy to the company until a second assessment was levied a year later. The company then refused to receive the policy, and brought action against the insured to collect the second assessment. The insured was held liable. "If he signed the application without reading it his act was inexcusably negligent. In such case there was the more necessity for reading his policy when he received it. Had he done either, he would have seen that he was insured upon the assessment plan, and the mistake, if any, could, and doubtless would, have been corrected. But he retained it, as before stated, and did not notify the company for sixteen months. During all of this time he had the benefit of the insurance. In case of loss the company would have been liable. Not only so; other parties may have insured upon the faith of his liability to assessment upon his premium note. An instrument may be reformed in cases of fraud, accident, or mistake, but, where the mistake was the result of the supine negligence of a party who sleeps upon his rights until other duties and responsibilities have grown up, the law will not help him."

In *Dwinnell v. Felt*, 90 Minn. 9, 95 N. W. 379, an action by a receiver of an insolvent company against the insured to collect an assessment, the latter defended on the ground that he had been induced to accept his policy upon the representation that the company was a stock, and not a mutual, company, and that the policies were issued on a cash plan, with no contingent liability in connection therewith. But the policy itself contained a stipulation that by its acceptance the insured assumed an additional liability. The court, after stating that misrepresentations as to the character of the policy were "not sufficient to constitute a fraud," continues: "If there had been some misrepresentations as to the nature of the policy and its legal effect, respondent was put upon inquiry as to the authority of the company to make the assessment referred to, and he would 67 L. R. A.

not be permitted to retain the policy, accept its benefits, and afterwards, when the company became insolvent, raise the question of having been imposed upon. . . . If there was any ground for having the policy canceled on account of fraud or misrepresentation, he was required to act with reasonable expedition. In the absence of such a showing, the defense pleaded was not sufficient."

That such a conclusion would not be reached where no such notice is conveyed by the terms of the policy, appears from the decision of the companion case, *Dwinnell v. Kramer*, 87 Minn. 392, 92 N. W. 227. It was there held that retention of a policy containing no other indication of its mutual character and additional contingent liability than that conveyed by a formal and insufficient reference therein to certain statutes relating to mutual policies, has no effect as an acceptance thereof and assent to the additional liability where the insured was induced to take it out by the representations of the insurer's agent that the policy was on the "all cash plan." "To permit them to issue cash or stock policies, and, by a formal reference to the statute and their by-laws, thereby impose upon the insured a contingent mutual liability for their losses, would be contrary to the express provisions and manifest intent of the statute, and a gross fraud."

So, in *Keller v. Equitable F. Ins. Co.* 28 Ind. 170, *supra*, II., where the court deemed the insured excusable in his failure to inspect the policy, by reason of the false statement of the insurer's agent at delivery that the policy was unconditional as agreed upon, the insured was held not liable to assessment upon his premium note fraudulently obtained at the time of application, although the policy expressly mentioned the same as a consideration for its issuance.

See also *Wyman v. Gillett*, 54 Minn. 536, 56 N. W. 167, *infra*, III., c.

6. Right to cancel.

The insertion of a clause limiting the right of the insured to cancel his policy is held, in *Hartford Steam Boiler Inspection & Ins. Co. v. Cartier*, 89 Mich. 41, 50 N. W. 747, to operate as a fraud upon the insured, where, at the time of the application, he had told the agent that he would probably cancel the policy on obtaining better rates from a rival company, and the agent did not disclose the existence of the non-

App.) 48 S. W. 371; *Rowley v. Empire Ins. Co.* 36 N. Y. 550; *Babcock v. Case*, 61 Pa. 427, 100 Am. Dec. 654; *Eaton v. Winnie*, 20 Mich. 156, 4 Am. Rep. 377; *McBeth v. Craddock*, 28 Mo. App. 380; *Chamberlain v. Rankin*, 49 Vt. 133; *Alexander v. Church*, 53 Conn. 561, 4 Atl. 103.

Where the soliciting agent of an insurance company falsely fills blanks in a form for application, the insured may enforce the contract if he elects so to do, notwithstanding such false statements.

May v. Buckeye Mut. Ins. Co. 25 Wis. 291, 3 Am. Rep. 76; *Miner v. Phoenix Ins. Co.* 27 Wis. 700, 9 Am. Rep. 479; *McBride v. Republic F. Ins. Co.* 30 Wis. 566; *Roberts v. Continental Ins. Co.* 41 Wis. 321; *American Ins. Co. v. Gallatin*, 48 Wis. 36,

3 N. W. 772; *Schomer v. Hekla F. Ins. Co.* 50 Wis. 575, 7 N. W. 544; *Dunbar v. Phenix Ins. Co.* 72 Wis. 492, 40 N. W. 386; *Renier v. Dwelling House Ins. Co.* 74 Wis. 93, 42 N. W. 208; *Bourgeois v. Mutual F. Ins. Co.* 86 Wis. 402, 57 N. W. 38; *Schultz v. Caledonia Ins. Co.* 94 Wis. 42, 68 N. W. 414; *Royal Neighbors of America v. Boman*, 177 Ill. 27, 69 Am. St. Rep. 201, 52 N. E. 264; *McCarty v. New York L. Ins. Co.* 74 Minn. 530, 77 N. W. 428; *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. ed. 617; *American L. Ins. Co. v. Mahone*, 21 Wall. 152, 22 L. ed. 593.

When a positive statement as to existing facts is made by the seller, the buyer is not bound to beware of intentional fraud, or to

cancellation clause in the policy, but had merely stated that no company could give him better rates. "The question here is not as to the effect of a naked acceptance of a policy without examination, but as to whether, in the absence of actual notice, a party can be bound by a new restriction in a policy, concerning the existence of which he has been lulled to sleep and actually misled and deceived. . . . The company cannot be allowed to evade his questions, mislead him, suppress the truth, and lull him to sleep regarding new restrictions which it has injected into the policy, and thereafter charge him with constructive knowledge of those restrictions."

A contrary conclusion is reached in the frequently cited case, *American Ins. Co. v. Nelberger*, 74 Mo. 167. The insurer's agent there agreed that the policy should contain a cancellation clause in favor of the insured. The policy issued made no mention of such a clause. It was accepted, and retained by the insured for a period of three and one half months without objection. On discovery of the omission the insured sought to cancel the policy, which the company refused to do, but, on the contrary, sued the insured upon his premium notes. A judgment in favor of the company was rendered on the ground that the insured had retained the policies too long without objection, and must be deemed to have accepted them in the form in which they were written. "When the application does not attempt to set forth all the provisions which the policy to be issued must contain," says the court, "and the agent, with or without authority, represents that the policy will contain certain stipulations which are not unlawful, then the policy must contain them, or the insured will not be bound to accept it. But in such case it will be the duty of the insured, when he receives the policy, promptly to examine the same, and, if it does not contain the stipulations agreed upon, to at once notify the company of such fact, and of his refusal to accept said policy. . . . If the policy was received by the defendant soon after the date on which it purports to have been issued, we think he waited too long to elect whether he would receive the policy without the stipulation in regard to cancellation, or refuse to accept it because it did not contain such stipulation. After such delay he will be deemed to have accepted the policy as issued."

So, a member of a mutual company was held
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liable for assessments, in *Susquehanna Mut. F. Ins. Co. v. Oberholtzer*, 172 Pa. 223, 32 Atl. 1105, 1108, in spite of an attempt to cancel his policy. It appeared that at the time of the application insured requested a policy containing a provision permitting him to withdraw at any time from the company upon payment of his share of the losses to date. The agent stated that the application, signed by the insured without reading, and the policy to be issued in pursuance thereof, contained such a stipulation. In fact no such right was included in the terms of either. By retaining the policy for sixteen months, and paying assessments thereon without objection during this period, the insured was held bound by its terms, and precluded from any other agreement in regard to cancellation than that expressly given by the policy. "As to the false representations made by the agent of the company to obtain an application for the policies, undoubtedly these were sufficient to avoid the policy if the insured chose to treat it as avoided at the proper time. When was the time which equity would regard as proper for the exercise of this right? Certainly within a reasonable time after discovery, or opportunity for discovery, of the fraud; the policies were delivered to Oberholtzer soon after the 26th of May, 1882. They were the evidence of his contract: he must then accept or refuse it. Without looking at it, he put it in his safe, where it remained for more than a year unopened. In the meantime he pays two assessments without objection; then examines his policies, and finds they express a different contract than that agreed upon between him and the agent; thereupon he returned them and demands cancellation. This was too late when examination a year before would have shown the fraud, and it must be presumed he did what it was his duty to do then,—examine them; his subsequent silence and payment of assessments is acquiescence."

7. Obligation to keep books in safe.

Where a policy was received only twelve days before a fire, it was held that there could be no estoppel of the insured from demanding a reformation of the policy, because of an unreasonable retention before suit. The agent had assured the complainant that, if his application, stating that he did not keep his books of account in a fire-proof safe, was accepted by the

make inquiry, even though the means are at hand.

McClellan v. Scott, 24 Wis. 86; *Warder, B. & G. Co. v. Whitish*, 77 Wis. 433, 46 N. W. 540; *Gunther v. Ullrich*, 82 Wis. 228, 33 Am. St. Rep. 32, 52 N. W. 88; *Redgrave v. Hurd*, L. R. 20 Ch. Div. 1; *Wolf v. Michael*, 21 Misc. 86, 46 N. Y. Supp. 991; *Hennessy v. Damourrette*, 15 Colo. App. 354, 62 Pac. 229; *Merguire v. O'Donnell*, 103 Cal. 50, 36 Pac. 1033; 10 Am. & Eng. Enc. Law, pp. 86-96; *Hale v. Filbrick*, 42 Iowa, 83.

Money paid by mistake may be recovered back notwithstanding negligence in making the payment.

Lawrence v. American Nat. Bank, 54 N. Y. 432; *National Bank of Commerce v. Na-*

tional Mechanics' Bkg. Asso. 55 N. Y. 211. 14 Am. Rep. 232.

The law of rescission has no application to this case.

C. Aultman & Co. v. Olson, 34 Minn. 450, 26 N. W. 451; *Walker v. Ebert*, 29 Wis. 104, 9 Am. Rep. 548; *Griffiths v. Kellogg*, 39 Wis. 290, 20 Am. Rep. 48; *Bishop, Contr.* §§ 646-648, 671; 14 Am. & Eng. Enc. Law, 2d ed. pp. 156, 157, §§ a, b; *Beckwith v. Ryan*, 66 Conn. 589, 34 Atl. 489; *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259; *Skinner v. Michigan Hoop Co.* 119 Mich. 467, 75 Am. St. Rep. 413, 78 N. W. 547; *Wessels v. Carr*, 15 App. Div. 360, 44 N. Y. Supp. 114.

Upon discovering the fraud, the plaintiff and his assignors had an election as be-

company, it would not be necessary to purchase a safe or keep his books in one. The policy as issued contained a promissory warranty that the books would be kept in a safe. Relief was granted by striking out this clause and enforcing the policy as so altered. *Home F. Ins. Co. v. Gurney*, 56 Neb. 306, 76 N. W. 553.

8. Obligation to keep watchman on premises.

Justification for insured's failure to read his application at the time of signing it, being found in the false statement of the insurer's agent as to its contents, it is held in *Kansas Mill-Owners' & Mfrs. Mut. F. Ins. Co. v. Central Nat. Bank*, 60 Kan. 630, 57 Pac. 524, that omission to read the copy attached to and made part of the policy, and to discover a promissory warranty contained therein to keep a watchman upon the premises, is insufficient to charge him with negligence, and to bar a recovery upon the policy for its breach in this regard.

9. Signature to application.

A constructive, if not actual, fraud was worked upon the insured in *Fulton v. Metropolitan L. Ins. Co.* 47 N. Y. S. R. 111, 19 N. Y. Supp. 660, through a soliciting agent's representation that the applicant for insurance upon the life of a sister might properly sign the application. Accompanying the policy issued upon the application so signed was a premium receipt book, in which were copied rules of the company, which required the signature of the party whose life was insured, to the application. Premiums were paid for several years before discovery of the fraud, and then insured's suit for rescission was met by the company's defense based on her negligence in not reading the conditions appearing in such receipt book. The defense was not allowed, however, and the rescission was granted, the court saying that premiums might be recovered on the theory of money paid under a mistake of fact. "It is elementary that money paid under a mistake of fact may be recovered; and the mistake of fact under which plaintiff paid the premiums sought to be recovered by her was that her applications for insurance complied with the conditions upon which the policies were issued to her,—a mistake which in part, at least, was induced by the misrepresentations of defendant's own agent. Neglect to examine or read a contract before it is entered into has sometimes been held a bar to relief, 67 L. R. A.

but only when the granting of relief would have worked injury to others; and in such cases the relief has been denied upon a proper invocation of the rule that, as between two equally innocent persons, he through whose fault the injury was occasioned should suffer the loss. But when, if the relief is afforded, no injury will happen to others, and particularly when the person to whom money was paid by mistake knew, or ought to have known, that he was not entitled to receive it, the neglect to read the contract will constitute no bar, and restitution of the moneys paid will be compelled, since, under such circumstances, a refusal to return the moneys would be unconscionable."

10. Agency clause.

The insertion in the policy of a clause making the company's agent the agent of the insured is held in *Nassauer v. Susquehanna Mut. F. Ins. Co.* 109 Pa. 507, to be a fraud upon the insured, and his failure to read the policy and discover its insertion could not affect his rights. "It was the assertion of a falsehood, and an attempt to put that falsehood into the mouth of the assured. It formed no part of the contract of insurance. That contract consists of the application and the policy issued in pursuance thereof. In point of fact the assured does not see the policy until after it is executed and delivered to him. In many instances it is laid away by him and never read,—especially as to the elaborate conditions in fine print. Grant that it is his duty to read it, his neglect to do so can bind him only for what the company has a right to insert therein. He was not bound to suppose that the company would falsely assert, either by direct language in the policy, or by reference to a by-law, that a man was his agent who had never been his agent, but who was, on the contrary, the agent of the company."

A recovery in equity upon the policy was allowed in *Boetcher v. Hawkeye Ins. Co.* 47 Iowa, 253, where the insured had truly stated the encumbrances upon the property insured at the time of the application, and the agent had falsely inserted the replies in the signed application, although the policy contained a clause making the agent the agent of the insured at the time of the application. The insertion of such a clause, the court says, worked a constructive fraud as to matters already completed, and that, while the insured might be charge-

tween remedies. They could have affirmed and retained the policies, notwithstanding the fraud, and brought an action for deceit to recover the difference between the value of such policies and those they should have received; or have done as they did,—repudiate the policies and sue *ex contractu*, on the promise implied by law, to recover back the premiums paid with interest.

McCann v. Metropolitan L. Ins. Co. 177 Mass. 280, 58 N. E. 1026; *Sarasohn v. Miles*, 52 App. Div. 628, 65 N. Y. Supp. 108; 14 Am. & Eng. Enc. Law, 2d ed. pp. 156, 157, 165, b.

And if the defendant had in fact suffered loss by forcing on these parties a position of advantage, or even actual benefit, through its own wrong, it could not have

recovered therefor had it pleaded the same as a set-off or counterclaim.

Hogben v. Metropolitan L. Ins. Co. 69 Conn. 503, 61 Am. St. Rep. 53, 38 Atl. 214; *Hedden v. Griffin*, 136 Mass. 231, 49 Am. Rep. 25; *Beckwith v. Ryan*, 66 Conn. 589, 34 Atl. 489; *McCann v. Metropolitan L. Ins. Co.* 177 Mass. 280, 58 N. E. 1026; *Dunn v. Amos*, 14 Wis. 115; *Blaeser v. Milwaukee Mechanics' Mut. Ins. Co.* 37 Wis. 31, 19 Am. Rep. 747; *Fisher v. Metropolitan L. Ins. Co.* 162 Mass. 236, 38 N. E. 503; *Hendrickson v. Hendrickson*, 51 Iowa, 68, 50 N. W. 287; *Guckenheimer v. Angewine*, 81 N. Y. 394; *Neblett v. Macfarland*, 92 U. S. 101, 105, 23 L. ed. 471, 472.

On petition for rehearing.

Courts will protect persons of ordinary

able with notice of the agent's position in regard to transactions subsequent to the receipt of the policy, yet, as to matters preceding such receipt, the actual agency for the company could not be changed by that clause to an agency for the insured. "We can readily see," says the court, "that the assured may be bound to take notice of the conditions and covenants in a policy that affect his rights, or that apply to matters in existence at the time the policy is delivered, or that may occur in the future; but we know of no principle of law which requires him to diligently examine the policy for the purpose of ascertaining whether it contains false statements of fact as to a past transaction which he might well suppose was closed."

11. Date of policy.

An immaterial error in dating a policy September 8th instead of July 1st, as requested by the application, is held, in *Home L. Ins. Co. v. Myers*, 50 C. C. A. 544, 112 Fed. 846, to be waived by the acceptance and retention of the same without objection for several months.

12. Value of policy.

Representations as to the value of a tontine policy at maturity, though made both at the solicitation of the insurance and at the delivery of the policy, are held in *Avery v. Equitable Life Assur. Soc.* 117 N. Y. 451, 23 N. E. 3, to be no ground for a reformation, where it is not alleged that they fraudulently induced the acceptance of the policy, or that the mistake in failing to incorporate the estimated value as a term of the policy is mutual. Furthermore, the acceptance and retention of the policy during the fifteen-year tontine period, without objection or attempt to secure reformation, "deprives the case," says the court, "of equitable features, and seriously assails the good faith of the plaintiff in her present attempt to charge the defendant with a liability inconsistent with the terms of its contract."

c. Variation of terms on renewal of policy.

An exception to the general rule that the terms of the policy as written govern the rights of the insured in spite of mistake or fraud, after the policy has been in the hands of the insured a reasonable length of time without ob-

jection, is impliedly made in *American Ins. Co. v. Nelberger*, 74 Mo. 167, *supra*, III, b. 6. It is there stated that, "when the application does not attempt to contain all the provisions which the policy to be issued must contain," then the insured is bound to inspect the policy on delivery for the purpose of ascertaining its terms. Stated conversely, the court's proposition is that when the application does set forth all the terms of the policy to be issued, the insured is not under obligation to inspect the policy to see that it incorporates them. Such a situation is found in an application to renew a policy, and the decisions uphold the converse proposition as stated.

In *Palmer v. Hartford F. Ins. Co.* 54 Conn. 488, 9 Atl. 248, it appeared that the insured had held for several years a fire policy which contained no restriction in regard to coinsurance. The company solicited a renewal of the policy, and this was agreed to by the insured. In apparent compliance with this agreement, a new policy was issued in which, however, was inserted a stipulation against coinsurance without indorsed consent. This policy was retained for three months by the insured without examination. Loss occurring, suit was then brought to reform it by striking out the coinsurance clause, and to enforce it in this form. Granting this relief, the court states that, while it may be a salutary rule which requires the insured to examine a policy issued upon an application which states the bare facts describing the property, the term of insurance, the rates, etc., and to hold him bound by the terms and stipulations of the policy issued in pursuance thereof, it is different where the contract *in extenso* has been agreed upon beforehand, and the policy issued is variant therefrom. Under such circumstances, says the court, there is no obligation to inspect the policy and to learn its provisions. "In his [the insurer's] promise to make and deliver an accurate copy there is justification before the law for the omission of the other party to examine the paper delivered and for his assumption that there is no designed variance. A man is not for his pecuniary advantage to impute it to another as gross negligence that the other trusted to his fidelity to a promise of that character. The rule of law that no person shall be permitted to deliver himself from contract obligations by saying that he did not read what he signed or accepted is subject to this limitation, namely, that it is not to be applied

intelligence against results of their own imprudence or negligence, in cases where the injury complained of has been intentionally inflicted through fraud or other intentional wrongdoing.

Pom. Eq. Jur. §§ 418, 419; *Barndt v. Frederick*, 78 Wis. 1, 11 L. R. A. 199, 47 N. W. 6; *McIntire v. Pryor*, 173 U. S. 38, 54-60, 43 L. ed. 606, 612-614, 19 Sup. Ct. Rep. 352; *Warder, B. & G. Co. v. Whitish*, 77 Wis. 433, 46 N. W. 540; *Strohn v. Detroit & M. R. Co.* 21 Wis. 554, 94 Am. Dec. 564; *National Bank v. Taylor*, 5 S. D. 99, 58 N. W. 299.

A wrongdoer cannot raise an equity in his own favor through his own wrongdoing.

Masson v. Bovet, 1 Denio, 69, 43 Am. Dec.

in behalf of any person who by word or act has induced the omission to read."

Where an agent informed the insured, on the latter's application for a renewal of a former policy, that he would make out another policy "like the first one," except that thereafter it could be renewed by a mere renewal premium receipt, it was held that the insured might recover in an action on the policy, although he had violated a new condition in the renewal policy avoiding it in case the insured was not the sole owner of the property covered. *Burson v. Fire Asso.* 136 Pa. 267, 20 Am. St. Rep. 919, 20 Atl. 401. "It would certainly have been proper for the agent, when he proposed to give the assured a new policy 'like the first one' to have informed him of any change . . . in the conditions. The assured had a right to suppose there was no essential difference between the policies; and the case does not come within the ruling in *Susquehanna Mut. F. Ins. Co. v. Swank*, 102 Pa. 17, where it was held that a person who accepts a policy, and retains it for sixteen months without reading it, cannot, after enjoying its protection during all that time, defend against an assessment upon the ground that the policy was issued upon a different plan from the one which he had verbally requested. We think that any judge was justified in admitting the first policy in evidence. . . . Surely, if such a defense is to prevail, insurance has ceased to be an indemnity."

So, in *Phoenix F. Ins. Co. v. Hoffheimer*, 46 Miss. 645, where application was made for "another policy like the first one," and a policy was issued which failed to describe the insured as "agent," in the manner of the first one, reformation in this regard was granted after the lapse of eleven months. The court regarded insured's action in taking it for granted that the new policy conformed to the original policy, and failing to examine the same on receipt, as but "a reasonable confidence" in the good faith of the agent of the company.

No recovery was allowed in *Wyman v. Gillett*, 54 Minn. 536, 56 N. W. 167, by the receiver of an insurance company upon an obligation imposed in a policy sent to the insured in substitution for the one previously taken out, marked "duplicate," and accompanied with a letter in which the company stated that the new policy was issued to conform to certain recent legislation, and that it was more liberal and advantageous to the insured than the prior policy. 67 L. R. A.

651; *Hogben v. Metropolitan L. Ins. Co.* 69 Conn. 503, 61 Am. St. Rep. 53, 38 Atl. 214; *Hedden v. Griffin*, 136 Mass. 231, 49 Am. Rep. 25; *Beckwith v. Ryan*, 66 Conn. 589, 34 Atl. 489; *McCann v. Metropolitan L. Ins. Co.* 177 Mass. 280, 58 N. E. 1026; *Dunn v. Amos*, 14 Wis. 106; *Fisher v. Metropolitan L. Ins. Co.* 160 Mass. 386, 39 Am. St. Rep. 495, 35 N. E. 849; *Hendrickson v. Hendrickson*, 51 Iowa, 68, 50 N. W. 287; *Guckenheimer v. Angevine*, 81 N. Y. 394; *Neblett v. Macfarland*, 92 U. S. 101, 105, 23 L. ed. 471, 472.

When the defendant sent policies differing from those agreed upon, promised, and expected, it was its duty to have notified the applicants of that fact; and its wrongful conduct in making such representations and

whereas in fact all the changes in it were for the benefit of the company, and the premium obligation therein was doubled. Under such circumstances, says the court, amounting to a fraud upon the insured, the latter was excused from ascertaining the terms of the policy, and was not bound thereby, although it had been accepted and retained for some time without objection.

An application by a mortgagee for the renewal of a former policy was fulfilled in *Hay v. Star F. Ins. Co.* 77 N. Y. 235, 33 Am. Rep. 607, by a policy containing a new clause subrogating the company to the rights of the mortgagee against the property to the extent of the loss, if any. The new policy was subsequently renewed by premium receipts several times without discovery of the clause so inserted. After a loss the policy was reformed by striking out the subrogation clause, and enforced, the court saying: "A party, whose duty it is to prepare a written contract, in pursuance of a previous agreement to prepare one materially changing the terms of such previous agreement, and deliver it as in accordance therewith, commits a fraud which entitles the other party to relief according to the circumstances presented. Equity will reform a written instrument in cases of mutual mistake, and also in cases of fraud, and also where there is a mistake on one side and fraud on the other. . . . The negligence of the plaintiff in not discovering the change, and laches in not sooner seeking relief, are questions which make the propriety of granting relief in a given case discretionary. The court below, upon the findings of fact, we think properly exercised its discretion in this case in granting relief. Policies of fire insurance are rarely examined by the insured. The same degree of vigilance and critical examination would not be expected or demanded as in the case of some other instruments. It is found that the plaintiff did not in fact examine the policy until after the fire, when, for the first time, he was informed of the peculiar terms of this provision."

Circumstances may exist, however, sufficient to charge the insured with knowledge. Thus, the mere renewal of an outstanding policy by the issuance of an entirely new policy, instead of by the giving of a renewal receipt, as had previously been the custom between the agent and the insured, is held, in *Thomson v. Southern Mut. Ins. Co.* 90 Ga. 78, 15 S. E. 652, to

promises, and its subsequent act of sending policies without notification that they differed from those promised, could not create a duty on the part of the applicant to examine the policy.

Strohn v. Detroit & M. R. Co. 21 Wis. 562, 94 Am. Dec. 564; *Converse v. Blumrich*, 14 Mich. 109, 90 Am. Dec. 230; *Groton Sav. Bank v. Batty*, 30 N. J. Eq. 126; *Duffield v. E. T. Barnum Wire & Iron Works*, 64 Mich. 293, 31 N. W. 310; *Bidwell v. Astor Mut. Ins. Co.* 16 N. Y. 263; *Baker v. Lever*, 67 N. Y. 304, 23 Am. Rep. 117; *Hay v. Star F. Ins. Co.* 77 N. Y. 235, 33 Am. Rep. 607; *Phoenix Ins. Co. v. Gurnee*, 1 Paige, 278, 19 Am. Dec. 431; *Fireman's Fund Ins. Co. v. Norwood*, 16 C. C. A. 136, 32 U. S. App. 490, 69 Fed. 71; *McElroy v.*

British America Assur. Co. 36 C. C. A. 615, 94 Fed. 990; *Palmer v. Hartford F. Ins. Co.* 54 Conn. 509, 9 Atl. 248; *McCarty v. New York L. Ins. Co.* 74 Minn. 530, 77 N. W. 426; *Kansas Mill-Owners' & Mfrs. Mut. F. Ins. Co. v. Central Nat. Bank*, 60 Kan. 630, 57 Pac. 524; *Temminck v. Metropolitan L. Ins. Co.* 72 Mich. 388, 40 N. W. 469; *Royal Neighbors of America v. Boman*, 177 Ill. 27, 69 Am. St. Rep. 201, 52 N. E. 266; *Bennett v. Massachusetts Mut. L. Ins. Co.* 107 Tenn. 371, 64 S. W. 758; *Equitable Safety Ins. Co. v. Hearne*, 20 Wall. 404, 22 L. ed. 398; *Kilbourn v. Sunderland*, 130 U. S. 518, 519, 32 L. ed. 1010, 9 Sup. Ct. Rep. 594; *Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.* 4 N. D. 219, 37 L. R. A. 593, 59 N. W. 1067;

have been sufficient in itself to put the insured upon inquiry in regard to the terms thereof, and his retention of the new policy without investigation into its terms is held to be a waiver of the variation between it and the previous policy in regard to the vacancy clause. Such provision in the new policy having been broken before loss, the court refused to reform the policy in regard thereto, but permitted a recovery thereon.

It appeared in *McHugh v. Imperial F. Ins. Co.* 48 How. Pr. 230, that, on an application by the insured for a renewal of a previous policy, which permitted additional insurance without notice to the company, the new policy, issued in apparent compliance with his request, stipulated against such additional insurance without the indorsed permission of the company. The retention of this new policy for a year, until loss, in alleged ignorance of this stipulation, although the policy had been twice altered during that period in other respects, was held to bar relief. "The delivery of the policy to them was a distinct notice that such permission was not then conceded. . . . The mistake, if any, through which he falls, is his own, and is the result of the oversight and neglect of himself and his agents. . . . No reasonable excuse for ignorance can be well assigned."

IV. Mistake or fraud as to facts disclosed by the insured.

a. Appearing in the policy.

1. Subject-matter of insurance.

(a) Property covered.

The rule, *caveat emptor*, would seem to apply properly only in regard to representations of the vendor concerning the article which is the subject of sale. Where the subject of the fraud or mistake on the part of the insurer, in his character of vendor, appears, therefore, not in connection with the terms of the policy, but with facts faithfully disclosed by the insured, the rule would seem to have no application. Ordinary honesty on the part of the insurer would seem to require that he incorporate such facts in the policy where necessary. It would not seem a lax business principle which permits the insured to rely upon the insurer to this extent. These facts do not fall within the cate-

gory or terms of the policy to be delivered, the qualities of the article to be sold. They are matters concerning the risk, supplied by the insured for incorporation in the policy, the terms of which have been represented to him. The majority of the cases sustain the insured in this confidence, and do not regard it as inexcusable negligence to omit an examination of the policy on delivery, for the purpose of ascertaining whether it has been drawn according to disclosed facts.

A line of cases is found, however, in which it is held that the insured is chargeable with notice of the contents of the policy as written, and that, if it is not in accordance with the facts, then good faith to the insurer requires that the latter's attention be drawn to the error. Retention of the policy by the insured amounts to an affirmation of the facts as they appear in the policy. If he is not estopped to deny that they are otherwise, by his neglect to give notice of the error he has waived his rights with respect thereto. Respectable authority is to be found in support of this position.

It is suggested as a possible ground of distinction, or of reconciliation of the cases upon their facts, that where the fraud or mistake appears to have been such as to render the policy void *ab initio* the insured should have relief therefrom in some appropriate form; but, on the other hand, if the policy has not been rendered void *ab initio*, and the insured has actually received protection under the policy, he is bound thereby notwithstanding the fraud or mistake.

In applying to the company's secretary for additional insurance, in *Okes v. Fire Ins. Co.* 12 Pa. Co. Ct. 341, the insured requested that a portion of the additional insurance be applied to a smokehouse about to be erected upon the premises. The additional insurance was allowed, but in noting it upon the policy the company failed to state that the smokehouse was covered thereby. After its return the policy was held by the insured for three years without objection, until a loss, including the smokehouse, occurred. The company denied liability for the damage to this portion of the property. Relief was sought by the insured in equity by way of reformation of the policy, but the court refused it, pointedly quoting the old maxim, *Vigilantibus, non dormientibus, æquitas subscribit*. "Nothing . . . can call forth this court into activity, but conscience, good faith,

Strand v. Griffith, 38 C. C. A. 444, 97 Fed. 856; *Stanley v. M'Gauran*, Ir. L. R. 11 Eq. 314; *Central R. Co. v. Kisch*, L. R. 2 H. L. 120; *Redgrave v. Hurd*, L. R. 20 Ch. Div. 13; *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40; *O. Aultman & Co. v. Olson*, 34 Minn. 450, 26 N. W. 452; *McClellan v. Scott*, 24 Wis. 86; *Gunther v. Ullrich*, 82 Wis. 228, 33 Am. St. Rep. 32, 52 N. W. 88; *Porter v. Beattie*, 88 Wis. 30, 59 N. W. 499; *Beetle v. Anderson*, 98 Wis. 8, 73 N. W. 560; *Butler v. Regents of University*, 32 Wis. 132; *Schultz v. Chicago & N. W. R. Co.* 44 Wis. 638; *Tyner v. Cotter*, 67 Wis. 488, 30 N. W. 782; *Rogers v. Phenix Ins. Co.* 121 Ind. 570, 23 N. E. 502; *Phenix Ins. Co. v. Golden*, 121 Ind. 524, 23 N. E. 503; *Peters v. United States Industrial Ins. Co.*

10 App. Div. 533, 42 N. Y. Supp. 348; *Jacobs v. Northwestern Life Assur. Co.* 30 App. Div. 285, 51 N. Y. Supp. 967; *Dwelling House Ins. Co. v. Bailey*, 39 Ill. App. 488; *Dwelling House Ins. Co. v. Downey*, 39 Ill. App. 524; *Donnelly v. Cedar Rapids Ins. Co.* 70 Iowa, 693, 28 N. W. 608; *Rowley v. Empire Ins. Co.* 36 N. Y. 550; *Gristock v. Royal Ins. Co.* 87 Mich. 430, 49 N. W. 634; *Dryer v. Security F. Ins. Co.* (Iowa) 82 N. W. 495; *Pomeroy v. Benton*, 57 Mo. 542; *Carmichael v. Vandebur*, 50 Iowa, 655; *Chicago, R. I. & P. R. Co. v. Levis*, 13 Ill. App. 170; *Hunt v. Barker*, 22 R. I. 18, 84 Am. St. Rep. 812, 46 Atl. 46; *Steckel v. First Nat. Bank*, 93 Pa. 376, 39 Am. Rep. 758; *Fine v. Stuart* (Tenn. Ch. App.) 48 S. W. 371; *Alfred Shrimpton*

and reasonable diligence. When they are wanting, the court is passive and does nothing.' It is the duty of one who receives a policy of insurance to acquaint himself with its contents. . . . A failure to read the instrument, or have it read, is of no avail. . . . Certainly a neglect by plaintiff for over three years to ascertain what a policy held by him covers, constitutes such laches as will turn his application for a reformation of . . . [the policy] out of a court of equity. Nor is the holder of a policy ever entitled to maintain an action for its reformation on the ground of his ignorance of its stipulations, simply because of his failure to read it, and in the absence of proofs of acts or representations on the part of the company misleading him into believing that they were different from what they are; . . . there is no such proof here."

Where the policy showed upon its face that the property intended to be covered was not included therein, its retention for "some months," taken in connection with the insured's letters to the company seeking cancelation and offering to pay short rates, was held, in *Walker v. State Ins. Co.* 46 Kan. 312, 26 Pac. 718, to be a waiver of the alleged fraud of the agent in obtaining the assured's signature to the application, which also failed to cover the property, and to show a recognition of the validity of the policy by the insured. He was therefore liable upon his premium note.

The policy issued in *Holmes v. Charlestown Mut. F. Ins. Co.* 10 Met. 211, 48 Am. Dec. 428, expressly provided that the amount of the insurance upon the building and fixtures did not exceed three fourths the value of the property as expressed in the application. In the application the values of the building and of the "movables" were separately given, the value of the building being less than three fourths of the amount covered by the policy; but more than that proportion if the value of the "movables" be added. The mistake in writing the policy to cover the building "and fixtures," instead of the building "and movables," was clear. But the action was upon the policy as it stood. "Besides," says the court, "the policy was delivered to the plaintiffs, and they must be presumed to have examined it at the time they received it, to have known what it contained, and to have understood its import. But they slept over it nearly four years, without requesting any alteration therein, until the loss

happened, when the rights and liabilities of the respective parties were fixed, and the directors might not feel authorized to alter the terms of the policy."

On the contrary, a policy having been written upon information personally obtained by a soliciting agent and without written application upon the part of the insured, it was held, in *Shanahan v. Agricultural Ins. Co.* 6 Pa. Super. Ct. 65, that the agent's admitted mistake in writing the description of the two stables insured as but a single "building" did not bar a recovery on the policy on the loss of only one. The defense of the company was that the "building" which had been lost was the stable, which was not insured. "The erroneous description," says the court, "was the act of the agent alone in the face of light and knowledge, and it was unknown to the insured until after the loss occurred. The defendant cannot be released from its contract because the plaintiff, acting in good faith, accepted without examination the policy written by its agent."

Although the insured read over his policy before leaving the insurer's offices, it was held in *Phoenix F. Ins. Co. v. Gurnee*, 1 Paige, 278. 19 Am. Dec. 431, that the policy might be reformed after loss by conforming the same to the application. The policy covered only the mill house, whereas the application had been made out to cover both the building and the machinery. The insured, it was noted by the court, was a plain countryman, to whom the difference between the policy as written and his application would not be apparent.

A policy was issued in *Liverpool & L. & G. Ins. Co. v. Wyld*, 1 Can. S. C. 604, 850, covering goods within a certain building only, although at the time of the application the insured had stated to the agent that a portion of the stock was kept in adjoining flats, into which doors had been opened, and a proportionately higher premium due to the increased risk paid. On loss the company refused to pay for the goods within the latter premises on the ground that they were not covered by the policy. The latter had been retained by the insured for a period of nine months without reading, and therefore without discovery of the error. The court held that, in view of the insured's actual ignorance of the terms of the policy, there could be no implied assent to its terms from the mere fact that it had been in his possession. Likewise, to the second question, viz., whether such retention

& Sons v. Netzorg, 104 Mich. 225, 62 N. W. 343; *Ripley v. Case*, 78 Mich. 126, 18 Am. St. Rep. 428, 43 N. W. 1097; *Maxfield v. Schwartz*, 45 Minn. 150, 10 L. R. A. 606, 47 N. W. 448; *Erickson v. Fisher*, 51 Minn. 300, 53 N. W. 638; *Alfred Shrimpton & Sons v. Philbriok*, 53 Minn. 368, 55 N. W. 551; *Briggs v. Ewart*, 51 Mo. 245, 11 Am. Rep. 445; *Woodbridge Bros. v. DeWitt*, 51 Neb. 98, 70 N. W. 506; *West v. Wright*, 98 Ind. 335; *Wenzel v. Shulz*, 78 Cal. 221, 20 Pac. 404; *Brooks v. Matthews*, 78 Ga. 739, 3 S. E. 627; *Wilson v. Higbee*, 62 Fed. 723; *Linington v. Strong*, 107 Ill. 302; *Trimble v. Ward*, 97 Ky. 748, 31 S. W. 866; *Iowa Economic Heater Co. v. American Economic Heater Co.* 32 Fed. 735; *Gardner v. Tremary*, 65 Iowa, 646, 22 N. W. 912; *Speed*

v. Hollingsworth, 54 Kan. 436, 38 Pac. 496; *Babcock v. Case*, 61 Pa. 427, 100 Am. Dec. 654; *Eaton v. Winnie*, 20 Mich. 156, 4 Am. Rep. 377; *McBeth v. Craddock*, 28 Mo. App. 380; *Chamberlain v. Rankin*, 49 Vt. 133; *Alexander v. Church*, 53 Conn. 561, 4 Atl. 103; *Moak's Underhill*, Torts, p. 538; *Bigelow*, Fr. §§ 522, 523; *Bigelow*, Torts, §§ 150, 152, 156; *Jaggard*, Torts, pp. 595-598, 970; *Cooley*, Torts, 2d ed. 583, 584; 14 Am. & Eng. Enc. Law, 2d ed. pp. 122, 161.

Marshall, J., delivered the opinion of the court:

Two propositions are presented for consideration: First, Were the applicants for insurance bound by their applications because of their failure to know what they

without objection had induced the insurer to alter its position, and thereby entitled it to set up an equitable estoppel against the claim that the policy as issued was inoperative, and that the true contract was expressed in the application and premium receipt, the court took a view favorable to the insured. "It has been said that, if the respondents had promptly read the policy, they would have discovered the mistake in time to have returned it, and have given the directors an opportunity of declining the risk and returning the premium before a loss. Still, actual knowledge of the contents of the policy is an indispensable element of such a defense; and the evidence not only fails in showing such knowledge, but the testimony of Mr. Jermyn and of Mr. Darling shows that the policy was never actually read, or even seen, by the defendants. . . . There could be no imputed knowledge of the contents of the policy, inasmuch as there was no obligation binding the respondents to read it; indeed, on the other hand, the respondents might well assume that it was sent to them to carry out the only contract of insurance they had with the appellants,—that entered into through their agent, Hooper, and not, as according to the contention of the insurance company it must have been, as a proposal for a contract entirely different in its terms from that just mentioned. . . . If the appellants have been greatly prejudiced in having been deprived of the option of rejecting the risk, their loss is attributable to the negligence of their own agent, Hooper, in omitting to communicate to the company's office, at Montreal, the letter of the 10th August, 1871, in its integrity. . . . It was not for the respondents to inquire either of the appellants or of Hooper, if the latter had performed his duty to the company. They had a perfect right to assume that the knowledge and contract of Hooper within the limits of his authority was the knowledge and contract of the company, and to act accordingly. In short, the case is one which, as far as legal principle is involved, depends on the application of that familiar rule of the law of agency, which throws the loss occasioned by the neglect of an agent on his principal, though innocent, rather than on another equally innocent third party."

(b) *Voyage covered by marine policy.*

A contract for marine insurance was established L. R. A.

lished by the correspondence between the parties in *Equitable Safety Ins. Co. v. Hearne*, 20 Wall. 494, 22 L. ed. 398, by which the port of loading, as well as the port of discharge, was to be covered by the policy. The policy as written failed to include this risk. Loss having occurred at such port, the policy was reformed by the insertion of this additional clause, and enforced. "It is not denied," says the court, "that the correspondence . . . constituted a preliminary agreement. Such, clearly, was its effect. The policy was intended to put the contract in a more full and formal shape. The assured was bound to read the letters of the company in reply to his own with care. It is to be presumed he did so. He had a right to assume that the policy would accurately conform to the agreement thus made, and to rest confidently in that belief. It is not probable that he scanned the policy with the same vigilance as the letters of the company. They tended to prevent such scrutiny, and, if it were necessary, threw him off his guard."

An application was made in *Wylde v. Union Marine Ins. Co.* 10 N. S. 205, for a marine policy covering a vessel "to and from" a certain port. The policy issued in apparent compliance with this application covered the vessel only from the day after loading. This policy was received and retained without reading until loss some two weeks after its issue. Reformation was granted without hesitation, the court stating that the defense based upon the insured's laches in failing to seek relief earlier was a mere assertion which hardly lies in the mouth of the defendants, one would think, who thus made the mistake. "To hold that plaintiffs had in any manner waived their rights under such a state of facts would, I think, be without warrant or precedent."

So, in an early marine insurance case—*Motoux v. London Assurance* (1739) 1 Atk. 545—it appeared that in writing the policy the risk had been limited to the voyage "from" a certain port, while the memorandum of agreement was for a policy upon the vessel "at and from" the port. It was urged by the insurer that the agent of the insured, when he came to get the policy should have compared it with the memorandum, so that any discrepancy might have been corrected on the spot, and that, in view of his failure to do so, the policy must prevail as written though at material variance from the agreement. The chancellor, however, held that

signed? Second, Did the retention of the policies by the applicants for several months, without objection, constitute an acceptance thereof, and waive the fraud, if there was fraud, in securing the applications? The learned counsel for respondent devoted nearly all their printed argument, as they did nearly all their oral argument, to the first proposition. As we do not think it is necessarily decisive of the case, we shall assume that in deciding it the trial court did not err. On the second proposition the court held that the applicants did not accept the policies because they repudiated them within a reasonable time after knowing that the instruments were not what they supposed their applications called for; that the mere retention of the policies with-

out such knowledge did not constitute an acceptance. Appellant's counsel contend that when the policies were received the applicants were, as ordinarily prudent persons, put upon inquiry as to the character thereof, that they should have examined the policies, and that their failure to do so, and retention thereof for several months before making any complaint, was an acceptance of them as fulfilling the applications as they supposed such applications were made, and a waiver of fraud, if there was fraud, in obtaining the same.

As we view the turning question above suggested, the law has been firmly settled in favor of appellant, and has been applied by this court in many cases. It does not militate, as counsel for respondent seem to

the objection was without color "because Hal-head was a mere agent or servant to the owner of the ship, and not at all necessary that he should be so exact as to compare the label [memorandum of agreement] and policy at the time he fetched it."

(c) *Misdescription of property.*

The insured was defeated in *Goddard v. Monitor Mut. F. Ins. Co.* 108 Mass. 56, 11 Am. Rep. 307, in an action upon a policy which, through an agent's mistake with which the insured had no connection, erroneously described an organ factory as a machine shop. "It is decisive of the case," says the court, "that the policy which the plaintiff accepted without objection, or attempt to have any mistake corrected, cannot be applied to the building which was destroyed by the fire. . . . However unfortunate this may be for the plaintiff, he accepted the policy in its present shape, and cannot complain that he has been misled by it."

But a recovery upon a fire policy written by an agent himself having authority to issue policies, without previous reference to his company for approval of the risk, was allowed in *Dowling v. Merchants' Ins. Co.* 168 Pa. 234, 31 Atl. 1087, where the insured had disclosed the fact that the property was used as a boarding house, although the policy was written by the agent describing the property as "occupied by insured as a dwelling house only," and the policy in this form had been accepted and retained by the insured without examination until loss. "The defendant cannot be released from its contract because the plaintiff, acting in good faith, accepted, without examination the policy written by its agent. . . . Having made a full and frank disclosure of the facts to the company's agent, who was empowered to write the policy, and who from observation knew the character and use of the building, there was nothing to induce or warn the insured to read the policy, unless it was the anticipation of fraud or mistake, and this could impose no duty in protection of the rights of the defendant." *Swan v. Watertown F. Ins. Co.* 96 Pa. 37, *infra*, IV., a, 3, (c), is distinguished upon the ground that there the insured knew facts putting him on his guard against mistakes, and which should have incited him to read the policy.

(d) *Location of property.*

A broker's blunder in returning the wrong 67 L. R. A.

policy for cancellation is held, in *Birnstein v. Stuyvesant Ins. Co.* 83 App. Div. 436, 82 N. Y. Supp. 140, to have been waived by the insured's retention of the policy incorporating an erroneous location of the property covered. Two policies were issued by the defendant, one describing the property as located on Third avenue, and a subsequent one correctly locating the property on First avenue. The latter was, by a blunder, returned and canceled; the former delivered to the insured and retained till loss,—a month later. The error was attributable to the broker, rather than to the insurer, the latter properly cancelling the policy returned. Retention of the wrong policy by the insured was deemed a ratification of the broker's mistake. No action was maintainable, at any rate, upon the policy as it read.

But a mutual mistake as to the section in which the premises were located was reformed in *German F. Ins. Co. v. Gueck*, 130 Ill. 345, 6 L. R. A. 835, 23 N. E. 112, although the policies had been in insured's hands fourteen years.

2. *Interest protected.*

An error in writing a policy so as to insure the interest of the mortgagor, loss payable to the mortgagee, instead of directly insuring the interest of the mortgagee, was relieved against in *Williams v. North German Ins. Co.* 24 Fed. 625, by reforming the policy after loss, where the error was chargeable to the fault of the agent. "Where an instrument fails to represent what both parties intended to have it represent, and one party had drawn up the instrument, and the other party merely accepted it, and the fault was on the part of the party drawing up the instrument, it can be reformed. It would be a harsh rule if a person applying to an insurance agent, who is supposed to know the legal value of the language used in such policies, which he is drawing up every day, and who is supposed to know exactly what is desired, if that agent fails to do that which was intended. —It would be harsh to say that the instrument shall not be reformed, and that chancery shall not give relief."

So, a policy issued to a mortgagee in pursuance of a request to insure his interest was reformed after loss in *Humphry v. Hartford F. Ins. Co.* 15 Blatchf. 504, Fed. Cas. No. 6,875, where the policy was erroneously issued to cover the mortgagor's interest, loss payable to the

think, against the maxim that a person cannot take advantage of his own wrong, but enforces that other one, which is quite as well established, that the court will not constitute itself the guardian of persons of mature age and ordinary intelligence, protecting them against the results of their own negligence; that it will not furnish a person a remedy for a wrong where he cannot prove a legal claim for damages without showing that his own negligence intervened between the act of the alleged wrongdoer and the result complained of, and was the real, efficient, producing cause of his injury; that in such a case it will be conclusively presumed that he voluntarily accepted the situation, because, if he had used ordinary care, the injury complained

of would have been prevented. Applying that in the decision of the cases, it has been repeatedly held that if a person contracts for an article to be delivered, and delivery is made ostensibly in fulfillment of the contract, under such circumstances that he has ample opportunity to test the thing delivered by the contract, he is put upon inquiry as to all departures therefrom which are open and obvious to ordinary inspection; that he is bound to see those things which are plainly observable, and is charged with knowledge thereof from the time he ought, in the exercise of ordinary care, to have discovered them; and that if he does not, within a reasonable time thereafter, give notice that the thing delivered is not accepted as satisfying the agreement to purchase, he

mortgagee. The policy remained in the hands of the insurer's agent pursuant to an arrangement with the insured, and the latter therefore, says the court, "had no opportunity before the fire, and before the rights of the parties had become fixed by the loss, to accept or reject it."

Seven months' retention by a mortgagee of the policy written in his favor is held, in *Bennett v. City Ins. Co.* 115 Mass. 241, to be evidence against the mortgagor of the latter's acceptance of the policy so written. It was a circumstance "having some tendency to show an acceptance by the plaintiff of the alleged new arrangement. It was a mistake, however, to rule that, as a matter of law, it constituted an acceptance on the plaintiff's part." It appeared that the application for insurance had been made by the mortgagor through a third party, and that the policy issued in response to such application had read in favor of the mortgagor. This policy was returned without authority by the third party, through whom it had been obtained, with the request that a new one be issued payable to the mortgagee. The policy issued in compliance with this request came into the mortgagee's hands by mistake, and there remained for the seven months until loss. In this action by the mortgagor upon the original policy, it was held that parol evidence showed that the return of the original policy by the third party was without authority, and a recovery upon the original policy was, therefore, allowed.

See also *Bidwell v. Astor Mut. Ins. Co.* 16 N. Y. 263, *infra*, IV., a, 3, (a).

A mistake by the company's agent in writing insurance upon a ship in the name of the agent of her owners, instead of in the name of the owners themselves, was corrected in *Hill v. Millville Mut. M. & F. Ins. Co.* 39 N. J. Eq. 66, although the error was not discovered by the insured till after loss. "The fact that they did not examine it [the policy] and discover the mistake cannot affect . . . [their] right to relief in this suit. Manifestly, justice requires that the company shall not be permitted to take advantage of its own mistake."

In *Franklin F. Ins. Co. v. Hewitt*, 3 B. Mon. 231, it appeared that the plaintiffs, who were commission merchants, applied for insurance upon the goods handled by them, both in their own right, and on commission. The premium receipt given at the time of the application evidenced such a policy. But the policy itself when

issued covered only such goods as they owned in their own right, and not those held upon commission. This policy was received by the plaintiffs' clerk and put away without examination among the other papers of the firm. The mistake was discovered only after loss. The policy was, nevertheless, then reformed and enforced. "If," says the court, "as may be assumed, they never saw it, there could have been no such acceptance of it by them as would prove that they had waived the original contract or taken this policy as a consummation of it. And, although their neglect to inquire whether it had been delivered, or to examine it, if they knew of its delivery, shows a high and culpable degree of carelessness, we think it would be visiting upon them too heavy a penalty for this neglect to say that by that alone they had forfeited the indemnity for which they had paid the stipulated price, and especially as they still held the certificate which bore evidence of the contract, and as they had no reason to anticipate a variance from it in any policy which had been, or might be, furnished, and as it is, moreover, by no means certain, nor even very probable, that, had they inspected the policy, they would have at once detected the variance or become aware of its importance until they had demanded payment upon it."

It was mistakenly represented by the company's agent in *Snell v. Atlantic F. & M. Ins. Co.* 98 U. S. 85, 25 L. ed. 52, that a policy written in the name of a single partner was sufficient to cover the firm's interest in the property. And on such representations the application was made for a policy which covered one partner's, instead of the firm's, interest. The policy as so written was retained by the company's agent until loss, when it was surrendered to the insured and immediately repudiated, on the ground that it did not insure the interest which it had been intended to cover. The court granted a reformation of the policy by inserting the firm name in place of the single partner's name, excusing the insured's ignorance of its terms by the fact that it had not actually come into the assured's hands until the loss. Under such circumstances, it says there was no such acceptance of the written policy as would justify the inference that he had waived any rights existing under the original agreement, or had conceded that instrument to be a correct statement of the contract of insurance. "Of course parol proof, in all such cases, is to be received

will be deemed to have accepted it and waived obvious departures from the agreement if there are such. Counsel for respondent vigorously attack that doctrine, but it is too firmly entrenched in our jurisprudence, and in the law generally, to be open to question.

The first case in which the principle above stated is distinctly declared in the decisions of this court is *Locke v. Williamson*, 40 Wis. 377. The court there said: "We have therefore concluded to hold this rule in respect to an executory contract: That when the defects in the goods are patent and obvious to the senses, when the purchaser has a full opportunity for examination, and knows of such defects, he must, either when he receives the goods or within what, under

the circumstances, is a reasonable time thereafter, notify the seller that the goods are not accepted as fulfilling the warranty: otherwise the defects will be deemed waived." In subsequent cases that rule was considerably expanded in accordance with the current of authority, to the effect that reasonable opportunity for obtaining knowledge is equivalent to knowledge, as the following citations will show. In *Mamlock v. Fairbanks*, 46 Wis. 415, 32 Am. Rep. 716. 1 N. W. 167, it was said that present means of knowledge must be considered; that the doctrine that one must observe what he has reasonable opportunity for knowing in matters of contract is within the rule of *caveat emptor*; that the law for the protection of persons against fraud will not be extended

with great caution, and where the mistake is denied, should never be made the foundation of a decree, variant from the written contract, except it be of the clearest and most satisfactory character. Nor should relief be granted where the party seeking it has unreasonably delayed application for redress, or where the circumstances raise the presumption that he acquiesced in the written agreement after becoming aware of the mistake."

See also *Phoenix F. Ins. Co. v. Hoffheimer*, 46 Miss. 645, *supra*, III., c.

Retention is taken as "potent evidence" that no mistake was committed in writing a policy in favor of the insured "as trustees," instead of in their individual interest, in *Bishop v. Clay F. & M. Ins. Co.* 49 Conn. 167. Taken in connection with other circumstances, the majority of the court found that there was no mistake, and accordingly refused relief. The case is of little value, though frequently cited, upon the question of the effect of retention as a bar to relief in cases where a mistake is made out,—especially when taken in connection with the opinion of the dissenting judges granting such relief upon their finding that a mistake had been made out.

Similarly, in *Graves v. Boston Marine Ins. Co.* 2 Cranch, 419, 2 L. ed. 324, the evidence did not clearly establish a mistake on the part of the company in writing the policy so as to cover only the individual interest of the partner applying for the insurance, and not the entire interest of the firm in the property. And the fact of the retention of the policy without objection is taken as evidence that no mistake had actually been made. "The policy was in the possession of the agent for the plaintiffs, and ought to have been understood by him before it was executed; he retained it in his possession for several months before a mistake was alleged. Under such circumstances, the information given to the insurance company ought to be very clear to justify a court of equity in conforming the policy to the intention of one of the parties, which was not communicated to the other till the loss had happened."

Where the policy was written in the name of another party, and both accepted and assigned by such party to the plaintiff, whose interest it was intended to cover, it was held that the mistake in writing the policy was thereby 67 L. R. A.

waived. *Mutual L. Ins. Co. v. Kelly*, 52 C. C. A. 154, 114 Fed. 268.

Beneficiary.

Lapse of the statutory period within which a mistake may be corrected is held, in *Webb v. Webb*, 23 Ky. L. Rep. 1057, 64 S. W. 839, to bar a suit to reform the policy. The suit was by the children of the insured by his wife at the time the insurance was taken out against his children by a second wife, the former claiming that the insured intended that they alone, and not "his children," as stated in the policy, were the intended beneficiaries.

So, failure to object within ten months to the writing of the policy in favor of the beneficiary, and on his death in favor of his son (the insured), instead of in favor of the beneficiary or his heirs, where such error was known to the beneficiary shortly after the delivery of the policy, is held, in *Roddey v. Talbot*, 115 N. C. 287, 20 S. E. 375, to bar any defense to his premium note executed at the time of the application. The failure to object, it is said, must be construed as an acceptance of the benefits of the policy. "To lend our sanction to the contention of the defendant would give him all the advantage of a beneficiary under the policy held by the assured for him, even though his purpose may have been, by apparent acquiescence, to place himself in a position to recover in case of the death of the assured, while he entertained the purpose during the interval to repudiate the contract in case his son should survive the maturity of the note. If defendant's conduct did not estop him, it was at least a waiver of the right to object when he failed to give notice of such objection within a reasonable time after acquiring knowledge of the precise terms of the policy delivered to the assured."

3. Facts affecting the hazard.

(a) Other insurance.

The existence of prior insurance was disclosed to the soliciting agent in *Barrett v. Union Mut. F. Ins. Co.* 7 Cush. 175, but through his error was not indorsed upon the policy as required by its terms. In an action upon the policy at law it was held that no recovery could be had, although the insured might have rights in equity. "It was said in the argument, that

to those who, "having the means in their own hand, neglect to protect themselves;" that "the law requires men, in their dealings with each other, to exercise proper vigilance, and apply their attention to those particulars which may be supposed to be within reach of their observation and judgment, and not close their eyes to the means of information which are accessible to them." *Vigilantibus, non dormientibus, jura subveniunt*. In *Warner v. Benjamin*, 89 Wis. 290, 62 N. W. 179, it was held that, if a person is put upon inquiry in respect to the quality of a thing offered for sale to him, he is bound to know what is discoverable in regard thereto by the exercise of ordinary care; that he cannot "close his eyes to defects which are before him, or to the infor-

mation which is at hand." In *Farr v. Peterson*, 91 Wis. 182, 64 N. W. 863, it was held that, if the defects in the subject-matter of the contract are patent, and should be discerned by the exercise of ordinary diligence, the purchaser is bound to discover them at his peril; that in dealings between individuals each is bound to apply his attention reasonably to the subject-matter thereof, and to discover those things which are within reach of ordinary observation and judgment, and which they are not prevented from discovering by artifice or fraud. Again, in *J. Thompson Mfg. Co. v. Gunderson*, 106 Wis. 449, 453, 49 L. R. A. 859, 82 N. W. 290, it was held that, if an article is delivered in fulfillment of an executory contract, and the receiver thereof has full opportunity for

there was a mistake or fault on the part of the defendants; that the policy was prepared by the defendants; and that they should have expressed in it the prior policy, and omitted to do so by design or by wilful negligence; and that the assured did not read it, but supposed that the prior policy was expressed. The assured certainly had abundant opportunity to read the policy, and need not have accepted it, if it was not satisfactory to him, according to the agreement of the parties. If the assured accepted the policy without looking at it, or knowing what it was, he would seem himself to be liable to the charge of culpable negligence made against the defendants."

To the same effect, *McHugh v. Imperial F. Ins. Co.* 48 How. Pr. 230, *supra*, III., c.

See also *Kiels v. Niagara F. Ins. Co.* 117 Mich. 469, 76 N. W. 155, and *Madison Ins. Co. v. Fellowes*, 1 Disney (Ohio) 217, *infra*, IX., where actions at law upon the policy were held not maintainable for breach of this condition.

On the other hand, the weight of authority is to the contrary.

A defense based upon the existence of concurrent insurance not indorsed upon the policy was overruled in *Fireman's Fund Ins. Co. v. Norwood*, 16 C. C. A. 136, 32 U. S. App. 490, 69 Fed. 71, where the failure to note the same was chargeable to the company's agent to whom it had been disclosed at the time of the application. "It is next said that it was the duty of the insured to examine the policies at the time the agent delivered them, and see that he had made the required indorsement in relation to other insurance, and that not having done so, they are conclusively bound by the condition. The law imposed no absolute duty on the insured to see what indorsement the agent had put on the policy in relation to other insurance. The insured had done their duty in the premises. They had imparted to the agent the requisite information to enable him to make the proper indorsement. It was his duty to make it in conformity to the information given him, and the insured had a right to rely upon his performing that duty, and his failure to do so, whether the result of a mistake or of a deliberate fraud, cannot operate to the prejudice of the insured. The contract of insurance is pre-eminently one that should be characterized by the utmost good faith on both sides. There is no rule of law requiring the business world to deal with insurance agents

upon the assumption that they are cheats and frauds. The presumption is that they are reasonably intelligent and honest men, who know and perform their duty both to the insurer and to the insured; and the company cannot escape payment of the loss merely because the insured acted upon this presumption."

Where an existing mortgage and the insured's intention to take out additional insurance upon the property were both disclosed to the soliciting agent at the time of the application, the same defense was again overruled in *McElroy v. British America Assur. Co.* 36 C. C. A. 615, 94 Fed. 990. The policy was issued on an application written wholly by the agent and unsigned by the insured, which made no mention of either. A defense based on the existence of an undisclosed mortgage and additional insurance, not assented to, was overruled in an action on the policy, the court saying: "It may be said that the insured should have ascertained the correctness of the policy upon receiving it. Barrington, who acted for the insured in the matter, testified that he did open the policy, and note the company insuring, and the amount of insurance, but nothing more. It would certainly have been an act of prudence on his part to read the entire policy, but his neglect to do so cannot excuse the company for the default of the agent in not writing the contract in accordance with the representations made by the insured. The insured had a right to rely upon the agent's performing his duty of making the contract in conformity with the information given; and the agent's failure to do so, whether the result of a mistake, or of a deliberate fraud, cannot operate to the prejudice of the insured. The contract of insurance is pre-eminently one that should be characterized by the utmost good faith on both sides."

So in *North British & M. Ins. Co. v. Steiger*, 26 Ill. App. 228, an action upon a fire policy after loss, the court's opinion does not disclose the length of time during which the policy was retained by the insured before loss; but it appears that the amount of additional insurance was erroneously stated in the policy as a result of the agent's mistake or negligent omission at the time of the application. "According to . . . [assured's] statement, the agent of the company called on him and solicited a renewal of the policy issued by a former agent, and the question was asked how much insurance he already had. To this the

examining the same and observing variations therein from the article contracted for, and fails within a reasonable time to give notice that the article is not accepted as fulfilling the contract, the variances, if any, will be deemed waived.

It is easy to apply the foregoing to the facts of this case. The applicants for insurance had ample opportunity to examine their policies when the same were received. It was their duty to do that. An examination of the policies, even of a casual character, would have revealed all the material facts. The applicants did nothing by way of examining the papers for months after receiving them, during all of which time the defendant carried the risks it had assumed. What appears to counsel for respondent to

be want of harmony in the authorities, in respect to such a situation, in the main, grows out of failure to take in the full scope of the rule that every person must use reasonable diligence for his own protection, or in confusing it with other rules with which it does not conflict. Counsel errs most grievously in the idea advanced, that negligence is never a defense in a case grounded on fraud against the wrongdoer, as the cases above cited amply show; though it is true that there are expressions in legal opinions that may be referred to in justification of the error, and later we will refer to an instance of that kind in our own decisions, and probably there are others. However, on a question so well settled, contrary statements in opinions, used *arguendo*, ought not, it

plaintiff replied he did not know, but referred the solicitor to two other agents in the city where all his other insurance was issued, for information. Whether this source of information was resorted to does not appear, nor is it material, for the way was open; but in a few days the plaintiff found on his desk the policy in suit, and, supposing it was properly drawn and binding on the company, he placed it in his safe without examination. In this he acted as would any ordinary business man under like circumstances, and to allow this defense would, in our judgment, work great injustice." A recovery upon the policy was allowed.

The jury having found that the insured was kept in ignorance of the company's failure to allow additional insurance through the misrepresentations of the insurer's agent at the delivery of the policy, a recovery was allowed thereon in *McKenzie v. Planters' Ins. Co.* 9 Helsk. 261, in spite of the existence of additional insurance in violation of a provision of the policy.

Reformation was granted in *Barnes v. Hekla F. Ins. Co.* 75 Iowa, 11, 9 Am. St. Rep. 450, 39 N. W. 122, although the policy had been in insured's hands up to the time of loss. The court said: "Because he failed to read the policy and discover the omission therein, and its terms and conditions, he is not guilty of such negligence as will bar him of relief."

Similar relief against the mistake of an agent in limiting the amount of additional insurance to \$12,000 instead of \$20,000, as had been agreed upon, was given in *Fitchner v. Fidelity Mut. Fire Asso.* 103 Iowa, 276, 72 N. W. 530, although the mistake appeared in the application signed by the assured, and although a copy of this application was attached to the policy, which the insured accepted and retained till loss. "The mere failure of the assured to read his application or the copy of it on the policy does not establish negligence. . . . Nor is the mere omission to read the policy [in which the mistake was incorporated] negligence. . . . Laub [the insured] had no reason to suppose the policy and application were drawn differently than understood. As to matters affecting the rights of the firm at the time the policy was delivered or in the future, it must be charged with notice, but the law did not require him to search through the policy to ascertain past mistakes or misstatements of the agent or company."

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The equitable rule as to reformation of instruments in case of mutual mistake is applied in a recent Nebraska case to make a policy express the intended contract notwithstanding the insured had retained it in his possession without objection, the court treating the mistake of the agent in failing to make the policy express the contract, and that of the insured in believing that he had done so, as concurrent or mutual. The court in so doing permitted the insured to avoid the effect of a judgment of the Supreme Court of the United States that there could be no recovery on the policy. The case is *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, and the parol-evidence rule was applied by the United States Supreme Court to defeat a recovery at law on the policy upon which the insurer's agent had failed to note an intention to take out additional insurance, disclosed at the time of application. (See *supra*, I.) Recovery was allowed by the state court, however, in a subsequent suit to reform. (Neb.) 102 N. W. 246. "The whole impression that this evidence makes upon our minds is this: That Walsh desired to obtain from the defendant insurance concurrent with that then existing. That Borgelt, the agent, knew of the existing insurance, and knew of the desire of Walsh, and intended to comply with it, but, through inadvertence, omitted so to do. That he knew of the condition for a forfeiture contained in the policy, and knew that it could be avoided only by an indorsement on the instrument. That the failure to make the indorsement was due, not to fraud, but to the mistake or inadvertence of the agent, and that the acceptance of the contract by Walsh without the indorsement was due, also, to his mistake or inadvertence. The evidence falls short of showing that he knew that such an indorsement was necessary. He seems to have had a desire for concurrent insurance, and to have made it known to Borgelt; but what form of contract or policy was requisite for that purpose, he does not testify; nor is it otherwise shown that he knew. That matter he seems to have left to the skill and fidelity of the agent. That he was somewhat negligent in so doing, and in accepting and retaining the policy without reading it, is evident; but his negligence in that regard was not greater than that of the agent, with which it was concurrent, nor, we think, greater than that of ordinary capable

would seem, to lead one astray. In 14 Am. & Eng. Enc. Law, 2d ed. pp. 115-117, the rule stated is supported by citations from English decisions, and from most of the states of the Union. The author says: "This doctrine is not based upon any consideration for the party who has been guilty of the false representations, but upon the ground that public policy requires that persons shall be required to exercise at least ordinary prudence in their business dealings, instead of calling upon the courts to relieve them from the consequences of their inattention and negligence."

Counsel for respondent cite to our attention cases to the effect that the time for a person who receives property upon an executory contract, or who is defrauded in the

making of a contract, to rescind the transaction, does not begin to run till he has knowledge of the facts. That is true, but, as we have seen, the rule does not require actual knowledge; constructive knowledge is just as efficient as actual knowledge. A person is presumed to know those things which reasonable diligence on his part would bring to his attention. If he accepts the article furnished without exercising that diligence, he does so at his peril. In that sense the maxim, *Caveat emptor*, applies, as said in *Mamlock v. Fairbanks*, 46 Wis. 415, 32 Am. Rep. 716, 1 N. W. 167. The observation in *Beetle v. Anderson*, 98 Wis. 5, 73 N. W. 560, that "the rule *caveat emptor* has no application to cases of fraud," as it might be understood, is wrong. The idea which the court

and prudent men in the transaction of such affairs."

A mortgagee applied for insurance upon his interest in the mortgaged property, in *Blidwell v. Astor Mut. Ins. Co.* 16 N. Y. 283. The policy as issued not only purported to cover the interest of the owner of the ship, payable in case of loss to the mortgagee, but the valuation of the property and the amount of concurrent insurance which it had been agreed upon might be taken out, had both been reduced also. These alterations were made at the request of the owner of the property, without the authority or knowledge of the mortgagee. The policy, though it came into the hands of the mortgagee more than a year before the loss, was not read, and the variations not discovered, until after the loss. To defeat a defense based upon an excess of concurrent insurance over that allowed by the policy, the mortgagee sought to have the policy conformed to the preliminary agreement in this regard. A reformation was granted. "The fact on which the appellants rely," says the court, "that the policy actually made out was in the plaintiffs' hands for a considerable time, and until after the loss had occurred, was a circumstance to be weighed by the judge, as bearing upon the truth of the plaintiffs' allegation that the policy did not pursue the contract. It has undoubtedly been considered by the judge, and his judgment has been given, notwithstanding that circumstance, in favor of the plaintiffs. There is no rule of law which fixes the period within which a man may discover that a writing does not express the contract which he supposed it to contain, and which bars him of relief for delay in asserting his rights, short of the period fixed by the statute of limitations."

See also *Palmer v. Hartford F. Ins. Co.* 54 Conn. 488, 9 Atl. 248, *supra*, III., c.

(b) *Occupancy of premises.*

Compare IV., b, 1, (c).

The vacancy of the premises covered by the policy in *McHoney v. German Ins. Co.* 52 Mo. App. 94, was disclosed by the insured to the soliciting agent at the time of application, but, through his mistake or fraud, was not noted therein. It was represented that the policy would contain a thirty-day vacancy clause. No such clause appeared in the policy, and on 67 L. R. A.

the back of it were copied the falsified answers of the application. Fourteen months' retention of this policy without objection was held to bar even reformation thereof. "Whatever fraud or deception," says the court, "may have been practised upon him by the soliciting agent in filling out his answers to the questions in the application, by keeping the policy in his possession without examination, he, in intentment of law, accepted it as written, and assented to its terms as constituting the contract, and the only contract, between him and the defendant."

Insured's acceptance of a fire policy covering a dwelling described as "occupied," is said, in *Hamburg-Bremen F. Ins. Co. v. Lewis*, 4 App. D. C. 66, to render the insured a participant in the fraud of a soliciting agent who was aware, through information conveyed by the insured before the issuance of the policy, that the property was unoccupied. "Even putting Gorman [soliciting agent] upon the footing of an agent of the company, the principle is settled that, if the agent be guilty of a fraud upon the insurers, and the assured knowingly aids in its perpetration, or, by neglecting to read the application or the policy, suffers it to be perpetrated, he is guilty of participating in the fraud, and must suffer the consequences."

See also *Thomson v. Southern Mut. Ins. Co.* 90 Ga. 78, 15 S. E. 652, *supra*, III., c.

On the contrary, a recovery on the policy is allowed in *Thackery Min. & Smelting Co. v. American F. Ins. Co.* 62 Mo. App. 293, an interesting case, in view of the earlier decisions from the Missouri courts. It appeared in that case that at the time of the application the soliciting agent knew that the property to be insured was vacant, and would probably continue to be so. The policy issued contained a clause avoiding it if the manufacturing plant, which was the property covered, ceased to operate for the space of more than ten days. In fact it was not operated during the four and a half months preceding the loss, which was the entire period during which the policy was in operation. In an action at law upon the policy the company defended under the vacancy clause, but a recovery was permitted nevertheless. "The defendant's agent well knew the nature and condition of the property, what it was then, and what its future condition as to operation would be. His knowledge was that of the company. With this knowledge the

intended to convey is that, where a person is so circumstanced that he may, consistently with reasonable care, rely upon the representations of the person with whom he is contracting the rule *caveat emptor* does not apply. That is, where the fraud complained of is actually produced by the wrongful conduct of the defendant, he cannot invoke the doctrine of *caveat emptor* to protect himself from the consequences thereof. But a person acts at the peril of suffering the consequences in relying upon the representations of another with whom he is contracting if the exercise of reasonable care would uncover to him the truth. Cases are cited to the effect that a person cannot profit by his own wrong. That is true as a general proposition, but it is just as true, as we

have seen, that a person cannot have the protection of the law where he fails to use reasonable care to protect himself. When it is said that a person cannot take advantage of his own wrong, it is meant that he cannot do so as against a person who is injured by that wrong. The mere fact that one person relies upon false representations made by another to his injury does not constitute a cause of action against such other. There must be a further circumstance. Such person must be induced to rely upon the fraudulent representations, and that circumstance does not exist where such person would not be so induced but for his own heedlessness.

The rule we have discussed has been applied elsewhere generally, and in many cases quite similar to the one before us, some of

plaintiff was, in effect, assured that the company would make no objection to the nonoperation of the plant. The plaintiff was thereby lulled into a sense of security, and, on the faith that defendant would raise no objection to the condition of the property, paid the premium. It would work a fraud on the plaintiff if this defense was allowed." Both *American Ins. Co. v. Nelberger*, 74 Mo. 167, *supra*, III., b, 6, and *McHoney v. German Ins. Co.* were before the court, and it was urged by counsel that they governed the decision. The *McHoney* Case was distinguished by the court on the ground that it was in equity, and the *Nelberger* Case was entirely disregarded as not in point.

An application for policies upon property in the course of erection, premiums for such a risk being paid, was filed in *Guggenheimer v. Greenwich F. Ins. Co.* 9 N. Y. S. R. 316, by policies stating the buildings to be occupied as stores and dwellings. Loss occurring within a few months after the delivery of these policies, the insured was permitted to recover on them in spite of the misdescription in this regard. "If O'Sullivan rightly stated the facts, . . . then there was no waiver on his part of his right to insist upon the performance of the oral agreement alleged to have been made for the issuing of these policies. For, without knowledge or information of their contents, it could not be inferred that he designed to accept these policies in place of those mentioned by him in his testimony as the form in which the insurance was to be made by the company.

There was no such lapse of time between the issuing of the policies and the occurrence of the fire and the discovery of the form in which they had been made out as would prevent him from refusing to accept them. In dealings of this description no very rigid rule can be applied, for some heedlessness on the part of the insured is not an uncommon attribute, and it is ordinarily excusable by reason of the manner in which the business of insurance is done. The party receiving policies commonly takes it for granted that they are properly issued by the agents or officers of the company. Reliance is placed upon the expectation that the company itself will take care to make the insurance valid and effectual, and that expectation relieves the assured from the obligation of making that degree of scrutiny as would exist if so much con-

fidence was not reposed in the agents and officers of the company itself. In this case it was undoubtedly assumed, when the policies were received, that they were effective and legal insurances of this property, and, if O'Sullivan is reliable in his statements, he had reason to believe them to be so, for he had enjoined upon the agent the description of policy expected to be obtained, and had, in his interview with the clerk in the presence of one of the officers of the company, impressed that also upon these individuals. And he had paid the premium exacted for the description of insurance desired to be obtained on these buildings. They were not so made, and when that fact was discovered O'Sullivan . . . was not deprived of the right to reject the policies, and to rest upon the agreement stated by him to have been made . . . at the office of the company."

Reformation was granted in *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 11 Am. St. Rep. 121, 20 N. E. 77, where the insured, not only at the time of the application, but also at the delivery of the policy, inquired of the agent in regard to the existence of a vacancy clause in the policy, and received an affirmative assurance in regard thereto from the agent. The retention of the policy for two years and six months thereafter was not deemed sufficient to charge the insured with notice of the actual terms of the policy and the agent's lack of authority to waive the same, although a clause limiting waiver of conditions to those made in writing on the policy under the authority of its officers appeared on its face.

Where the policy remained in the hands of the insurer's agent, it was held (*St. Paul F. & M. Ins. Co. v. Wells*, 89 Ill. 32) that constructive notice of its terms was not imputable to the insured. Consequently, having a right to presume that it conformed, as written, to the verbal agreement with the agent in regard to the vacancy of the premises, a breach of its terms in this regard was held to be no defense to the company. "Appellee," says the court, "no doubt relied upon the contract he had made with the agent, and nothing is shown to put him on inquiry. He had a right to suppose that the policy would conform to the contract as he made it with the agent. The company, failing to notify appellee of the change, that he might repudiate or ratify it, must be bound

the more important of which are cited in the brief of counsel for appellant. In *New York L. Ins. Co. v. McMaster*, 30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 63, it was held, that where a person receives an insurance policy pursuant to an application it is his duty to examine it and see those things in respect thereto which are open to ordinary observation by a person of ordinary intelligence, and that if he neglects to do so, taking it for granted that he has received what he applied for or intended to apply for, he is guilty of inexcusable negligence, and in law his conduct amounts to an acceptance of the policy received regardless of whether it corresponds to the policy applied for or intended to have been applied for or not; that representations made by an

insurance agent at the time the application for a policy of insurance is made constitute no excuse for failure of the applicant to look at his policy when it is delivered to him, to see if it corresponds to the one expected, and to discover the facts in that regard if that can be done by a reasonable examination of the paper; that if one fails to read his contract under such circumstances, having full opportunity for doing so and ability to read, he is guilty of gross negligence, and cannot be heard successfully to say that he kept it in ignorance of its character; that the rule in that regard applies to all contracts, insurance contracts being no exception. In *Fennell v. Zimmerman*, 96 Va. 197, 31 S. E. 22, it was held that it is the duty of a person, on receipt of an insur-

by the contract as it was made with the agent."

(c) *State of title.*

Eight months' retention of a policy alleged to misdescribe, through the agent's mistake, the interest of the insured as that of absolute owners, instead of that as commission merchants, was held, in *Westchester F. Ins. Co. v. Wagner* (Tex. Civ. App.) 38 S. W. 214, to bar a reformation. "The evidence developed the fact that there were no statements on the part of the agent to mislead appellees or throw them off their guard; and yet for at least eight months they held the policy of insurance in their hands, and did not discover the error in it until after the property was consumed by fire, and their attention was called to it by the adjuster of the insurance company. Equity will not relieve against a mistake which resulted from carelessness and neglect. It does not put a premium upon the carelessness or inattention of a person to his own business."

No recovery was allowed, likewise, in *Swan v. Watertown F. Ins. Co.* 96 Pa. 37. The insured in this case signed the application before it had been completed by the agent, after some discussion with him in regard to the property which should be covered by the policy. No inquiry had been made in regard to the existence of encumbrances. The application was completed by the agent without consulting the insured, included certain property not owned absolutely by the insured, and stated that no encumbrances upon the property existed. A policy issued in conformity with the application was retained by the insured without reading, and, therefore, without objection for two months, until loss. The errors of the agent appeared in the policy, although a copy of the application was not attached. Under these circumstances, no recovery was allowed on the policy. "When he accepted the policy he accepted its terms. He was not the sole owner of part of the property insured, and part was encumbered by judgment, neither of which facts was expressed in the written portion of the policy. This was plain, and he could readily see that his policy was void. To say that he did not read the policy, and, therefore, is not bound by its terms, sounds as ill in him as in the company to say it did not know Smullen was its agent. Warren held the policy more than 67 L. R. A.

two months before the fire. Not a circumstance is proved tending to induce him not to read it; but, instead, he says the application was not finished when he signed it; that he was not satisfied about the sewing machine being put in, and that he instructed Smullen to fill it up. Then he knew facts to incite him to read the policy. After the lapse of a reasonable time without objection, he is presumed to have accepted it. There is no evidence which ought to overcome that presumption."

On the other hand, the mere acceptance of a policy by an illiterate insured, who is ignorant that it contains the usual provision for avoidance in case his title to the property covered by the policy, if less than absolute, is not expressed in the policy, is held, in *Mlotke v. Milwaukee Mechanics' Ins. Co.* 113 Mich. 166, 71 N. W. 463, not to defeat a recovery thereon after loss, where the true state of his title was disclosed to the agent, and it is through the latter's negligence or mistake that it was not inserted in the policy.

The Missouri supreme court, in *Franklin v. Atlantic F. Ins. Co.* 42 Mo. 456, unanimously reversed the judgment of the trial court in excluding evidence offered by the insured to show that, before the delivery of the policy, or payment of the premium, he had informed the general agent of the company that he was only a part owner of the property covered, and that his interest was encumbered, and that the agent had informed him that it was "all right, it would make no difference," although the policy in suit, expressly demanding that the title of the insured, if less than absolute, should be indorsed thereon, had been retained by the insured until after loss. "The policy is accepted and the premium is paid on the faith of this assurance. The party insured goes away relying upon its validity to protect him against loss during the time specified. He acts upon a state of things represented to him by the agent to be sufficient, and it would work a fraud upon him if the company should now be allowed to avail itself of this defense."

The insured correctly stated the deed under which his title had been acquired, in *Medley v. German Alliance Ins. Co.* (W. Va.) 47 S. E. 101, but the agent erroneously construed the estate conveyed thereby to be a fee simple, and it was so stated in the application and in the policy issued thereon. In fact it was but a mere life estate, and the company defended an action

ance policy pursuant to his application, to examine it; that he commences receiving benefits immediately upon the policy coming to his hand, and that it is his duty to examine the paper upon its receipt, and to return it within a reasonable time if it is not satisfactory, and that a failure to do so is in law an acceptance of the policy. In *McMaster v. New York L. Ins. Co.* 40 C. C. A. 119, 99 Fed. 856, cited by counsel for respondent, the doctrine in the previous case, regarding the same policy (30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 63), was discussed at length, and it was said to apply both at law and in equity. There are many cases of like character, which might be referred to, but the principle upon which they rest is so universally recognized that we shall

omit further reference to cases, except to cite *American Ins. Co. v. Neiberger*, 74 Mo. 167, as an indication of the current of authority as regards the length of time held by courts to constitute ratification of a policy not issued according to the representations of the agent, where no objection is made in that regard within a reasonable time after the assured has had a fair opportunity to read and understand it. In that case no objection was made for about three months, and it was held that the delay constituted an acceptance of the policy.

In this case the representations made to the applicants for insurance in no way prevented them from examining the policies when they were received. It was their duty to make such examination. Had they per-

son on the policy on the ground of this misstatement of title. The court, however, allowed a recovery. Speaking of reformation of policies, the court says: "If the terms of a policy are so unalterably and absolutely binding upon the assured, after its acceptance, upon the theory of notice, how is it possible that such jurisdiction exists and may be exercised in one forum or another in all the states? . . . The only ground upon which this right of reformation can be denied is laches. How is the person into whose hands the policy of insurance is placed to know whether it has been drawn according to the verbal understanding of the parties until after he has read it? Is he to reject it upon suspicion? Has he not the right to assume for the time being that it has been properly drawn? As a matter of fact, is it not common knowledge that agents are relied upon to properly prepare the policies, and that they are scarcely ever critically examined before acceptance? There can be no notice until after the reading, and, after the acceptance of the policy, there can be nothing more than a sort of implied notice; and a court of equity will not hold the party guilty of laches for mere negligence to actually read the policy, any more than it will in the case of a deed. Compare the case of a misdescription of a tract of land with the insertion of the complex and artificial terms of insurance policy, such as 'unconditional and sole ownership,' 'fee-simple title,' and say whether a layman, especially an illiterate person, can be rightfully or legally subjected to a stricter rule in respect to them than he is in respect to a description of a thing with which he is perfectly familiar, or which he is obviously capable of fully comprehending." There is a strong dissent, however, in this case by Brannon, J., who refuses to concur in an "opinion excusing one from reading a policy before he accepts, and excusing him from its conditions because he did not read or understand it."

The soliciting agent in *Ben Franklin Ins. Co. v. Gillett*, 54 Md. 212, was informed by the insured at the time of the application that the building insured stood upon leased ground. This fact was omitted by mistake when the agent, on returning to his office, made out the policy, and the error was not discovered by the insured until some nine months later, when the property was destroyed by fire, and he had occasion to examine his policy. He had put it

away with other policies on receipt, "having entire confidence in the good faith of the agent." Under these circumstances, the policy was reformed and enforced after the loss.

A policy erroneously written in favor of insured's husband, her agent, who had no interest in the property covered, as was known to the agent of the insurer, was reformed in *German F. Ins. Co. v. Gueck*, 130 Ill. 345, 6 L. R. A. 835, 23 N. E. 112, in spite of fourteen years' retention of the policy, where it was shown that the insured was an illiterate foreigner, and that the policies were brought home, put away in a drawer, and never read, under the supposition that they were all right.

Failure of the insured to read the policy and discover that it has been erroneously issued through the agent's mistake in the name of a deceased owner is held, in *Taylor v. Glens Falls Ins. Co.* 44 Fla. 273, 32 So. 887, not to be such laches as will preclude the insured from a reformation and enforcement thereof after loss, although the policy so erroneously written has been in his possession over two years.

See also *Burson v. Fire Asso.* 136 Pa. 287, 20 Am. St. Rep. 919, 20 Atl. 401, *supra*, III., c.

(d) Encumbrances.

Compare IV., b, 1, (d).

On application for a policy covering a warehouse and grain, the insured disclosed the probability of future chattel mortgages upon the grain, but received the assurance from the agent "that the company cared nothing for encumbrances upon the chattels." *Smith v. Continental Ins. Co.* 6 Dak. 433, 43 N. W. 810. In reliance upon this statement, subsequent mortgages upon the grain were placed without obtaining the assent of the company, thereby violating the usual stipulation in the policy against encumbrances. The policy having been retained by the insured without objection, it was said that "he cannot now shield himself from the effect of violating its provisions under the plea that he never read it." A suggestion appears, p. 440, 6 Dak., p. 811, 43 N. W., however, that a different result might have been reached had the representation been made by a general agent; under which circumstances a waiver of the condition of the policy might have been worked out.

A failure of the insurer's general agent to note existing and anticipated mortgages in the

formed that duty they would have easily discovered all that they complain of. The opening lines of the letter sent appellant with his policy told the whole story. A casual glance at it would have informed him that the policy was not such as he expected to receive. Certainly he cannot, under any rule, be excused for omitting to read the first three lines of a letter addressed to him on so important a business matter, which contained other information of interest to him than that with reference to the character of his policy, *viz.*, information in regard to the amount of his annual payment. All the parties were insured for months before appellant had any intimation that the policies were not satisfactory. It cannot be doubted that, if death had come to any of

them in that period, his policy would have been enforced. Under those circumstances the applicants for insurance must be presumed to have accepted their policies long before their attempted rescission thereof and demand for the payment of the money paid thereon. The trial court and the learned counsel for respondent fell into a grievous error in supposing that the omission by the policy holders to look at their policies can be justified by what occurred at the time the applications for insurance were made, and that, as against a party charged with fraud in the making of an executory contract, the injured party was not bound to object in order to preserve his rights, till he has actual knowledge; that negligence on his part in failing to make the discovery is

application written by him was held no bar to a recovery by the insured on the policy, in *Copeland v. Dwelling-House Ins. Co.* 77 Mich. 554, 18 Am. St. Rep. 414, 43 N. W. 991, although it had been accepted and retained some time prior to the loss. The agent's omission of the mortgage from the application is declared "as much a fraud . . . as though he had written a clause in the application without the knowledge of the plaintiffs, making the policy void if such additional encumbrance was placed upon the property. The plaintiffs had a right to rely upon the agreement of the agent to so write the application, and when they took the policy they had a right to assume that the company waived any conditions in the policy inconsistent with their right to further encumber. Parol evidence was certainly competent to show such an agreement."

So, a recovery was allowed in *Gristock v. Royal Ins. Co.* 87 Mich. 428, 49 N. W. 634, upon a policy which, through the agent's mistake, failed to note a mortgage upon the insured property, disclosed by the insured at the time of his oral application. "Plaintiff had a right to rely upon the assumption that his policy would be in accordance with the terms of his oral application. If the defendant desired to make it anything different, it should, in order to make it binding upon plaintiff, under the authorities in this state, have called his attention to those clauses which differed from the oral application."

In *McGuire v. Hartford F. Ins. Co.* 7 App. Div. 575, 40 N. Y. Supp. 300, where the insured was an illiterate farmer to whom the local agent of the company had represented that its policy was good, although the property to be covered was chattel mortgaged; and it appeared that the agent actually had authority to waive the express condition of the policy against such mortgages by his personal indorsement thereon,—the negligent mistake of such agent in failing to make the required indorsement after promising the insured so to do was held no bar to a recovery on the policy. The loss occurred six days after the issue of the policy which was retained at the request of the insured, by the agent. "No fault or laches is imputable to the insured. . . . Having made a full and frank disclosure of the facts to the company's agent, who was empowered to write the policy, there was nothing to induce or warn the insured to have the pol-

icy read, unless it was the anticipation of fraud or mistake, and this could impose no duty in protection of the rights of plaintiff."

In *Phoenix Ins. Co. v. Warttemberg*, 24 C. C. A. 547, 48 U. S. App. 344, 79 Fed. 245, it appeared that the agent of the company, at the time he solicited the insurance, was informed of the existence of certain mortgages upon the property to be covered by the policy, and that the insured expected to pay them off within a short time. Instead of stating the existence of these mortgages in the application, the agent assured the applicant that, in view of the fact that they would soon be removed, it was unimportant to mention them, and therefore they were entirely omitted from the application. The policy issued in pursuance thereof contained the usual statement that it was based upon the application the answers of which were declared warranties. After loss the company defended on the existence of the undisclosed mortgages. A recovery was nevertheless allowed, the court saying: "If would be a harsh doctrine, indeed, to hold that insurance companies shall have the opportunity of perpetrating such wrong and injustice as would result from the application of the ruling in the *Fletcher Case*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837, *infra*, IV., b. 1, (a), to the facts presented in the present case. It is well known that insurance is usually effected, especially upon farm property, by agents who travel through the country supplied with the printed blanks of the insurance companies for the purpose of taking applications and forwarding them to their home offices. The applicant for insurance naturally relies upon the statements of him whose business it is to procure insurance, and the agent should not have it in his power, while obtaining premiums from the insured for the enrichment of his company, to absolve the latter from liability on its policies, provided he can, either honestly or otherwise, induce the applicant to adopt in his application such construction as the agent may persuade him to believe is proper to be placed upon the facts which he has honestly detailed."

To the same effect, also, are *Boetcher v. Hawkeye Ins. Co.* 47 Iowa, 253, *infra*, III., b. 11; *Klister v. Lebanon Mut. Ins. Co.* 128 Pa. 553, 5 L. R. A. 646, 13 Am. St. Rep. 698, 18 Atl. 447, *infra*, IV., b. 1, (d); *McElroy v. British America Assur. Co.* 36 C. C. A. 615, 94 Fed. 990, *infra*, IV., a. 3, (a).

not to be considered. The law is otherwise as we have seen. It seems perfectly clear that plaintiff entirely failed to establish any cause of action against the defendant, and that the complaint should have been dismissed.

The judgment of the Circuit Court is reversed and the cause remanded with directions to render judgment in favor of defendant for costs.

A rehearing having been had, **Marshall, J.**, on November 11, 1902, handed down the following additional opinion:

A rehearing having been had in this case, we have examined the questions involved with this result: We are satisfied the law was correctly laid down in the former deci-

sion, though it is considered that the same was not in all respects correctly applied to the facts. If we should attempt to write an opinion discussing at length all the propositions advanced in defense of the judgment appealed from, reviewing each of the multitude of authorities cited in support thereof, eliminating in detail those believed not to be in point as to any proposition legitimately in the case, harmonizing those which are correctly decided, and pointing out the errors of expression therein, and such errors and decisions in the others, we are fearful the result would be an opinion of such great length that in so attempting to light a clear way through the mass of things to which our attention has been called, the law, though correctly stated, would not be so clearly de-

See, however, *Swan v. Watertown F. Ins. Co.* 96 Pa. 37, *infra*, IV., a, 3, (c), where circumstances tending to put the insured upon inquiry were found, and *Johnson v. Dakota F. & M. Ins. Co.* 1 N. D. 187, 45 N. W. 799, *infra*; IV., b, 1, (d), where the principles of the Fletcher Case are applied.

b. *Appearing only in the application.*

1. *Copy attached to policy.*

(a) *Physical condition of insured.*

It is stated in the frequently cited case, *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837, that a party who retains a policy to which is attached a copy of the application, containing false answers inserted by a soliciting agent after the disclosure of the truth by the insured, becomes a participant in the agent's fraud, if he makes no objection within a reasonable time after the receipt of the policy. In this case it appeared that the insured had honestly stated his physical condition, and disclosed the fact that he had diabetes. This was misstated, entirely omitted, by the agent in writing the application, which the insured signed without reading. Notice in red type appeared at the top of the copy attached to the policy, that such copy was attached for the purpose of giving the insured notice of the answers in the application as forwarded to the company, in order that any errors therein might be corrected. The insured did not discover the agent's fraud because he neglected to read the policy and the application. Aside from the fact that the agent's authority was limited by a stipulation in the application, says the court, "there is another view of this case equally fatal to a recovery. Assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated, not only upon himself, but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agents, and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and 67 L. R. A.

of its statements. The consequences of that approval cannot, after his death, be avoided."

A *dictum* appears in *John Hancock Mut. L. Ins. Co. v. Houtt*, 113 Fed. 572, in accord with the Fletcher Case, to the effect that false answers inserted by a medical examiner in the application must be deemed adopted by the insured, where a copy of the application is indorsed on the back of the policy, which is accepted and retained by the insured without objection. "He could not, in good faith to the company, hold the policy." Cancellation of the policy was granted at the suit of the company.

Whether the insured had correctly stated his physical condition and the names of the physicians who had previously attended him, does not appear in *National Union v. Arnhorst*, 74 Ill. App. 482, but the application signed by him and attached to his policy, showing the answers inserted in regard to these questions, clearly misstated the facts. Retention of the policy for a year and a half in this condition was deemed by the court an affirmation of the truth of the answers as reported in the application, and therefore supported a cancellation of the policy by the company upon proof of their falsity. "Arnhorst accepted the certificate knowing the misrepresentations made to the medical examiner, and retained it for more than a year and a half among his other valuable papers, where he frequently saw it, and therefore must be charged with knowledge of what the answers were. By these acts he adopted and approved the answers, as written by the medical examiner, and appellee cannot now claim any benefit from his contract based on his untruthful statements."

There was a conflict of evidence in *Reynolds v. Atlas Acci. Ins. Co.* 69 Minn. 93, 71 N. W. 831, upon the question whether, at the time of the application, the insured had actually stated to the agent, who wrote the answers therein, whether or not he was subject to epileptic fits. But a copy of the application was attached to the policy, and the latter retained for three years without objection. Under such circumstances, the insured, it is said, "must be deemed to have approved of it and accepted it as containing his answer. The consequences of that approval and acceptance cannot now be avoided after his death." No recovery upon the policy was allowed in favor of the beneficiary. Compare, however, *Otte v. Hartford L. Ins.*

clared as to enable trial courts and the profession to easily understand the position of this court by which they are to be guided in future cases involving the same questions. The ground required to be explored to that end, if we were to take the course indicated, would be so extensive that the essential principle finally elucidated would after all be in a measure obscured to one who, from necessity or otherwise, must act from a quick view of things, and the result would be mistakes in the application of the law. Desiring, however, to leave nothing untouched that might, in any event, give rise to a thought on the part of counsel who with much labor presented the case for consideration, that material matters have been overlooked, we will endeavor to cover all the

important contentions urged upon our notice, supplementing briefly, as seems practicable, what was formerly said on some points, and discussing others so far as seems necessary to show the infirmity of counsel's reasons for a different decision as to the law, and wherein and why we have concluded to apply the same to the facts with a somewhat different result than at first decided upon.

A brief restatement of the facts seems appropriate to the end that the change decided upon from the previous result, may be better understood. We treat the facts as found by the court as verities, and add such undisputed matters on the evidence, not mentioned specifically in the findings, as are of importance.

Appellant's agent induced respondent to

Co. 88 Minn. 423, 97 Am. St. Rep. 532, 93 N. W. 608, following.

A strong dissent from the Fletcher Case and the decisions following it is to be found in well-considered opinions both prior and subsequent to its date.

A recent case from Minnesota, *Otte v. Hartford L. Ins. Co.* 88 Minn. 423, 97 Am. St. Rep. 532, 93 N. W. 608, expressly repudiates the doctrine. It appears in this case that a canvassing agent appointed by a resident general agent of the insurer misstated in the application insured's answers in regard to his health and previous sickness and medical attendance. A copy of this application was attached to the policy subsequently issued pursuant thereto. And the usual defense was interposed by the insurer, based upon the falsity of the answers, in an action upon the policy by the beneficiary. A recovery was allowed, however, the court saying: "Since the insured is to be treated as having dealt directly with the company when he signed the application, the insurer took it upon itself to make out the application and to answer the questions truthfully; hence, it cannot transfer the results of its own misconduct to the innocent victim of its deception, who parted with his money in the belief, induced by defendant, that he was obtaining indemnity; nor can we hold that the insured was bound to suspect a dishonest purpose on the part of the insurer contrary to the dictates of good faith and all rules of legal presumption, and hence required to institute an inspection of the policy upon its receipt to ascertain if he had been deceived."

The fraud of a medical examiner in inserting false answers as to insured's physical condition and family history, in his application, was not deemed waived by three years' retention of the policy to which a copy of the application containing the false answers was attached. *Bennett v. Massachusetts Mut. L. Ins. Co.* 107 Tenn. 371, 64 S. W. 758. It does not appear that the insured was put off his guard by any representation at the time of the policy's delivery. The company claimed that there was no fraud or mistake on its part, or, if there had been, that the insured was estopped to assert the same. But the court says that, "reposing confidence in the examiner, and assuming that he wrote the answers correctly, the complainant neither read the medical examination when it was made nor until two years or more there-

after, when he became aware of the fraud, and thereupon sought to avoid it. While it was an act of negligence in complainant not to have examined the writing, it was negligence superinduced by the confidence which he reposed in the medical examiner, and this enabled the company to practise the fraud upon the assured. We think that, whatever might be the rights of third persons growing out of this matter, it does not lie in the mouth of the company, upon the one hand, to confess its fraud, and, on the other, to say that you are estopped to rely upon that fraud because you have not more promptly discovered it. As a matter of common observation, even good business men do not examine the various conditions and statements in their policies as they should; but we think that, when the fraud is virtually confessed, and from the very nature of the case must have been premeditated and designed, it would be going too far to hold that, because the assured was lulled and misled by his confidence in the agent of the insurance company, that the company can take advantage of this to make its own fraud effective."

(b) *Prior insurance.*

A false answer in regard to prior insurance, written by the agent in the application, was held, in *Hook v. Michigan Mut. L. Ins. Co.* 80 N. Y. Supp. 56, to bar a recovery on the policy where it was retained by the beneficiary, with a copy of the application attached, for six or seven months, without objection. "Ordinarily . . . it is incumbent on a party to a contract to acquaint himself with its contents, and he cannot escape the consequences thereof by failing to read the same, in the absence of fraud or other circumstances, such as do not exist in this case. It is only by the application of the principle of estoppel as applied to actions on insurance policies, and as distinguishing such contracts from other contracts, that the plaintiff seeks to avoid the effect of the untruthful answer which the parties have incorporated into the contract between them. But to constitute an act of estoppel it must be such as to mislead another acting in good faith and with reasonable care and diligence, . . . and the party setting up the estoppel must be free from laches. . . . Tested by these principles, I do not think that the defendant is estopped from setting up the breach of war-

sign an application for a \$10,000 policy of life insurance by representing to him that it called for one that would be fully paid for in ten annual payments of a specified amount. He signed and parted with such application, relying on the truth of such representations. During the negotiations between respondent and appellant's agent, resulting as stated, the latter urged the former to take out what he called a 5-per-cent debenture policy, while respondent insisted from first to last that he wanted and would purchase only a contract that would be fully performed on his part by ten annual payments. In due time a policy was sent to respondent by mail, ostensibly responsive to his application, accompanied by a letter from appellant's agent to the effect that it

was a 5-per-cent debenture policy issued pursuant to the application. Respondent put the policy away among his papers without making any examination thereof, relying upon its being what the agent assured him the application called for. He gave cash and notes therefor to the amount of \$1,062 for the first premium, which notes he subsequently paid. About four and one-half months after receiving the policy he examined it for the first time, and then easily and at once discovered that it was an annual-payment life policy, requiring him to pay \$1,062 each year during his life. He immediately made complaint to appellant's managing agent in respect to the matter, expressing dissatisfaction, and making known that he wanted a different policy.—

ranty in question. This case is easily distinguishable from those relied on by the plaintiff. . . . In none of those cases does it appear that copies of the application and medical examination were delivered with the policy as in this case. According to the testimony of the plaintiff, the answer under consideration was written down by the examiner without comment or explanation. Nothing was said to mislead the insured or the plaintiff, or to throw them off their guard. Copies of all questions and answers were attached to the policy when it was delivered by the company's agent. It was received by the plaintiff, who was the beneficiary named therein, and the initial premium was paid by him. He procured the application to be made, and sent the defendant's agent to the insured for that purpose. The policy and copies of the application and of all questions and answers have, ever since the delivery thereof, remained in possession of the plaintiff. Whether in his possession or that of the insured is immaterial as far as this question is concerned. He, as well as the insured, knew the facts concerning the prior applications for insurance, because he testifies that he was present and heard his brother state those facts to the medical examiner at the time when it is claimed that the latter recorded the false answer. Before accepting and paying for the policy, it was incumbent upon the insured or the plaintiff to examine the same. It was for this purpose that copies of the application and questions and answers were attached to the policy and delivered therewith. Good faith toward the defendant, as well as reasonable care on the part of the plaintiff, requires an examination of the contract, and a failure to make such examination constituted laches on the part of the plaintiff, which precludes him from asserting an estoppel against the defendant."

A contrary conclusion was reached in *Michigan Mut. L. Ins. Co. v. Leon*, 138 Ind. 636, 37 N. E. 584. It appeared in this case that the agent falsified insured's answers in an application for life insurance in regard to a prior application to and refusal by another company. This application was signed by the insured without reading. Attached to the policy issued in pursuance thereof was a copy of the application containing the false answers. This was retained for a year and a half by the insured without actual discovery of the fraud. *Dur-* 67 L. R. A.

ing the progress of a suit by the company to cancel the policy on this ground the insured died, and the beneficiary under the policy brought counteraction thereon. The court, in refusing the cancellation and enforcing the policy, states that this retention by the insured did not have the effect of making him a party to the fraud, or of giving him notice thereof, where it appeared that the agent who drew up the application was a general agent having no superior in the state, "whatever may be the rule as to applications prepared by special agents where the assured has knowledge of the limitations upon his authority. . . . We think," says the court, "the insured might well assume that the policy was properly prepared and was based upon such facts, and that he was under no obligation to make a diligent reading of the policy with a view of ascertaining whether the appellant's own agent had perpetrated a fraud upon it. To permit the appellant now, since a loss has occurred, to avoid its policy on the ground that it was deceived by its own agent without the fault of the assured is to permit it to violate one of the best known principles of the law, namely, [to permit it] to take advantage of its own wrong. It is equivalent to permitting it to say, It is true I issued to the assured the policy upon which the suit is based, but I will not pay it, because I, through my duly authorized agent was guilty of the wrong of falsely recording the answers made by the assured to the questions asked him. . . . No wrong is attributed to him, unless it be said that he was guilty of a wrong in neglecting to read the copy of the application attached to the policy issued to him by the appellant. We do not think that this was such a wrong as would relieve the appellant from liability on its policy under the circumstances surrounding this case."

(c) *Occupation.*

A good defense to an action by the company upon a premium note was held to have been made out in *Michigan Mut. L. Ins. Co. v. Reed*, 84 Mich. 524, 13 L. R. A. 349, 47 N. W. 1106. It appeared that "some days" after the delivery of his policy, to which a copy of his application was attached, the insured discovered that the soliciting agent, in making out the application, had misdescribed his occupation, and he thereupon returned the policy to the

one such as he bargained for. He continued negotiations for several months, endeavoring to have appellant give him what he supposed his application called for, ending with his becoming convinced that no satisfaction would be given him, whereupon, and about eleven months after the policy was received, he wholly rejected it.

One George H. Parker applied to appellant for a \$5,000 policy of life insurance under circumstances similar in all respects to those characterizing respondent's application, except the one Parker supposed he was to obtain was a twenty-annual-payment life contract. In due time a policy was delivered to him by mail, accompanied by a letter, not stating anything to the effect that it was pursuant to or in accordance with his ap-

plication. He gave cash and notes to the amount of \$144 for the first premium, which notes he afterwards paid. He examined the policy for the first time about four months after its receipt, readily and at once discovering that it was an annual-payment life policy instead of one such as he supposed his application called for. A few days thereafter he notified appellant's managing agent that he had been deceived into applying for, receiving, and keeping a policy different from the one he desired, tendered the policy back, and demanded to be restored to his former position by a refunding to him of all that he had given for the policy except a proportionate amount of the premium to cover the time his life had been insured, which demand was refused.

agent to correct this error. Shortly afterwards the agent redelivered the policy, saying that the change had been made. Relying upon this assurance, the insured did not examine the policy again for some time, but finally discovered that no change had actually been made. He complained again to the agent, and finally returned the policy to the company some months after its issuance. While the court states that it was the duty of the insured to call attention to the agent's misrepresentation if he did not wish to be considered a participant in the latter's fraud upon the company, yet this duty was deemed to have been fulfilled under the circumstances, and the retention of the policy after its return by the agent with the assurance that it was corrected was not deemed to deprive him of his right to cancel it, and to refuse payment of the premium note.

(d) *Encumbrances.*

The Fletcher Case is followed in *Johnson v. Dakota F. & M. Ins. Co.* 1 N. D. 187, 45 N. W. 799. Failure of the insured to ascertain from the attached application that the soliciting agent had falsified it as to the amount of encumbrances truthfully disclosed renders him "constructively a participant in the original fraud of the agent," where the policy had been in his hands "some months" before loss. "Upon receiving the policy with copy indorsed thereon, the plaintiff is legally chargeable with notice and knowledge of the entire terms of the insurance contract, and he is estopped from denying such knowledge. It was the plaintiff's duty to have taken steps at once, upon receiving the policy, to have the same corrected or rescinded."

An adoption of the agent's misstatement in the application concerning encumbrances is said, in *Richardson v. Maine Ins. Co.* 46 Me. 394, 74 Am. Dec. 459, to have been worked by the retention of a policy to which a copy of the application was attached. The statement being false, and a breach of warranty, there could be no recovery upon the policy.

But an agent's fraud in falsifying insured's answers to questions in the application in regard to encumbrances and prior losses of the property to be insured was held, in *Kister v. Lebanon Mut. Ins. Co.* 128 Pa. 553, 5 L. R. A. 646, 15 Am. St. Rep. 696, 18 Atl. 447, to be 67 L. R. A.

available to the insured in an action upon the policy, although he had retained it, with a copy of the application attached showing the false answers, for the period of two and a half years before loss. "A copy of the application accompanied the policy, and it is argued that Kister could and ought to have read it, and, if he had done so, he would have seen the answers were untrue. These are considerations which were properly addressed to the jury. We cannot say that the law, in anticipation of the fraud upon the part of a company, imposed any absolute duty upon Kister to read his policy when he received it, although it would certainly have been an act of prudence on his part to do so."

One thing is certain, however,—the company cannot repudiate the fraud of its agent, and thus escape the obligations of a contract consummated thereby, merely because Kister accepted in good faith the act of the agent without examination."

2. *Copy not attached.*

The Fletcher Case, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837, *supra*, IV., b, 1, (a), is distinguished in *Lewis v. Mutual Reserve Fund Life Assn. (Miss.)* 27 So. 649, on the ground that a copy of the application containing the falsified answers was not attached to the policy. Untrue answers as to insured's health and attending physicians, inserted through the agent's fraud in the application retained by the company, were held no defense to an action on the policy by the beneficiary. "How can one ascertain and correct errors in answers in the application where the company keeps that and puts in copy of it with the policy?"

But in *Providence Life Assur. Soc. v. Reutlinger*, 58 Ark. 528, 25 S. W. 835, the insured was held bound in a case of similar fraud. The policy appears to have contained the usual statement that it was issued "in consideration of the stipulations and agreements in the application hereof," etc. This is deemed sufficient to incorporate the application therein, and to make the applicant responsible for, and chargeable with notice of, its statements. So that a retention of the policy, although a copy of the application was not attached, rendered the insured "a participant in the fraud committed."

Arthur H. Barrington, under circumstances similar to those last detailed, applied to appellant for a policy of life insurance, supposing he was to obtain a twenty-annual-payment life contract. His application in fact called for an annual-payment life contract. In due time he received such a policy, accompanied by a letter not stating anything to the effect that it was in accordance with the application. He gave his note for the first premium, amounting to \$195.50, which he afterwards paid. About five months after receiving the policy he examined it for the first time, immediately and readily discovering that it was not what he supposed he was to get. A few days thereafter he notified appellant's managing agent of the facts, tendered back the

policy, and demanded to be restored to his former position, which was refused.

There was nothing in either instance misleading the applicant into receiving and retaining his policy as stated, other than what occurred at the time the application was made, except, in respondent's case, the circumstance of the assurance, in the letter accompanying the policy, that it was the one applied for.

Parker and Barrington severally assigned their rights against appellant to respondent before this action was commenced. The court held that in each case, by artifice and fraud of appellant's agent, the assured signed his application for a policy, supposing it to call for one different from that actually sent in response thereto; that by

V. Mistake or fraud as to matters outside of the policy and application.

Actual knowledge of misrepresentations as to matters not disclosed by the policy seems to be required, inasmuch as there can be in such case no imputation thereof from the mere possession of the policy. This seems to be clear from the cases.

Being induced to take out a policy by a false and fraudulent circular stating that insurance in the defendant company would cost only half as much as elsewhere, by reason of the cancellation of the premium notes by dividends, the insured, in *Rohrschneider v. Knickerbocker L. Ins. Co.* 76 N. Y. 216, 32 Am. Rep. 290, retained the policy and paid half the premiums thereon during the five-year period of its life without discovering the fraud. At the end of that time, plaintiff's demand for the surrender value of the policy at the sum advertised in the circular being refused, suit was brought to recover the premiums with interest that had been paid on the policy. This was granted, the court saying that she was not estopped, although the policy had run to maturity, to recover the premiums that had been obtained through the fraud. "She did not discover the fraud, and, so far as we can perceive, had no means of discovering it, during the five years. She was bound to give the notes, but was assured that the dividends would pay them. After she gave the notes, she had no occasion to look after them. She could rest upon the representations made to her. The defendant had the whole five years to make good the representations: and the first time she could expect to learn their falsity was when she went to demand the \$500. When she made such demand, and learned that her note had not been paid by the dividends, she asserted the fraud. It is impossible, therefore, to perceive upon what theory it can be said that she waived or lost any right to assert this fraud against the defendant."

In *Beckwith v. Ryan*, 66 Conn. 589, 34 Atl. 488, the agent of the company had fraudulently represented to the insured the amount by which the annual dividends would reduce the premiums on his policy, and thereby induced him to take out the insurance. In an action upon the premium note, in which the insured defended upon the ground of such fraudulent representations, the court held that his failure to as-

certain the fraud was no bar to the defense, where it appeared that, immediately upon learning of the fraud, he returned the policy for cancellation, and notified the holder of the note thereof. "The plaintiff's claim that the attempt to disaffirm and repudiate the contract was too late can hardly raise a question of law," says the court, "when the finding shows that the defendant returned the policy for cancellation on the day when he first ascertained the falsity of the representations on which he had relied, and that he immediately thereafter notified the plaintiff. Counsel for the plaintiff urged in argument that the defendant did not act with sufficient promptness in ascertaining the falsity of the statement relied on. If in fact the defendant believed the statement, it would hardly be claimed that he was under an obligation to investigate the truth of a statement he believed and acted upon."

A defense to an action upon premium notes, based upon fraudulent representations of the insurer's agent in regard to the rate of assessment on such notes, the solvency of the company, and the fact of insurance in the same company by business acquaintances of the defendant, which induced the latter to take out his policy, was sustained in *Whitman v. Melssner*, 34 Ind. 487, where the policy had been returned as worthless upon discovery of the fraud seven months after its issue.

An agent who fraudulently represented that certain parties had insured under a certain plan with his company, and thereby induced the insured to take out a similar policy, was held liable personally for the fraud in *Hedden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25. Six months had elapsed between the issuance of the policy and the discovery of the fraud. This lapse of time is not considered by the court, but only that which elapsed after the insured discovered the fraud. "Upon discovering the fraud, the plaintiff had his election of two remedies. He could retain his policy, or he could cancel and repudiate it, and have resort to the defendant for the fraud practised upon him. . . . The plaintiff had the right to, and did, elect to cancel the policy."

Five years' retention of the tontine policy accepted in substitution of a prior endowment policy upon the false representations of the company's cashier as to the value and condi-

reason thereof the applicant was not estopped from rescinding the transaction with appellant if, before the expiration of a reasonable length of time after he obtained actual knowledge of the facts, he made his election in the matter; that he acted in that regard within such reasonable time, and that respondent was therefore entitled to recover as to each of the causes of action sued on.

If this decision depended wholly on whether the applicants for insurance were estopped from rescinding the policies, by signing the applications therefor, they would be entitled to the relief granted by the circuit court. It is elementary that a person of mature age and sound mind, who, in his dealings with another, deliberately signs a written instrument, is conclusively pre-

sumed, as to that other and all persons claiming under him, to know and consent to what the paper contains, no fraud or deceit being used by such other or in his behalf at the time of such signing or efficiently reaching thereto, reasonably calculated to and which does induce such other to become a party to the instrument without reading it, and there being no mutual mistake. It is just as well settled that, where there is such fraud or deceit, such person is not guilty of such unreasonable conduct, in relying upon the honesty of such other and signing the paper without reading it or knowing its contents, as to preclude him from obtaining judicial redress in some form for the wrong, if he is injuriously affected by the instrument not being what such other's

tions of the former was held, in *Knauer v. Globe Mut. L. Ins. Co.* 16 Jones & S. 454, to be no bar to a rescission by the insured, an illiterate German, upon a discovery of the fraud, and a recovery of the premiums which he had paid thereon. In reply to the defense, based on the insured's retention of the policy for so long a period without objection, the court says: "It may well be doubted whether the plaintiff had not the statutory time within which to bring his action, *viz.*, six years, . . . and so whether it could be held that any action brought within that time should fail because of laches. . . . The fact that the second policy was obscure in its terms—so much so that only experts in insurance matters could understand it—takes this out of that class of cases where courts of equity have refused to relieve a party who, by the exercise of ordinary diligence and by such an examination as a prudent person ought to have made, might have discovered the falsity of the representations."

The especial diligence required of members of a mutual company in the discovery of fraud as to their liability to assessment (noted *supra*, III., b. 5) is required, even to matters not appearing upon the face of the policy.

Thus, a fraudulent statement by the soliciting agent as to the financial condition of the mutual company was the inducement which led the insured to take out a policy and give the premium note sued upon in *Schofield v. Leach*, 15 Pa. Super. Ct. 354. "By his delay of nearly two years, and the payment of the assessments on the policies while he held them," says the court, "he allowed the rights of other parties to intervene. He owed a duty to his fellow members, and especially to those who may have been induced through his membership in the company to unite their risks with his, some of whom sustained losses to which he must contribute his share towards paying. . . . A delay of one year has been held to be an unreasonable time to withhold such a defense."

The same principle is invoked in *Capital City Mut. F. Ins. Co. v. Boggs*, 5 Pa. Super. Ct. 394, to charge a member upon his premium note, where he had made no attempt to rescind his policy, on the ground of a fraud as to the financial standing of the company, before the rights of subsequent members intervened.

Similarly, where the rights of innocent subsequent policy holders have intervened, the com-

pany's fraud in pretending to have previously issued a thousand policies is no bar to an action by the company's receiver to collect an assessment made for losses occurring after the issue of the policy. *Dettra v. Kestner*, 147 Pa. 566, 23 Atl. 889.

After having received the benefits of his policy for the whole period of six years covered by it, it was held in *Sherman v. Frasier*, 112 Iowa, 236, 83 N. W. 886, that a member of a mutual fire insurance company was liable to its receiver in an action to recover an assessment, and that he was liable in spite of the fact that he had been induced to take out his policy by the false representation of the company's general agent backed by a circular issued by the company, to the effect that the company was solvent, in good standing, and secured indemnity to the insured at lower rates than were procurable elsewhere; and that the said agent fraudulently concealed from the insured knowledge of the company's by-laws and charter. "If," the court said, "by reason of the fraud alleged, they did not become members upon the making and accepting of their applications, they did become members by standing upon their contract after, by reasonable diligence, they could have ascertained the facts." The same attitude on similar facts is found in *Corey v. Sherman*, 96 Iowa, 115, 32 L. R. A. 490, 64 N. W. 828.

VI. Effect of retention by other than insured.

Where the policy is retained by the company's agent under an arrangement with the insured, who does not see it before loss, there is no such imputed knowledge of its terms as will bind him as to a mistake due to the agent's error. *Humphry v. Hartford F. Ins. Co.* 15 Blatchf. 504, Fed. Cas. No. 6,875; *Snell v. Atlantic F. & M. Ins. Co.* 98 U. S. 85, 25 L. ed. 52; *St. Paul F. & M. Ins. Co. v. Wells*, 89 Ill. 82.

The contrary is true where the policy is delivered to the agent of the insured. *Graves v. Boston Marine Ins. Co.* 2 Cranch, 419, 2 L. ed. 324; *Smith v. Continental Ins. Co.* 6 Dak. 438, 43 N. W. 810.

So, the beneficiary is as much chargeable with laches as the insured, where the policy comes into his hands with a copy of the application containing the answers falsified by the insurer's medical examiner, attached, and no objection

wrongful conduct induced him to understand was its import, and if he acts in the matter before the intervention of some other element legally efficient to render such wrong without remedy. Of course, mere ignorance by a person of the contents of a paper which he signs, cannot avail him to avoid it. True, there are decisions which do not clearly recognize that. Some of them counsel for respondent point to as excusing the applicants here, both in not knowing the contents of their applications, and in not knowing the character of the policies received in response thereto till months after their receipt. *Butler v. Regents of University*, 32 Wis. 124; *Schultz v. Chicago & N. W. R. Co.* 44 Wis. 638. So far as such authorities are referred to to show that mere ignorance on the part

of the applicants for insurance, of the contents of their applications, is sufficient to rebut the legal presumption that such applications were signed and parted with by them with knowledge of the contents thereof, and that the written evidence may be impeached by oral evidence of the actual bargain made at the time the applications were signed, they are not in point, because the court found the element of fraud reasonably calculated to induce the applicants to sign the papers in ignorance of their contents. So far as they are referred to to excuse the applicants on the ground of mere ignorance, for receiving and keeping the policies for months without objection, they have been discredited by more recent decisions of the court. *Prince v. Overholser*, 75 Wis. 646.

is made thereto, although the truth is equally well known to him and to the insured. *Hook v. Michigan Mut. L. Ins. Co.* 90 N. Y. Supp. 56.

And delivery to the insured is sufficient to charge the beneficiary with notice of the terms of the policy and render him liable on the premium note given by him, where no objection is made to the writing of the policy in a manner variant from that stipulated for. *Roddey v. Talbot*, 115 N. C. 287, 20 S. E. 375.

But retention of a policy by a mortgagee, to whom it was delivered by mistake, is regarded in *Bennett v. City Ins. Co.* 115 Mass. 241, as merely evidence of assent by the mortgagor to its terms as written, subject to rebuttal.

See also *Franklin F. Ins. Co. v. Hewitt*, 3 B. Mon. 231, where the policy, received through the mails, was put away among the insured's papers by its clerk, without examination. Reformation was, nevertheless, granted after considerable retention.

VII. Effect of insured's illiteracy.

Where the retention of the policy is urged as presumptive knowledge of its contents, the illiteracy of the insured has sometimes been taken to rebut the presumption.

Taken in connection with an agent's misrepresentation as to the terms of the policy, it is said, in *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 11 Am. St. Rep. 121, 20 N. E. 77, to be doubtful whether the insured should be held chargeable with notice of such terms in spite of retention.

It is again adverted to in *German F. Ins. Co. v. Gueck*, 130 Ill. 345, 6 L. R. A. 835, 23 N. E. 112, where twelve years' retention of a policy by a foreigner unable to read English was not deemed to work a waiver of a mistake by the insurer's agent, appearing in the policy.

"The rule that the law favors those who are diligent and careful, rather than the reckless and indifferent, is not to be applied," says the court in *Keller v. Equitable F. Ins. Co.* 28 Ind. 170, "for the protection of those who avail themselves of the ignorance existing in the community to perpetrate fraud upon its members. If, as is charged in the answer, the conditions of an insurance policy, upon which its validity depends, are to be printed in a type so small as in fact to discourage their perusal, 67 L. R. A.

and in terms requiring more than ordinary capacity to comprehend their effect, it must be expected that, as the standard of education and intelligence requisite to understand the conditions is thus elevated, the courts will, in a corresponding degree, lower the tests of diligence exacted from the insured."

"It ought not to be held," says the court in *State Ins. Co. v. Gray*, 44 Kan. 731, 25 Pac. 197, "that a person not able to read or write, by merely holding the policy in his possession which contains his application signed with his mark, thereby approves the action of the agent or solicitor in falsely or improperly taking his application, and becomes, by holding such a policy, a participant in the fraud committed by the agent or solicitor."

"How can it be negligence not to read when one cannot read?" inquires the court in *Lewis v. Mutual Reserve Fund Life Assn. (Miss.)* 27 So. 649, where the fraud perpetrated by a medical examiner in the application of an illiterate negroess was held not to defeat her beneficiary's rights.

"We are unable to assent to it as a proposition of law," says the court in *McGuire v. Hartford F. Ins. Co.* 7 App. Div. 575, 40 N. Y. Supp. 300, "and much less as a principle of equity, that an insurance company may relieve itself from responsibility for the fraudulent representations of its agent by imposing upon a blind or illiterate person the obligation of seeing to it, at his peril, that the agent has fulfilled his duty to himself and to the company by making out the policy according to the terms and conditions agreed upon. In other words, that the insurance company may, by and through the false assurances of its agent, foist upon an illiterate person an instrument that is void at the instant of its creation."

The fact that the insured had read his policy before leaving the office of the company, and that he retained it without objection until loss, was held, in *Phoenix F. Ins. Co. v. Gurnee*, 1 Paige, 278, 19 Am. Dec. 431, to be no bar to a reformation and enforcement of the policy, where the insured was merely "a plain countryman, unacquainted with the law of insurance," and the effect of the language used in the policy was not such as would have informed him of its variance from the application which he had made in unambiguous terms.

To the same effect, see *Miotke v. Milwaukee Mechanics' Ins. Co.* 113 Mich. 166, 71 N. W.

44 N. W. 775; *German Bank v. Muth*, 96 Wis. 344, 71 N. W. 361; *Jackowski v. Illinois Steel Co.* 103 Wis. 448, 79 N. W. 757; *Straker v. Phenix Ins. Co.* 101 Wis. 413, 77 N. W. 752; *McGowan v. Supreme Court*, 1 O. F. 107 Wis. 462, 83 N. W. 775; *Deering v. Hoeft*, 111 Wis. 339, 87 N. W. 298. It follows that no further attention need be paid to the question of whether the applicants were precluded from rescinding their policies upon the ground that they might, had they seen fit to use the means in their hands at the time of such signing, have known the kind of policies they were to receive. The maxim, *Vigilantibus, et non dormientibus, servat lex* (the law assists those who watch and not those who sleep) does not apply to a business transaction as

between parties thereto where one omits to investigate, relying on assurances by the other as to the facts, made at the time of entering into the transaction, such as signing and parting with a paper by one relying on representations as to its contents by the opposite party thereto. *Schultz v. Chicago & N. W. R. Co.* 44 Wis. 638; *Brooks v. Matthews*, 78 Ga. 739, 3 S. E. 627; *Wenzel v. Shultz*, 78 Cal. 221, 20 Pac. 404.

Counsel vigorously urges receding from the former decision to the effect that it is negligence for a person to omit to examine his policy of insurance as soon as reasonable opportunity therefor is afforded, relying on assurances made by the company's agent at the time he took the application, as to the kind of policy it called for. We must adhere

463, and *Knauer v. Globe Mut. L. Ins. Co.* 16 Jones & S. 454.

The contrary view is found in some cases, however.

Illiteracy is held no excuse for insured's failure to become acquainted with the terms of his policy, in *Massey v. Cotton States L. Ins. Co.* 70 Ga. 794. The court said: "If the plaintiff could not understand or fully comprehend the nature of the policy issued to him by defendant, then, as an ordinarily prudent man, he should have made inquiry of someone who could have informed him as to its character and nature."

"Nor does the fact that the plaintiff could not read take his case out of this principle," says the court in *McHoney v. German Ins. Co.* 52 Mo. App. 94, speaking of the imputation to the insured of knowledge of the terms of his contract, and of the statements in the application attached thereto. "His wife could read; his daughter could read; his neighbors could read; his lawyers could read; and the same duty rested upon him of informing himself seasonably whether or not the provisions of the contract as executed and delivered to him complied with the original understanding, as rests under such circumstances, upon contracting parties who are not illiterate."

To the same effect is *Mutual Reserve Fund Life Asso. v. Stephens*, 115 Ga. 192, 41 S. E. 679.

VIII. Retention with knowledge of defect.

a. Generally.

Retention without objection is adverted to by *BOSTWICK V. MUTUAL L. INS. CO.* as ground for the imputation to the insured of knowledge of the terms of his policy.

Where knowledge is admitted the rule of *caveat emptor* has no application. Retention after notice is generally admitted to be a waiver of rights arising from fraud or mistake, or to be inexcusable laches barring the enforcement of such rights. The cases are uniform in the enforcement of this proposition.

An agent's fraudulent representation as to the amount of the probable surplus at maturity of the policy was the ground on which the insured defended, in an action upon a premium note given by him at the time of the application, in *Norton v. Gleason*, 61 Vt. 474, 18 Atl. 45. It appeared that the insured discovered 67 L. R. A.

the agent's fraud three days after the receipt of the policy, and immediately wrote to the company to substantiate the facts stated by the agent. Receiving no reply, he returned the policy a week later. Whether the insured acted with reasonable diligence in rescinding was deemed a question for the jury. "A contract induced by fraud is only voidable, not void; and if, after discovery of the fraud, the party acquiesces by express words or an unequivocal act, such as treating the property as his own, his election will be determined, and he cannot afterwards reject the property. Mere delay, also, may have the same effect, if, while deliberating, the position of the vendor has been altered. . . . In this case . . . it was, so far as appears, a case of mere delay, in good faith, and fairly required in order to make the legal status clear. As the case stood, we think it was clearly a question for the jury whether the defendant acted with due promptness in rescinding."

In *Plympton v. Dunn*, 148 Mass. 523, 20 N. E. 180, it appeared that the soliciting agent, after receiving a correct reply in regard to insured's health, falsified the application on which the policy was based. A copy of this application was attached to the policy, which was delivered to the insured and retained by him for a month before he discovered the error. Upon discovery of the error, however, no objection was made, or any notice given of the falsification, until two months later, when an indorsee of his premium note demanded payment, and he denied liability upon the ground of failure of consideration, saying that the policy was "no good." There was no offer to return or rescind the policy until fifteen months later, just prior to the action upon the note by such indorsee. Under such circumstances, says the court, the insured must be held liable upon the note, having received the benefit of the policy. "Every day that elapsed after the defendant discovered, or ought to have discovered, the error without notifying the company, he was receiving the benefit of the policy. To be sure, the company might discover the falsity of the statement, but it might not, and the defendant cannot be allowed to speculate on that chance. By his silence he left the company bound so far as they knew, and in a position in which, if he had died, they might have paid the loss in ignorance of any defense. To accept the benefit of a contract after you have notice of

to our former conclusion on that point, notwithstanding the decisions confidently relied on by counsel to show that it is in conflict with other decisions of this court and authorities elsewhere. We believe the former decision is right on principle, is well supported by authorities cited in the opinion, and is in strict accordance with the doctrine of the Supreme Court of the United States on the subject, as we shall show before closing what we have to say. If it were clear that there was any conflict of authority to be dealt with, as claimed by counsel for respondent, since the doctrine involved is within the spirit, if not the letter, of *Mamlock v. Fairbanks*, 46 Wis. 416, 32 Am. Rep. 716, 1 N. W. 167; *Locke v. Williamson*, 40 Wis. 377; *Warner v. Benjamin*, 89 Wis.

290, 62 N. W. 170, and *Farr v. Peterson*, 91 Wis. 182, 64 N. W. 863; and not contrary to any other case in this court when rightly understood,—we should not hesitate to be guided, if assistance were necessary, by the decisions of the Supreme Court of the United States rather than to depart from the settled position here, which has not been disturbed since proclaimed clearly in the *Mamlock Case*. Nearly all the authorities which counsel for respondent rely upon relate to where the complaining party was lulled into security by something said or done by the wrongdoer at the time of the particular transaction complained of. Under those circumstances, it is rightly held that such person is not inexcusably negligent. The following are samples of the authorities referred

your right to rescind it is to affirm it,—especially when, as here, the benefit accepted and the corresponding risk imposed upon the company are of a kind 'that never can be cured, in a rational sense,' by a subsequent surrender of the policy."

See also *Hedden v. Griffin*, 136 Mass. 229, 40 Am. Rep. 25, *infra*, V.

In *State Mut. F. Ins. Co. v. Smith*, 1 Pa. Super. Ct. 470, the insured was induced to take out a policy in a mutual company by the representation of its secretary that an indemnity fund proportionate to the membership of the association was kept for the special purpose of reimbursing withdrawing members according to their contract, and for no other purpose. It appeared that this was false, and, upon discovery of the fraud the insured, according to the testimony, had gone to the company's office, but failed to find anyone there. He made no subsequent attempt to cancel the policy, and retained the same for over a year and a half, when he again attempted to cancel the policy in view of the levy of a second assessment, which he refused to pay. He was held liable, nevertheless, the court saying that, "by his laches, the appellee lost the opportunity to have his policy canceled, and he allowed the rights of other parties to intervene while he was a member of the company; and upon no just principle should he be allowed to escape the burden of his undertaking."

The misrepresentations of a soliciting agent that the insurer maintained an office in a neighboring city, where premiums would be payable and money obtained in case of loss, was relied upon in *American Ins. Co. v. Kuhlman*, 6 Mo. App. 522, to defeat an action upon the premium notes. The policy required annual premiums, but had been retained its three-year period. It was thus apparent that the insured had learned the falsity of the representation early in the life of the policy. "Another rule concerning fraudulent representations," says the court, "requires that the party claiming to have been injured by them shall make his objections known within a reasonable time after his discovery of the alleged falsehood, and that he shall not leave the other contracting party to suppose the contract in full force while the objector continues to enjoy its benefits. Here the defendant held his insurance policy for three full years, without any protest or attempt at cancellation on the ground of the al-

leged false representations. If a loss had occurred during that time, he could, for aught that appears in the record, have claimed and recovered indemnity from the plaintiff to the extent of the policy. The defense as presented was unfair and inequitable in every respect, and ought not to have been allowed."

The agent of a mutual hall insurance company, in soliciting the insured for a policy, greatly exaggerated the number of members in the company, and also the amount of property insured. This was urged by the assured as a defense to an action upon a premium note; but it appeared upon the trial that he had become aware of the extent of the exaggeration while the policy was in force, and had made no attempt to repudiate the obligation by cancellation of the policy, until suit upon the note a couple of months later, after the danger of loss was over. It was held that he did not bring himself within *Dak. Comp. Laws*, § 3591, which requires a prompt rescission upon discovery of the facts entitling a party thereto, and a restoration to the other party of everything of value which he has received from him under the contract; and he was therefore held liable upon the premium note. *Northwestern Mut. Hall Ins. Co. v. Fleming*, 12 S. D. 36, 80 N. W. 147.

So, in *Elchman v. Herscher*, 170 Pa. 402, 33 Atl. 229, where there was a fraudulent representation by the agent as to the extent of the membership in a mutual company, thereby inducing the insured to take out a policy, it was held that the retention of the policy and the continued payment of assessments by the insured after he had learned of the fraud estopped him from denying liability to the company's receiver for assessments necessitated by losses occurring during the life of his policy.

b. Effect of attempted rescission.

Of course, the retention of the policy after an attempt has been made to return the same, because of its noncompliance with the application, does not affect the applicant's rights, or render him liable upon a premium note, where such offer to return was made with due diligence. *Jones v. Gilbert*, 93 Ga. 604, 20 S. E. 48.

What is effectual rescission.

A return, or offer to return, to the insurer's general agent is sufficient. *Jones v. Gilbert*, 93 Ga. 604, 20 S. E. 48.

to: *Warder, B. & G. Co. v. Whitish*, 77 Wis. 433, 434, 46 N. W. 540, where the rule in *Mamlock v. Fairbanks* was inferentially affirmed. The injured person, by false representations made at the time, was induced to sign a paper, which was immediately taken away by the wrongdoer. The court said: "This is not the case of a party, in the absence of fraud or mistake, failing to know the contents of a written instrument signed by himself by reason of his own negligence or want of reasonable care. as . . . *Herbat v. Lowe*, 65 Wis. 316, 26 N. W. 751. . . . Certainly no one will contend that a person can procure the signature of a party to a contract by false representations, and then enforce the contract on the ground that, had the party so deceived been more

vigilant, he would have discovered the fraud in time to have withheld his signature from the contract. In other words, a person cannot procure a contract in his favor by fraud, and then bar a defense to it on the ground that had not the other party been so ignorant or negligent he could not have succeeded in deceiving him."

That clearly shows that the court did not have in mind the action of a person in accepting an article in fulfillment of an order therefor, nothing being then done to prevent or deter such person from seeing obvious departures from the thing bargained for. The distinction between the two classes of cases has not always been carefully pointed out in legal opinions, and not always recognized, leading to expressions therein quite liable

Return to the soliciting agent is sufficient when the policy does not conform to the application, although the policy contains a provision limiting the agent's powers. *New York L. Ins. Co. v. Easton*, 69 Ill. App. 479. The clause is inoperative as to applicant since no provision of a policy, not accepted, can be binding upon him, and the soliciting agent has the apparent authority, outside the stipulations of the policy, to accept a rescission.

An agent "to receive applications and send them to the company," is held, however, in *Susquehanna Mut. F. Ins. Co. v. Swank*, 102 Pa. 17, to be the agent of the insured, and not of the insurer, as regards a return of the policy. So that the sending of a policy to such agent for correction or rescission is ineffectual as a return to the company, where such agent retains it, and does not forward it to the company.

The return of a policy is not effectual where made, not to the agent, but to his father, among whose papers it is found after his death, where it appears that such father was not in any way connected with the affairs of the insurance company. *Leigh v. Brown*, 99 Ga. 258, 25 S. E. 621.

c. Effect of agent's reassurances.

The effect of a reassurance as to the validity of the policy, on objection to its terms, has been variously treated.

The property covered by the policy in *Maier v. Hibernia Ins. Co.* 67 N. Y. 283, was described as "occupied as dwelling." The agent knew to the contrary, that the lower floor was used as a store, but told the insured that the description was sufficient. On receipt of the policy, insured again complained of the description, and was again reassured by the agent that it was all right. The officers of the company also were aware of the condition of the property from personal inspection. On refusal to pay the loss on the ground of misdescription of the risk, relief was sought by way of reformation in equity, and was granted by the court, which recognized that the parol-evidence rule would prevent a recovery at law. While it is stated that the assured must ordinarily make himself master of the form and contents of his policy when he receives it. It is different when he is prevented, or thrown off his guard and dissuaded, therefrom by the act or decla-

ration of the insurer. The evidence in regard to the agent's representations, both at the time of the application and on receipt of the policy "was material and competent, as tending to show that the plaintiff was not careless,—was not thoughtlessly satisfied with the terms of the policy,—but sought an emendation thereof, and was balked of a successful pursuit thereof by the action and declaration of the defendants through their agents and officers."

Upon receipt of the policy in *German Ins. Co. v. Davis*, 6 Kan. App. 268, 51 Pac. 60, the insured noted that the title to the property was written in his wife's name through the negligence of the agent in failing to inquire concerning the title at the time of the application. He immediately gave notice of the error to the agent, and requested correction, but was told that "that would make no difference." Relying upon this statement of the agent, the insured retained the policy without further objection until loss. Under these circumstances the retention of the policy was held by the court not to amount to an assent to its terms, and relief was granted by reformation and enforcement after loss.

A hard case on the insured, however, appears in *Mecke v. Life Ins. Co.* 8 Phila. 6. It appeared that the insured agreed with the agent upon an endowment policy nonforfeitable after the expiration of two years. The application, written and signed by the insured himself, contained no provision for nonforfeiture; nor did the policy. On receipt of the latter and examination of its terms, the insured found that it contained no nonforfeiture provision, and immediately complained to the resident general agent of the company, who assured him that the company would make it all right. Relying upon this, he kept the policy, and paid two premiums without objection. On demand for the third premium, he applied to the company for a nonforfeitable policy, such as he had agreed upon with the agent. The company refusing to issue such policy to him, he attempted to rescind and recover back the premiums which he had already paid. The court, however, refused to give him this relief, saying that "originally he might have abandoned the contract and treated it as a nullity, and claimed the consideration. But, having made his election to keep the policy, which he received as a subsisting contract, and having thereby imposed the risk upon the defendants for two years, it was

to cause one to go astray if he does not keep in mind the philosophy of the rule that *caveat emptor* applies when no deceit is exercised to reasonably excuse a person from dealing at arm's length, and not when there is such deceit; and therefore, while it may not apply to estop a person from successfully complaining of a transaction on account of what occurred at the time of entering into it, it may as to electing whether to abide by the transaction if he is inexcusably negligent in the matter. Those distinctions are accurately pointed out in the reasoning of Judge Sanborn in *New York L. Ins. Co. v. McMaster*, 30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 63, and 40 C. C. A. 110, 99 Fed. 856.

Another of the authorities relied on by counsel—one which he insists is directly in conflict with *Mamlock v. Fairbanks*, and is supported by the better reasoning—is *Strohn v. Detroit & M. R. Co.* 21 Wis. 554, 94 Am. Dec. 504; citing *Boorman v. American Exp. Co.* 21 Wis. 154, and *King v. Woodbridge*, 34 Vt. 565, in both of which it was held that a party is presumed to consent to the conditions of a paper to which he deliberately becomes a party, the idea being that it would be negligence for him not to know its contents; and, so such knowledge is conclusively presumed in the absence of some rea-

sonable excuse for his ignorance. So far as the expressions in the *Boorman* and *Strohn Cases* indicate that mere ignorance is a sufficient excuse for avoiding a paper, they have not been followed in recent years, as we have shown. The real situation in the *Strohn Case* is that property was delivered to the railway company for transportation on the faith of a verbal understanding had at the time of the delivery. The property had been sent forward and was so situated that the transaction could not be varied when the freight receipt, containing the clause complained of, was delivered to the shipper. Speaking to those circumstances the court said the shipper had a right to rely on the verbal understanding, and was not bound, immediately upon receiving the freight receipt, to examine it, and used expressions, it is true, somewhat out of harmony with *Mamlock v. Fairbanks*. The case has never been cited by this court during the thirty-six years since it was decided to sustain such expressions as good law; while *Mamlock v. Fairbanks* has been followed over and over again, is firmly entrenched in the jurisprudence of the state, and is treated by text writers and courts elsewhere as proclaiming sound doctrine. The *Strohn Case*, with the limitations necessary to harmonize it with current authority, was cited in

afterwards too late for him to adopt the other course. Men cannot by their own conduct and negligence impose burdens upon those with whom they deal, and then claim to stand in the position of persons who, in the assertion of their own rights, have been mindful of their obligations to others."

In Indiana such representations as to the effect of provisions in the policy known to the insured are taken to be nothing more than a construction of the policy's terms, upon which it is said fraud cannot be predicated. It is thus held in *Farmers' Mut. F. Ins. Asso. v. Kryder*, 5 Ind. App. 430, 51 Am. St. Rep. 284, 31 N. E. 851, that the statement of the insurer's agent that a policy covering "barn: contents therein" would protect horses while on the farm, is insufficient to support a charge of fraud, the insured having read his contract.

Similarly, in *Fidelity & C. Co. v. Teter*, 136 Ind. 672, 36 N. E. 283, no recovery for an injury received from a fall from a hayloft while caring for horses in the course of transportation was allowed on a policy clearly insuring only against injuries resulting from the hazard of travel, although the insurer's agent had represented to the insured that the policy, properly construed, covered accidents received from whatever source.

J. W. Gillum & Co. v. Fire Asso. 106 Mo. App. 673, 80 S. W. 283, is a case of similar nature, in which the insured attempted to justify a breach of the iron-safe provision of his policy, of which he was aware, by an agreement that it need not be observed, made with the insurer's agent at the time of application and reasserted on delivery of the policy. Retention of the written policy contradicting such agreement is 67 L. R. A.

deemed an assent to its terms, and recovery was denied.

IX. *Distinction between action at law and suit in equity.*

In some cases in which the parol-evidence rule is applied to an action at law upon the policy, which is taken as an affirmation of its terms as written, the court distinctly recognizes that relief might be granted in equity by way of reformation or rescission in spite of the policy's retention.

This is clear in *Germania Ins. Co. v. Bromwell*, 62 Ark. 43, 34 S. W. 83. Says the court: "If the agent of the insurance company agreed with appellee that he need not keep books, he should have refused to accept a policy in which it was expressly stipulated that he should keep books. If, through mistake, he accepted a policy which did not express the contract made with the agent, he should have applied to a court of equity to have the contract reformed. Having brought his action at law upon the policy, and prosecuted it to judgment, he has elected to treat it as expressing the true contract between himself and the company, and he cannot now recede from it or contradict it. *Washburn v. Great Western Ins. Co.* 114 Mass. 175. We must therefore, in considering this case, disregard entirely the testimony of oral contemporaneous declarations which contradict the provisions of the policy."

"Had the plaintiff's case been framed with a view to correct a mistake or omission in the policy," says the Cincinnati superior court in *Madison Ins. Co. v. Fellowes*, 1 Disney (Ohio) 217, "the testimony would certainly have been

Schaller v. Chicago & N. W. R. Co. 97 Wis. 31, 71 N. W. 1042, this language being used: "From the delivery and acceptance of the bill of lading at the time the goods were delivered to defendant for shipment, the presumption arises that plaintiff assented to it. . . . The presumption is not conclusive, but mere ignorance of the contents of the bill of lading, arising from failure to read it or to make more reasonable effort to obtain information in that regard, in the absence of any evidence of fraud on the part of the defendant, or of the use of any means to deter the shipper from fully understanding the contract, is not sufficient to overcome it." Again the court, after saying, in effect, that ignorance is no defense to a contract where the making thereof springs from inexcusable neglect, used this language: "The familiar rule applies that, if a person makes a written contract, with another, he takes upon himself the responsibility of acting intelligently, and exercising ordinary care to inform himself of its provisions. Failure to read the contract or to examine it, or, in case of inability to do so without assistance, to obtain such assistance if reasonably within reach, is negligence as a matter of law." To the same effect are *Herbst v. Lowe*, 65 Wis. 316, 26 N. W. 751; *Fuller v. Madison Mut. Ins. Co.* 36 Wis. 599; *Bonneville v.*

Western Assur. Co. 68 Wis. 298, 32 N. W. 34; *Wilcox v. Continental Ins. Co.* 85 Wis. 197, 55 N. W. 188; *J. A. Coates & Sons v. Buck*, 93 Wis. 128, 67 N. W. 23. In this class of cases the question involved was, Under what circumstances can a person, by oral evidence, impeach a written contract? As shown in the Federal cases, the deceit of one person affecting the conduct of another in becoming a party to a written instrument, must refer to the particular instrument in controversy, and to deceit in the transaction leading to the injured party's signing or accepting the instrument. That applies in this case to the signing of the applications for insurance, but not to the acceptance and retention of the policies.

Another of the authorities cited on this branch of the case is *Gunther v. Ullrich*, 82 Wis. 222, 33 Am. St. Rep. 32, 52 N. W. 88, where a person purchased real estate on the faith of false representations, made at the time of the purchase, respecting the location of the property. *West v. Wright*, 98 Ind. 335, is another case. There a person purchased land of another on the faith of false representations made by such other as to the record title to the property. Strong language was used in deciding the case, condemning the transaction and stating the law along lines many times laid down by

competent; but, as it was, it simply went to set up a parol agreement in contradiction to an agreement in writing. By the terms of the policy made and accepted as the contract between the parties it was expressly declared to be the agreement of the parties that it should not have effect in case there was any other insurance upon the premises not mentioned in, or indorsed upon, the policy itself. By the proof offered, it was sought to establish that such was not the agreement of the parties, but that, at the time of making the policy, the agreement was that it should have effect notwithstanding the indorsement was not made. . . . 'A court of law must act on the agreement as it is; it cannot strike out or change any part, or add anything to it so as to contradict or vary the agreement contained in the written instrument. The parol evidence offered in this case is, therefore, clearly not admissible; and, taking the policy as it is, the plaintiffs cannot recover.' But, to authorize a relief in equity, a case of fraud or mistake must be made by the bill or appear from the pleadings in the cause; otherwise the evidence cannot be received."

"But if, from mistake or fraud, an agreement is so defective," says the court in *Bartlett v. Union Mut. F. Ins. Co.* 7 Cush. 175, speaking of a policy upon which additional insurance disclosed by the agent had not been noted, "that, instead of conveying the meaning of the parties, it expresses a different or opposite intent, if relief can be given at all, it must be sought exclusively in a court of equity. A court of law must act on the agreement as it is; it cannot strike out or change any part, or add anything to it, so as to contradict or vary 67 L. R. A.

the agreement contained in the written instrument."

So, in *Mutual Reserve Fund Life Asso. v. Stephens*, 115 Ga. 192, 41 S. E. 679, where an action upon a policy was defeated by breach of its provision for payment of premiums in cash, in spite of the agent's representation that the premium might be paid by note, the court distinctly recognizes that rescission might have been granted had it been sought within a reasonable time after delivery of the policy.

The authorities "negative the idea that one may reduce his oral agreement to writing, formally execute or accept and keep it, and at a later time ignore the solemn writing, and bring an action upon a preliminary agreement. This would be an innovation that would render written contracts no better than oral ones, and practically make them subject to variation and contradiction by parol, and, by indirection, evade one of the best and most uniformly settled rules of law, and render obsolete a branch of equity jurisdiction." *Kleis v. Niagara F. Ins. Co.* 117 Mich. 469, 76 N. W. 155.

A *dictum* appears in *Taylor v. Glens Falls Ins. Co.* 44 Fla. 273, 32 So. 887, that an action at law could not have been maintained by the insured on a policy erroneously written in favor of the deceased owner of the property, although the policy was in that case reformed.

A similar statement is found in *Mahe v. Hibernia Ins. Co.* 67 N. Y. 283, where a policy misdescribing the occupancy of the premises was reformed after loss.

See also *Holmes v. Charlestown Mut. F. Ins. Co.* 10 Met. 211, 43 Am. Dec. 428, *infra*, IV., a, 1, (a). W. A.

this court, but having no reference to such a situation as that here presented, so far as relates to the acceptance and retention of the policies, leaving out of view for the time being the question of whether anything occurred subsequent to the making of the applications to induce such acceptance and retention, reasonably calculated to deter the applicants from examining the policies. *McKinnon v. Vollmar*, 75 Wis. 82, 6 L. R. A. 121, 17 Am. St. Rep. 178, 43 N. W. 800; *Montreal River Lumber Co. v. Mihills*, 80 Wis. 540, 50 N. W. 507; *Porter v. Beattie*, 88 Wis. 22, 59 N. W. 499; *Beetle v. Anderson*, 98 Wis. 5, 73 N. W. 560; *Hart v. Moulton*, 104 Wis. 349, 359, 76 Am. St. Rep. 881, 80 N. W. 599. Counsel quotes, and recited it upon the oral argument with appropriate emphasis, overlooking, as it seems, that it does not apply to the facts of this case,—leaving out of view for the moment, as before said, the question of whether any circumstance occurred at the time of the delivery of the policies reasonably calculated to mislead the persons insured,—this language from *West v. Wright*, 98 Ind. 335: “I cannot, however, assent to extend the maxim, *Caveat emptor*, so far as to hold . . . that where a vendor of real estate, for the fraudulent purpose of effecting a sale, makes a positive representation of particular facts respecting the title, which he knows or has good reason to believe to be false, and which turn out to be false in fact, but which, if true, would make the title good, he cannot be held liable in an action for the fraud, or the vendee can have no right to rescind, because he had it in his power to ascertain from the records the truth or falsehood of the representation and the true state of the title, but has neglected to do so, in reliance upon the truth of the vendor’s representation of the facts. There may be good prudential reasons why, when I am selling you a piece of land, or a mortgage, you should not rely upon my statement of the facts of the title, but if I have made that statement for the fraudulent purpose of inducing you to purchase, and you have in good faith made the purchase in reliance upon its truth, instead of making the examination for yourself, it does not lie with me to say to you, ‘It is true that I lied to you, and for the purpose of defrauding you, but you were guilty of negligence, of want of ordinary care, in believing that I told the truth; and because you trusted to my word, when you ought to have suspected me of falsehood, I am entitled to the fruits of my falsehood and cunning, and you are without remedy.’”

It will be easily seen that the court held that there was no negligence on the part of 47 L. R. A.

the injured person in that case, because he relied upon the positive representations made by the wrongdoer at the time the transaction was entered into. To make that apply to this case we must be able to point to something said or done by the appellant at the time the policies were delivered, reasonably calculated to deter the persons receiving the same from making any examination thereof. *Prince v. Overholser*, 75 Wis. 646, 44 N. W. 775, was referred to. There the rule of *Mamlook v. Fairbanks* was expressly affirmed, the court saying, in effect, that to take the case out of the rule there must be fraud or mistake of such a nature that the defendant could not, with reasonable diligence, acquire knowledge thereof when put upon his inquiry.

We should say, in passing, that we deem it to be elementary law, as held in *Locke v. Williamson*, that when a person receives an article pursuant to an order or contract therefor, he is put upon inquiry as to departures therein from the thing bargained for, which are open to ordinary observation, nothing occurring then to induce him to accept the article as satisfying the order or contract without examining it. Such is the rule laid down in the Federal court in the *McMaster Cases* in all stages of the litigation over the six policies involved in the transaction, with which the court had to deal. In all stages of the litigation up to and inclusive of the final disposition thereof by the Supreme Court of the United States, as we shall see hereafter, the rule we have stated was clearly recognized and applied. We might go on through substantially all the great array of cases cited by counsel to show that deceit practised by the appellant’s agent in obtaining the applications for insurance excused the applicants from making any examination of their policies when received, with the same result as with those to which we have referred. To do so would draw this opinion out to a very great length, which is what we desire to avoid. We will suspend on the question here discussed, believing that the law is fully established, and that we have clearly demonstrated it, that a person is negligent in receiving an article and accepting it without any examination thereof, wholly relying on representations, whether fraudulent or not, made at or previous to the time when the article was contracted for or ordered. In this it should be understood that the mere reception of the article does not imply acceptance thereof till the expiration of reasonable time for examination. That is the rule of *Locke v. Williamson*.

It is earnestly contended by counsel for respondent that the former decision, holding

that negligence on the part of the insured persons, in receiving and retaining the policies for a long time without objection, stands effectively in the way of respondent's recovery, is wrong on principle: (1) Because negligence does not preclude relief by a person damaged by intentional wrongdoing; (2) negligence of one does not accrue to the benefit of another to whom he owes no duty; (3) the court's decision is out of harmony with the doctrine that a person cannot profit by his own wrong; (4) nothing short of actual knowledge prevents relief till the right involved is extinguished by the statute of limitations,—that reasonable means of knowledge, and negligence in not profiting by it, from which knowledge in fact is presumed, is not sufficient. We will briefly answer each of the propositions, though in doing so we must repeat, somewhat, what was formerly said.

1. The conclusive answer to the first proposition is that it does not necessarily apply here, leaving out of view the question of whether anything occurred inducing belief as to the character of the policies at the time they were received, because it relates only to when there is a concurrence of intentional wrongdoing and negligence producing the injury, not where inexcusable inadvertence actually intervenes between the wrong and the injury complained of, so as to stand as the real producing cause of such injury.

2, 3. The second proposition does not fit this case, because the inexcusable negligence of a person, in entering into or abiding by a business transaction with another guilty of deception, influencing such person's conduct in the matter, is not held to be a direct defense to such person's claim for redress, but to be evidence of acquiescence with knowledge of the facts, or in connection with injury to such other by delay in such person's asserting his right to relief, if such assertion were successful, or in connection with some other efficient circumstance, to estop such person from doing anything inconsistent therewith. Even a wrongdoer has rights which the law respects. A person injuriously affected by the wrong of another in a business transaction may himself be guilty of wrong in asserting his right to redress, so affecting the latter as to give him the right to use the doctrine of estoppel for his protection against the former's claim. A third answer is this: Inexcusable negligence of a person in his business transactions with another is not, as said in the former opinion, held to be a defense to the former's claim for redress out of any favor found in the law for the latter, or defense, strictly so called, to such claim at all, in 67 L. R. A.

any other sense than that the law affords no redress under the circumstances, its policy being only to aid those who use some reasonable degree of care to guard their own interests. All of such reasons, we apprehend, will readily be recognized as elementary law.

Answering more particularly counsel's first proposition, a contract entered into by fraud on one side, or mistake through negligence on the other, is not absolutely void. While in one sense it is not the contract of the latter at all, because of his nonassent to its terms with knowledge of the facts, he may add the element of assent at any time, actually or constructively. Such a transaction is not then, in a legal sense, absolutely void; it is only voidable. *Weed v. Page*, 7 Wis. 503, 512; *Potter v. Taggart*, 54 Wis. 395, 400, 11 N. W. 678. When the essential element of assent is added, it gives effect to the transaction as a binding contract from the beginning, the same as if no deception had been practised. The evidence of such assent may rest solely in inexcusable neglect of the injured person to do anything inconsistent with the validity of the contract. Then if such person fails to recover, such other does not, in the sense of the salutary doctrine which counsel invokes, profit by his own wrong, but by such person's submission to the wrong. Or, if the other element be added, of misleading the wrongdoer himself in the meantime, the recovery is defeated by such person's own wrong, misleading the first wrongdoer to his prejudice, upon principles of estoppel. Speaking of contracts voidable for fraud, it is said in *Wald's Pollock, Contr.* p. 539: "Omission to repudiate within a reasonable time is evidence, and may be conclusive evidence, of an election to affirm the contract; and this," says the writer, "is in truth the only effect of lapse of time," by itself. Again the writer says (p. 541): "The party who made the misrepresentation in the first instance may have acted on the faith of the contract being valid in such a manner that a subsequent rescission would work irreparable injury to him."

Keeping in mind that rescission, whether the object of a suit in equity or forming the basis of a rescission at law, is governed by equitable principles (*Gates v. Raymond*, 106 Wis. 657, 82 N. W. 530; *Gay v. D. M. Osborne & Co.* 102 Wis. 641, 78 N. W. 1079; *Ludington v. Patton*, 111 Wis. 208, 86 N. W. 571), the application of this language from the opinion of Sir Barnes Peacock, in *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, 239, to the facts before us is not difficult to see: "Where it would be practically unjust to give a remedy, either be

cause the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. . . . Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

In *Clough v. London & N. W. R. Co. L. R. 7 Exch. 26, 35*, Mellor, J., said, in effect; that, if a person is induced to enter into a contract by fraud, he has his election to avoid it till he elects to affirm it, and that lapse of time alone may constitute conclusive evidence of such election, with this exception, however: If the rights of innocent third persons intervene in the meantime, or if, in consequence of the delay, the position of the wrongdoer is affected, it will preclude him (the injured party) from exercising his right of rescission. See also, to the same effect, *Oakes v. Turquand*, L. R. 2 H. L. 325; *Houlden v. Glasgow Bank*, L. R. 5 App. Cas. 317; *Kerr, Fraud & Mistake*, 3d ed. by Williams, 10.

Those principles apply with great force to this class of cases. The respondent had the full benefit of his insurance for nearly a year before he repudiated the transaction, and his assignees had the benefit of theirs for months before they acted in that regard. The entire period covered by the first premium upon respondent's policy had, before he refused to abide by such policy, nearly expired. No one would venture to claim that, if he had died during such period of delay, the company would not have been bound by the policy, and his personal representatives would not have enforced it. During all that time the money paid by respondent for his policy formed a part of the fund relied upon by the other policy holders for their protection, part of the assets of the company upon which all its operations were based. It was not guilty of any moral turpitude except by imputation. Its officers were not guilty of any wrongdoing whatever. They supposed, and had a right to suppose, for months, that the company's soliciting agent acted honestly in obtaining the applications for the policies. They knew that the policies issued, received, and retained were in strict accordance with the applications. They carried the risk assumed on their books as part of their lia-

bilities, and the premiums paid, as before indicated, as part of their assets. All the policy holders of the company were interested in the fund of which the money sought to be recovered formed a part, and many of them, we may rightly assume, joined the company during the period of delay.

Speaking more particularly in regard to the third reason we have given for condemning counsel's second proposition, that the rule declared in the former opinion, that negligence may prevent a recovery in a case like this, is wrong on principle,—the rule following the maxim, "The law assists the vigilant, not the careless," *Vigilantibus, et non dormientibus succurrunt jura*, is grounded on that wise policy in the law which at every turn of life casts upon all persons in severalty, who are of sound mind and mature years, the personal duty to exercise some reasonable degree of care for their own protection, enforcing it, in some cases, solely by refusing to open the doors of judicial tribunals to those who deal heedless of their interests, depending upon the courts to protect them from injurious results, as that policy which in the end best protects individual members of society and at the same time guards against those responsibilities that can be better borne in an individual way, being unnecessarily or unreasonably, to any extent, cast upon the public at large. In that, as can readily be seen, the courts, while not excusing at all the iniquity of the wrongdoer, regarding the interests of society as a whole as well as individual rights, place a reasonable limit upon the use of those instruments provided for administering justice between man and man. Litigants do not bear the burden of administering justice except in a very small degree. It is borne in the greater part by the public at large. Proper appreciation of that will enable one to easily and clearly see the wisdom of that policy which extends the benefit of courts of law in business matters, only to those who use common prudence to guard their own interests. One may consent, either actually or constructively, to be imposed upon, if he sees fit, in a business transaction, and the courts will not interfere. It is unfortunate that courts have sometimes been so swayed by apparent hardship in applying the rules we have stated to particular cases, as to use language in opinions leading to false notions both as to the reason of the law and its application,—language quite liable to mislead unless one is firmly grounded in the philosophy of the law so as not to be unduly disturbed by the rhetorical flights sometimes indulged in by judges, seemingly losing sight, for the moment, of a safe landing place. Evidence of

such mental excursions is not hard to find in some of the quotations called to our attention by the learned counsel for respondent, which have, perhaps not unreasonably, produced conviction in counsel's mind that the judgment appealed from is wholly right. The correct idea is expressed by a leading case in the Supreme Court of the United States, often cited and followed by this court, and cited by the learned counsel for respondent, substantially thus: Want of proper care on the part of the vendee of an article to protect himself from imposition takes from him all just claims for relief, whether his negligence is attributable to his indolence or credulity. *Slaughter v. Gerson*, 13 Wall. 379, 20 L. ed. 627. Clearly, the court used the term "just claim" solely as regards the right of the purchaser to invoke judicial power to save himself from loss, not with the idea that the moral wrong done by the vendor could be balanced by his victim's negligence. Obviously, there are many such wrongs for which the machinery of courts does not furnish a remedy. Perhaps the reason for the rule is as clearly stated in the early case of *Moore v. Turbeville*, 2 Bibb, 602, 5 Am. Dec. 642, often cited by courts and text writers, as anywhere: "There are many instances in which a person may be guilty of a moral delinquency, without incurring a legal responsibility; for legal obligations are necessarily more circumscribed in their nature than moral duties. *Fides servanda* is indeed a rule of law, as well as of morality, and will be rigorously enforced in favor of one who is chargeable with no culpable negligence or inattention to his own interest. But to one so chargeable, the law will not afford relief. . . . The law does not deny its aid in such case, because it looks upon a want of candor and sincerity with indulgence, but because it will not encourage that indolence and inattention, which are no less pernicious to the interest of society. A diligent attention to our own concerns, as well as good faith to others, is a virtue; and the law, while it recognizes the rules which tend to preserve the latter, at the same time is careful to guard the principles which prompt to the exercise of the former. With respect to points plainly within the reach of every man's observation and judgment, and where an ordinary attention would be sufficient to guard against imposition, the want of such attention is, to say the least, an inexcusable negligence. To one thus supinely inattentive to his own concerns, and improvidently and credulously confiding in the naked and interested assertions of another, the maxim, *Vigilantibus, et non dormientibus, jura subveniunt*, emphatically applies, and opposes 67 L. R. A.

an insuperable objection to his obtaining the aid of the law."

The supreme court of Ohio, in *Etna Ins. Co. v. Reed*, 33 Ohio St. 283, speaking on the same subject and citing in support a multitude of authorities, said that in matters of contract, if one negligently omits to guard his own interests, the law will not lend its help to aid him. Pages could be covered in citations to the same effect.

4. Counsel for respondent further attacks the former decision, standing firmly on the theory which the circuit court supposed ruled the case, that, conceding negligence may affect the right to recover in a case like this, it does not so operate in the absence of actual notice of the fraud; that if the wronged party is not thereafter negligent in electing what course he will pursue and informing the wrongdoer thereof, the remedy for rescission in equity, or for damages at law based on a previous rescission by the act of the party, will remain open to such party. It will be observed that the trial court did not deal at all, in the findings, with whether the policy holders were negligent in discovering the facts respecting the fraud. Counsel's contention was evidently adopted, that mere constructive notice, evidenced by negligence in not profiting by reasonable opportunity to discover the fraud, only sets running the statute of limitations: We confess there is some judicial support for that, contrary, however, to the great weight of authority, and to *Mamlock v. Fairbanks* and authorities affirming that case in this court, as respondent's counsel seem to appreciate. An earnest appeal to disregard the *Mamlock Case* is made, though it is nowhere pointed out that it has been directly discredited by this or any other court or text writer, and it is not and cannot be denied that it has been here many times affirmed in spirit, if not in letter. We have not been able to discover in any of the authorities brought to our attention a satisfactory reason for departing from the established judicial policy of the state indicated in that case. No case in this court has, in the decision thereof, directly or indirectly favored the doctrine that the right to rescind a contract for fraud continues during the running of the statute of limitations regardless of constructive notice of the facts. Means of knowledge of the fraud, said the court in the *Mamlock Case*, is always a material question in determining the right of rescission, and that is within the principle of *caveat emptor*, citing as a "principle so universally recognized by the authorities that it needs no further reference," Kerr, *Fraud & Mistake*, 101, to the effect that he who has under all the circum-

stances reasonable opportunity to discover the deceit, is chargeable with knowledge thereof to the same effect as if he possessed actual knowledge of the subject. That doctrine is laid down in 2 Parsons, Contr. pp. 781, 782, in these words: "If he rescinds on the ground of fraud, he must do so at once on discovering the fraud. Any delay, especially if it be injurious to the other party, would be regarded as a waiver of his right. The mere lapse of time, if it be considerable, goes far to establish a waiver of this right; and if it be connected with an obvious ability on the part of the defrauded person to discover the fraud at a much earlier period, by the exercise of ordinary care and intelligence, it would be almost conclusive."

In *Erlanger v. New Sombrero Phosphate Co.* L. R. 3 App. Cas. 1283, the language heretofore quoted from the judgment of the privy council in *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 230, was cited with approval, with remarks by Lord Blackburn, recognizing that the deceived party may forfeit his right to rescind by failing to make his claim in that regard with reasonable promptness after "he knows, or may with reasonable diligence know, that he has been defrauded." Moncreiff, *Fraud & Misrepresentation*, 282.

McCarty v. New York L. Ins. Co. 74 Minn. 530, 77 N. W. 426, is cited by counsel as in direct conflict with *Mamlock v. Fairbanks*. The court there treated the subject of negligence as evidence of waiver, and negligence as a defense, but not as involving the right to judicial remedies as affected by public policy. A clear distinction was pointed out between negligence of a person in not protecting himself from fraud perpetrated by another at the time of signing and delivering to such other an application for an insurance policy, and negligence in failing to discover obvious departures from the application when the policy is received, nothing occurring at the time to lull such person into security on the subject. The language used by the learned judge as to the last situation mentioned, wherein some discrimination is made between the rights of a person injured by the fraud of another, as against such other and as against third persons, leaving out of view the doctrine of estoppel, overlooked, as it seems, some elementary principles which we have mentioned, and is in direct conflict with the Federal cases to which we have referred and will hereafter more particularly refer. It is significant that the subject was treated very briefly, no authorities being cited to support what was said. However, where the court, earlier in the case, discussed and disposed of the question of whether construc-

tive notice of the fraud sets running the time within which the wronged party can rescind, constructive notice was recognized as effective as well as actual notice, and it was inferentially held that a statement of the rule not so recognizing the law to be is inaccurate. Here is the language used: "The rule, as generally laid down in the books, is that the right of rescission accrues only after discovery of the fraud, and that delay is not imputable against the party defrauded, until he makes that discovery. But we have no doubt that there may be cases where the party is so grossly negligent in failing to use means of knowledge within his possession, which he was bound to avail himself of, that delay would be imputable to him, even before he actually discovered the fraud. Hence perhaps a more accurate statement of the rule is that delay is not imputable to the party defrauded until he has sufficient knowledge of the fraud to make the delay material, or such means of knowledge as he was bound to avail himself of."

Leake, Contr. 394, and *Browne v. McClintock*, L. R. 6 H. L. 456, were referred to, which amply support what was said. That which the learned judge said was perhaps the way to accurately state the rule was thus recognized by Mr. Justice Field to be the law, in *Slaughter v. Gerson*, 13 Wall. 383, 20 L. ed. 628, to which we have before referred: "A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another."

The exception mentioned,—which is found in all careful statements of the law in these words: "where no concealment is made or attempted,"—we have heretofore shown, refers to concealment made or attempted by some act of the wrongdoer at the time, or efficiently reaching to the occasion, when the wronged party should exercise his senses, reasonably, to protect his own interests. It will be seen that the law was so distinctly applied in the *McMaster Cases* to which we shall presently refer. We might go on reinforcing the *Mamlock Case* by a large num-

ber of citations, though we confess that the inaccurate statement of the rule under discussion, recognized by Judge Mitchell, as before indicated, can be found many times in legal opinions where constructive knowledge was not material, and in some instances, probably, it formed the basis for erroneous decisions, and for misleading judicial declarations in others, some of which are found quoted in the brief of counsel for respondent, and were referred to by him with great emphasis upon the oral argument. It would seem that the confession by so learned a judicial writer as Judge Mitchell, that the statement of the law as to when time for the rescission of a contract for fraud commences to run, as in the *Mamlook Case*, is probably the strictly accurate way to put the matter, and the other authorities to which we have referred, render any further vindication of such case unnecessary. If, however, it needs further support, that will be found in our treatment of the next reason urged by counsel for respondent why our former decision is wrong.

Leaving out of view what we formerly regarded as controlling decisions of this court, the *McMaster Cases* in the Federal court were cited as worthy of the highest regard in reaching a correct conclusion. It is now contended by respondent's counsel, as we understand his argument, that, admitting the effect of the decisions in the court of appeals, those cases (30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 63, and 40 C. C. A. 119, 99 Fed. 856) if in any event they could be considered as voicing the doctrine of the Federal courts, are of no force because the last decision was reversed by the Supreme Court of the United States, it being held, "in substance, that knowledge of the contents of the policies was not 'legally imputable' to McMaster because of his failure to read them." "But," says the learned counsel, "it is not necessary to multiply citations to show the error of the assumption that the doctrine of constructive notice can be made available as a cover for fraud." In that is a most striking indication of the misapprehension in the mind of counsel of what we aimed to say, and in our view plainly said, in the former opinion, and a strikingly illegitimate characterization of the solemn decision of this court, which was based on what counsel admits to be the established doctrine in *Mamlook v. Fairbanks* is to stand as the settled law. Constructive notice was not formerly held to be under any circumstances a "cover for fraud." It was held to be evidence of assent, regardless of the fraud, or, if not such, of inexcusable negligence, waiving judicial remedies for fraud; and not upon mere assumption, but

upon the authority of this court in previous decisions, and of most other courts.

Here we may, as it seems, properly and beneficially digress to make some observations on aspects of the argument for and on rehearing. It is hardly legitimate, in endeavoring to persuade the court to recede from a decision, admittedly right if a previous decision of the court of long standing is to be followed, to refer to the later decision as based on error of assumption, and to speak, as was done in the motion for reargument, of the former decision as if it were a personal affair, and of decisions in this and other courts, and the reasoning therein found, as mere "wind of doctrine." It is not understood here that the former opinion was based on assumption, or upon anything but judicial authority, largely drawn from our own judicial history. It was a careful, considerate decision of the court, voiced by the writer, as its instrument, to whose lot it happened to fall to perform that duty, and who performed it, keeping strictly within the lines decided upon. Courts are not infallible in fact, and never will be so long as the law must be administered by human agencies; but their judgments, based on judicial authority, are not properly referred to as based on "error of assumption," or mere "wind of doctrine." Nor are they the work of any particular member of the court,—not of the one upon whom may devolve, under the court rules, the duty of giving voice to the grounds for it in the opinion, any more than the others. The idea sometimes in the mind of counsel in viewing a decision, that it is something other than that of the court, is erroneous, and is liable to stimulate inconsiderate action on the part of counsel, both in language and procedure. It gives to counsel the appearance of not appreciating the responsibility resting here to decide controversies as to the best of our ability it is given us to decide, regardless of the effects and consequences upon parties or counsel in the particular litigation, necessary to enable them to view with complacency the final result, whatever it may be. In connection with these remarks, to the end that the beneficial purpose intended may not be misconceived, we wish to record the fact that we greatly appreciate the earnest, faithful devotion of the eminent counsel for respondent in this case to the interests he stood for in court, and entertain a high regard for his ability, industry, and courage, which is manifest on his every appearance here, and for the aid which his labor has given us in arriving at a correct conclusion now.

Returning to the *McMaster Cases*, we will say, and endeavor to demonstrate, that

counsel is in error in his view that the supreme court, in reversing the decision of the court of appeals, 40 C. C. A. 119, 99 Fed. 856, held that possession of a policy of insurance does not impute knowledge of its contents, in the absence of any deception practised upon the possessor subsequent to his making the application therefor, reasonably calculated to deter him from examining such policy at the time of its receipt. The court, as it seems to us, held directly to the contrary. We can best demonstrate the correctness of that view by giving a full history of the McMaster litigation as found in the Federal reports. Here is the history: Fred A. McMaster signed applications for six policies of life insurance in the New York Life Insurance Company, delivering them to such company's agent. After the applications were signed the agent, without the applicant's knowledge or consent, wrote into them these words: "Please date the policies same as applications," in order to further his own interests by obtaining credit for the work in the year in which such applications were made, helping to make up the necessary amount of insurance taken by him during such year to entitle him to a greater percentage upon the business of such year, as his compensation for service, than he would otherwise obtain. The policies were issued, dated as directed, making the annual-premium payment December 12 in each year, when it otherwise would have been made December 18 in each year. As the applications were when signed, the first payment would have covered thirteen months from the time the first premium was paid, which was December 26, 1893. By the unauthorized act of the agent, the life of the policies was cut down so they had but twelve months and seventeen days, after the actual delivery thereof, to run. McMaster failed to pay the premiums on his policies when due by their terms, December 12, 1894. He died December 18th, the day he supposed the payments were due. An action was brought by his administrator to reform the policies, advancing the due date of the annual premium from December 12th to December 18th of each year, in accordance with the applications as they were when signed. There was evidence that the policies were delivered ostensibly responsive to the applications, no evidence being produced of any communication at the time of such delivery to McMaster to deter him from examining the same. There was evidence to the effect that the agent represented, when the applications were made, that the first payment of premium would cover a period of thirteen months. McMaster made no complaint at any time that the policies were

not as agreed upon. He did not read them or know that they were not so drawn as to make the first payment carry the policies till December 18th the next year. The company's collector called on him December 11th or 12th before he died, to whom he said he did not intend to keep up the policies, but made no complaint whatever. The court held, on those facts, that, if fraud was committed on McMaster, his keeping the policies as he did, without objecting when he had ample opportunity to know their contents and to reject them if he did not want them, since he was not deterred from doing so by anything said or done by the company after the applications were signed, was in law a waiver of the fraud, precluding any judicial relief therefor. The court said: "He could not have been received as to the terms or legal effect of these contracts, if he read them. It was his duty to read and know the contents of the policies when he accepted them. It is true that the evidence is that he did not read them, but the legal effect of his acceptance is the same as if he had read them. He had the opportunity to read and to learn their contents, and, if he did not, it was his own gross negligence, and no act of the insurance company or its agent that concealed them and misled him as to their effect." [30 C. C. A. 535, 536, 57 U. S. App. 644, 87 Fed. 66, 67.]

Taking up the question of whether the statement made by the agent when the applications were made, to the effect that the first payment would cover thirteen months, was sufficient to take the case out of the rule requiring a person, upon receiving an article ostensibly upon fulfilment of an order or contract, to see obvious departures therein from the thing bargained for, the court held that nothing short of something said or done at the time of the delivery of the article, the applicant therefor then having ample opportunity to examine it as to defects therein, open to ordinary observation, throwing him off his guard and reasonably excusing him from making such examination, will excuse him from improving the opportunity for such examination; and if he does not intend to assent to keep the contract in satisfaction of his order, within a reasonable time thereafter, from notifying the party from whom he received such article that it will not be so accepted. This language on the subject was used, in addition to that just quoted: "The statement of the agent fourteen days before the deceased received the policies that they would insure him for thirteen months from the payment of the first premiums was not a statement of an existing fact. It was not calculated to impose upon him, or to pre-

vent him from reading his policies and learning for himself whether this promise had been kept or broken." To the quoted language in the whole the court cited many authorities, including cases decided by this court. The conclusion reached was that neither a court of law nor of equity could afford the McMaster estate relief. The decision was inferentially approved by the Federal Supreme Court by its judgment refusing to issue a writ of certiorari to review it. 171 U. S. 687, 18 Sup. Ct. Rep. 944. Later, McMaster's administrator commenced an action to recover upon the policies in the circuit court for the northern district of Iowa, and was defeated. The case was carried to the circuit court of appeals for review, where the judgment was affirmed, the court following the decision in 30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 63, the evidence being substantially the same in both cases, except in the latter it was made to appear that the agent personally delivered the policies to McMaster, stating then, in response to the latter's inquiry as to whether they were as promised, and would insure him for thirteen months for the first premium, that they were and would; and the premiums were paid upon such assurance being given. The court held that such circumstances, as a matter of law, were not sufficient to excuse McMaster for not knowing the terms of his policies and seasonably objecting to them if he did not care to accept them as satisfying what he bargained for. The judgment was carried for review to the supreme court, and was there reversed solely on the ground that the assurance to McMaster at the time of the delivery of the policies, rendered the question of whether his keeping them as he did, without objecting, constituted an acceptance thereof as satisfying what was bargained for, one of fact for the jury. The general principles upon which the case was decided by the trial and appellate courts were fully approved, but it was held that the false representations made at the time of the delivery of the policies had sufficient tendency to throw McMaster off his guard,—to lull him into security as to their being what he expected.—to prevent the court from holding, as matter of law, that he was inexcusably negligent, precluding him from successfully invoking the aid of the court to redress the wrong committed by the company's agent in its name. Speaking of the changed situation produced by giving proper significance to the circumstance mentioned, this language was used: "We are unable to concur in the view that McMaster's omission to read the policies when delivered to him and payment of the premiums made con-

stituted such negligence as to estop plaintiff from denying that McMaster, by accepting the policies, agreed that the insurance might be forfeited within thirteen months from December 12, 1893." *McMaster v. New York L. Ins. Co.* 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10.

There is the rule clearly recognized that when a person receives a policy of insurance in response to an application therefor, or as the result of a written application, or a written application and verbal communications between him and the agent of the company issuing the policy, unless some misrepresentation or fraud is practised upon him at the time of the delivery of the policy, furnishing some reasonable excuse for his not reading and knowing its provisions so far as they would, by such reading, be readily understood, it is such negligence not to so read and know, that if he neglects to object to the policy within a reasonable time after receiving the same, the delay will estop him from obtaining judicial aid to remedy any injury he may suffer from the policy not being as agreed upon. That, as we have seen, is not because of any breach of duty on his part to the wrongdoer, but because of breach of duty to himself, or his assent to the contract. The idea of counsel for respondent that there can be no negligence in circumstances such as we have discussed which can help the wrongdoer because the injured party owes the wrongdoer no duty, grows out of failure to appreciate that negligence in a case like this does not, except when coupled with circumstances effecting an estoppel, presuppose duty of the injured person to the wrongdoer, but as we have indicated, duty of such person to himself.

All the reasons advanced for a different decision than that formerly announced as to the law of this case, which seem worthy of attention, have now been discussed. There remains to be considered the subject of whether we before correctly applied the law to the facts. At the threshold of that inquiry we met the point made by appellant's counsel,—not considered on the former occasion because unnecessary in view of other questions decided,—that there is no evidence that Bostwick placed himself in a position, before this action was commenced, to give him a complete cause of action. That is, that he had not, before his suit was commenced, rescinded his policy. There is no controversy but that, promptly after he actually discovered the facts he complained of the fraud established in the case and made known to appellant his election to disaffirm the policy. It does not appear that then, or at any subsequent time, he formally offered

to return his policy, or that he made, before suit brought, a formal tender thereof to appellant. It is undisputed, however, that he insisted upon having his money back or a new policy; that he would not abide by the transaction as it stood; and that appellant positively refused to make any change in the matter, and denied his right to rescind. Such denial was, in effect, found by the trial court, and not excepted to. There is a finding that respondent offered to return his policy, which finding is excepted to. It is considered that the repeated demands by respondent for a return of his policy or for a new one in accordance with his understanding of the application, carried with them, inferentially, a sufficient offer to surrender the policy to effect a complete rescission thereof, before suit was commenced, in view of appellant's unqualified denial of respondent's right. This court has several times so held under similar circumstances. *Potter v. Taggart*, 54 Wis. 395, 11 N. W. 678; *Herman v. Gray*, 79 Wis. 182, 48 N. W. 113.

True, a cause of action at law to recover the consideration paid upon a contract void for fraud is not complete so that a suit may be maintained to enforce it until the transaction has been fully repudiated, the complaining party having done all that in justice he ought to do, measured by settled laws on the subject, to restore the wrongdoer to his former position. The idea is that the existence of the cause of action itself depends upon the contract, binding till avoided, having been in fact avoided. Hence, in such a case as this the plaintiff must fail unless he is able to show that before he commenced the same the contract relations between him and the defendant, which were fatally tainted with fraud, had been wholly severed so far as was reasonably within his power to accomplish it. We must not overlook the distinction between an action at law based on rescission for fraud,—an action where rescission necessarily precedes the existence of the cause of action,—and an action in equity for rescission. In the former case rescission is effected by the act of the party injured. In the latter he seeks the aid of a court of equity to effect rescission. In the one case there must be an election to rescind, fully acted upon. That requires the complainant, before commencing suit, to return, or offer to return, that which he received, or willingness and ability to return the same, and such conduct on the part of the wrongdoer as to show that a formal offer or tender would have been wholly useless. In the other case there must be at least willingness and ability to restore the wrongdoer to 67 L. R. A.

his former position so far as justice requires, as a condition of the contract being set aside by the judgment of the court. These distinctions, which have been recently carefully elucidated by this court (*Ludington v. Patton*, 111 Wis. 208, 86 N. W. 571), need to be kept in mind. They have not always been, as indicated by the cases cited. We need not go further than *Potter v. Taggart*, 54 Wis. 395, 11 N. W. 678, to discover, in an action at law based on rescission, language wholly appropriate to an action in equity for rescission. In stating the conditions precedent to the bringing of the suit, it was said that the action was for rescission, and the rule in relation to the necessary conduct of the complainant to maintain such an action was somewhat confused with that requisite to an action in equity. That was intensified in *Herman v. Gray*, 79 Wis. 182, 48 N. W. 113. However, those cases may be considered as holding, and have generally, we think, been so considered, that there must be at least an unconditional offer to restore the wrongdoer to his former position before suit brought, or the equivalent, such as a complete repudiation of the fraudulent transaction, notice thereof to the wrongdoer, unconditional denial of the right of rescission on the latter's part, his attitude being such as to render a formal offer to return to him what he parted with useless, and a willingness and ability to make such return so far as justice requires, at the time of the trial, enabling the court then to give back to him what the complainant could not because it would not be received. The facts of this case fully meet those requirements, so we hold that they effected a complete avoidance of the policy by respondent before the action was commenced. His insistence, from the time he discovered the fraud down to the time of the commencement of the suit, upon a return of his money or possession of such a policy as he bargained for, and the unqualified refusal of the appellant to do either one thing or the other, rendered a formal offer on the former's part to tender back his policy, a useless proceeding.

Some other points are made by appellant, which are rendered immaterial by the conclusion we have reached.

Now in applying the law to the facts, in view of what has been said each of the policy holders must be considered as having had knowledge of the fraud from the time when, by the exercise of ordinary care, he might have had it. That time, as to Parker and Barrington, was substantially when they received their policies. As to each of them, as we have seen, there was no statement made, or circumstance which occurred

after the making of the applications, reasonably excusing him for not examining his policy when it was received. Since, as to each of them, when he did make such examination, he easily and at once discovered the fraud that had been perpetrated upon him, we must assume that he ought to have had knowledge thereof very soon after his policy came to his hands. We have no finding by the trial court as to electing to rescind the policies within a reasonable time, except upon the theory that constructive knowledge of the fraud did not start the time therefor running. That left several months' time out of view. We adhere to our former decision that upon the evidence Parker and Barrington are chargeable, as a matter of law, with knowledge of the fraud from the time they received their policies: that, as a matter of law, they waited thereafter an unreasonable length of time before electing to rescind the same. Therefore, as to the assigned claims, there can be no recovery.

As to the Bostwick policy, it is considered that the assurance contained in the letter accompanying it when it came into respondent's hands, in effect that it was in accordance with the understanding which he supposed and had a right to suppose was written into the application, was reasonably calculated to lull him into security on the subject and cause him to lay the policy aside without examining it. It is useless here to discuss at length the particular wording of the letter containing such assurance. We have weighed it in every reasonable aspect in which it can, in our judgment, be viewed, resulting in a conclusion—not without some misgivings, we confess, on the part of some of the members of the court as to its correctness,—that it was not, as a matter of law, entirely unreasonable for Bostwick, relying upon the letter which presumably he read, to lay the policy aside without reading it. True, the letter characterized the policy as a 5-per-cent debenture contract, and Bostwick testified that such a policy of a particular character was urged upon him by the agent at the time the application was taken, and that he then insisted that he would not take anything but a ten-annual-payment life policy, indicating, in one view, that the two policies were at the time of the application considered as entirely different. But it is also true, as we understand it, that a 5-per-cent debenture policy might well be written on a 10-annual-payment life plan. Therefore, the assurance contained in the letter, that the policy was in accordance with the applica-

tion, might reasonably be said to convey the idea that it was a 10-annual-payment life contract with the 5-per-cent debenture feature which the agent so strongly recommended. In that view it is considered, not without some hesitation, we must say, that the circumstances characterizing the delivery of the policy are substantially the same as those in the last *McMaster Case*, which were deemed of sufficient significance to stand effectively in the way of a conclusion that, as a matter of law, McMaster knew the contents of his policies from the time he received them. Guided by that decision, we are constrained to hold that the assurance to Bostwick may be reasonably said to satisfy the principle, said in the *Mamlock Case* to be concomitant and necessary to be considered with the maxim, *Vigilantibus, et non dormientibus, jura subveniunt*, and the rule of law based thereon, "that the seller must not use any art or practise any artifice, to conceal defects, or make any representations, or do any act, to throw the purchaser off his guard, or to divert his eye, or to obscure his observation, or to prevent his use of any present means of information." In that light we must hold that it does not appear, as a matter of law, that Bostwick was chargeable with knowledge of the fraud found to have been practised upon him till he obtained actual knowledge thereof. That leaves the question of whether he ought to have read his policy when he received it notwithstanding the assurance accompanying it, one of fact not covered by the findings. It must be solved before a complete disposition of this case can be made. In the *McMaster Case*, it will be remembered, the farthest the court went was to hold that the question of whether the assurance given McMaster when his policy was delivered, was sufficient to render the question of whether he was inexcusably negligent, testing his conduct by what persons of ordinary care would generally do under the same or similar circumstances, in laying his policy away and not examining it, a jury question. The case was tried by a jury. Here the case was so triable, but was by consent tried by the court. In that situation this court does not direct the judgment to be rendered if the unsolved issues of fact might go either way and it is doubtful which is proper, so that in attempting to decide them originally here injustice might be done. *Brown v. Griswold*, 109 Wis. 275, 85 N. W. 363. If the time within which respondent was bound to make his election to rescind the policy commenced to run from the time when he obtained ac-

tual knowledge of the fraud, the circumstances being such as not to charge him with constructive knowledge, then there should be a recovery as to his policy, as decided by the trial court. But if, on the other hand, it shall be found as a fact that, notwithstanding the language of the letter accompanying his policy, and all the evidence bearing on the question, he was inexcusably negligent in not looking at the paper when he received it, or soon thereafter, and observing the evident departures therein from the one he intended to apply for, he is not entitled to recover.

The judgment of the circuit court is reversed and the cause remanded with directions to decide the question of fact suggested as being yet unsolved, and to then render judgment in accordance with this opinion.

Cassoday, Ch. J., dissenting in part:

I concur in the result of the decision in this case, except as to the Bostwick policy; and as to that I think the judgment should be affirmed. As to that policy, the evidence, in my judgment, clearly brings the case within the well-established rule stated in a recent standard work, cited by plaintiff's counsel, as follows: "By the overwhelming weight of authority, ordinary prudence and diligence do not require a person to test the truth of representations made to him by another as of his own knowledge, and with the intention that they shall be acted upon, if the facts are peculiarly within the other party's knowledge or means of knowledge, though they are not exclusively so, and though the party to whom the representations are made may have an opportunity of ascertaining the truth for himself." 14 Am. & Eng. Enc. Law, 2d ed. p. 120. The principle upon which the rule is based is sanctioned in cases cited in the opinion filed and the decision herein. It is cited merely as a concise summary of the law applicable to the Bostwick policy. Such evidence is, in my opinion, sufficient to sustain the judgment. The mere fact that the trial court did not specifically find upon the subject is no good ground for refusing to affirm the judgment so far as it relates to that policy. *Wilkinson v. Wilkinson*, 59 Wis. 560, 18 N. W. 527, and cases there cited. *Jones v. Jones*, 71 Wis. 520, 38 N. W. 88; *Deitz v. Neenah*, 91 Wis. 425, 426, 64 N. W. 299, 65 N. W. 500; *Williamson v. Neeves*, 94 Wis. 666, 69 N. W. 806; *Disch v. Timm*, 101 Wis. 189, 77 N. W. 196; *Re Callahan*, 102 Wis. 561, 78 N. W. 750.

67 L. R. A.

Paul VOGT, Appt.,

v.

Joe SHIENEBECK, Respt.

(.....Wis.....)

- *1. One who undertakes to accomplish a certain result, by implication agrees to supply all the means necessary thereto.
2. Courts take judicial notice that, where one agrees to sell to another property "f. o. b. cars" at the place of shipment, such term means that the seller will, without expense or act of the buyer, deliver to the latter the subject of the sale on cars at such place.
3. The term "f. o. b. cars," in mercantile contracts, means free on board cars, and so plainly as not to admit of explanation or change by reference to extrinsic evidence or circumstances. It prima facie means, also, when used as regards the seller, that he will procure the cars for use in executing the contract; and such ordinary meaning cannot be changed without clear and satisfactory evidence of a custom to the contrary, known to both parties to the transaction at the making of the contract.
4. When a contract has been reduced to writing, evidence of what occurred between the parties in respect thereto at the time thereof or prior thereto is inadmissible.
5. The rule that where a written contract is made as a mere part execution of an entire verbal contract, that portion not embodied in the paper may be shown by parol, applies only where such portion is in itself a distinct, complete contract, not to mere stipulations in regard to and varying the terms of the written contract.
6. In an action to recover damages for the breach of an executory contract to sell and deliver goods, the general rule is that the difference between the market value thereof at the time and place of delivery, and the contract price, with interest from the time of the breach, is the true measure.
7. The basis of such rule is that the buyer at the time of the breach presumably could have supplied himself with the goods at the time and place agreed upon for the delivery; and where such is not the case the rule does not apply, but the matter is governed by the broad principle that recoverable damages in such circumstances are "such as may fairly and reasonably be considered as either arising naturally, i. e., according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time

*Headnotes by MARSHALL, J.

NOTE.—As to effect of contract to ship goods f. o. b. see also *Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co.* 62 L. R. A. 795, and note; and a recent case in the circuit court of the United States for the northern district of Illinois, holding that the obligation to deliver coal f. o. b. did not require the seller to furnish cars. *Evanston Elevator & Coal Co. v. Castner*, 133 Fed. 409.

they made the contract, as the probable result of the breach of it."

8. When the general rule of damages does not apply as above stated, and there was a market value for such property at the time agreed upon for the delivery, at the point to which the property was to be consigned, the difference between the contract price and such value, less any expense which the buyer, if the contract had been performed, would have been put to in delivering the goods at such place, with interest on the residue at the legal rate, from the date of the breach, is the proper measure of damages.

(September 27, 1904.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Ashland County in favor of defendant in an action brought to recover damages for a breach of contract for sale of lumber. *Reversed.*

Statement by **Marshall, J.:**

Action to recover damages for breach of contract for the sale of lumber. The complaint was to the effect that defendant contracted to sell plaintiff 100,000 feet of 1-inch pine lumber then owned by the former and piled at Stadler's mill, near the village of Butternut, Wisconsin, at \$8 per thousand feet for the culls, and \$15 per thousand feet for common or better, delivery to be made to the plaintiff free on board cars at Butternut upon demand by him within two months from November 15, 1902, and the customary inspection fees to be paid one half by each party: that defendant breached such contract by refusing to deliver the lumber when the same was duly demanded, or at all, to the plaintiff's damage in the sum of \$1,500.

The defendant, for answer to the complaint, denied all the allegations thereof, and alleged the making of a contract substantially as stated in the complaint, except that it was agreed, as part of such contract, that the cars for use in delivering the lumber to the plaintiff were to be furnished by him, the lumber to be delivered only upon his demand within two months after November 15, 1902; that he would furnish the inspector to examine, grade, and measure the lumber, the expenses to be paid equally by the parties; and that plaintiff did not within the time specified, or before the commencement of the action, demand the lumber or furnish cars for use in delivering the same, or furnish or offer to furnish the inspector; that, on the contrary, he at all times neglected to make any demand for the lumber, and refused to accept the same.

The evidence showed that the contract was in writing and as follows:

Received of Paul Vagt of Milwaukee, Wis., Five (5) Dollars on account of sale 67 L. R. A.

to him by me, made this 15th day of November, 1902, of 100,000 feet more or less of pine one-inch lumber at Eight Dollars per 1,000 feet cull & Fifteen Dollars per 1,000 feet common or better now at Stadler's Mill, f. o. b. cars Butternut, Wis., to be delivered upon demand within two months from above date. Inspection fees paid by both of us.

Dated at Butternut, Wis., Novbr. 15th, 1902. Josef Shienebeck.

Evidence was allowed, against objections by plaintiff's counsel, in effect that at the time such contract was made plaintiff verbally agreed to furnish the cars for use in delivering the lumber; also as to what the custom was between buyer and seller in regard to such matters. The court instructed the jury, in substance, that the burden of proof was on plaintiff to establish by a fair preponderance of the evidence that defendant agreed to furnish the cars, and that, if the jury were satisfied that he did so agree, plaintiff was entitled to recover; otherwise defendant was so entitled, and to the extent of the difference between the contract price for the lumber and the value at the time and place the same should have been delivered as agreed, if there were lumber, purchasable, of the quality and quantity contracted for at such time and place; otherwise the difference between such contract price and the value at such time at Milwaukee, less half the reasonable fees for the services of an inspector and what it would have cost to transport the lumber from the agreed delivery point to Milwaukee. The court required the jury to find whether "f. o. b.," as used in the contract, meant free on board cars, instructing them that if such were the case it was defendant's duty to furnish the cars unless there was an agreement to the contrary. The court further instructed the jury that plaintiff, in order to recover, must prove by a fair preponderance of the evidence that the words "f. o. b. cars," as used, meant that the defendant would furnish the cars for the shipment of the lumber.

At the close of the evidence defendant's counsel moved the court for a verdict, which was refused. The verdict was in favor of the defendant, and judgment was entered thereon, from which this appeal was taken, questions being duly saved for review discussed in the opinion.

Messrs. Bohmrich & Williams, for appellant:

One who undertakes to accomplish a certain result, by necessary implication agrees to supply all means necessary to such result.

John O'Brien Lumber Co. v. Wilkinson, 117 Wis. 408, 94 N. W. 337.

The clear weight and preponderance of the evidence establishing that the defendant did not deliver the lumber f. o. b. cars Butternut, there was no warrant for submitting the case to the jury on the question of whether or not the defendant was guilty of breach.

Hubbard v. McLean (Wis.) 99 N. W. 466; *Flaherty v. Harrison*, 98 Wis. 559, 74 N. W. 360; *Finkelston v. Chicago, M. & St. P. R. Co.* 94 Wis. 270, 68 N. W. 1005; *Lewis v. Prien*, 98 Wis. 87, 73 N. W. 654.

Messrs. Salter & Holland, for respondent:

The agreement between plaintiff and defendant provided that the lumber was to be delivered on demand. A demand was therefore necessary.

Tiffany, Sales, p. 186: *Posey v. Scalca*, 55 Ind. 282; *Rhyner v. Carver*, 84 Wis. 181, 53 N. W. 849.

There was an issue for the jury on the question as to whether or not the plaintiff or the defendant was to furnish the cars for shipment of the lumber.

Boyington v. Sweeney, 77 Wis. 55, 45 N. W. 938; 27 Am. & Eng. Enc. Law, p. 862.

Marshall, J., delivered the opinion of the court:

The motion for a verdict in appellant's favor was based on the assumption that from the contract or evidence, or both, it conclusively appeared that it was respondent's duty to furnish the cars. The trial court's view, as indicated in the statement, was that prima facie the contract requiring respondent to deliver the logs f. o. b. cars at the point where the transit by rail was to commence burdened appellant with the duty of furnishing the cars. So the jury were instructed: "The plaintiff must prove by a fair preponderance of evidence that the words 'f. o. b. cars,' as used in this case, mean that the defendant is required to furnish the cars for the shipment of the lumber in question." That is consistent only with this broad proposition being correct: As between buyer and seller of property to be conveyed by a common carrier, the seller having agreed to deliver the subject of sale to the buyer "f. o. b. cars" at the place where the transit is to begin, the implication of law or of fact is that the latter is to furnish the cars in place ready for loading. Doubtless the learned circuit court was guided by *Boyington v. Sweeney*, 77 Wis. 55, 45 N. W. 938, where, as regards a contract, the same in effect as the one before us, requiring the seller of logs to deliver the same on board cars for shipment, though

the set phrase "f. o. b. cars" was not used, it was said:

"The duty of the defendant in regard to the delivery of the logs under the contract ended when they were placed on the cars. By the terms of the contract the plaintiffs were to receive them on the cars, and then the absolute title passed to them. The defendant was in no way bound to pay for the use of the cars on which they were to be loaded, or to pay for their transportation after they were placed on the cars. The plain inference to be derived from the contract is that the plaintiffs were to furnish the cars to receive and transport the logs to their destination."

No authority is cited to the proposition. Reference in the opinion to the attitude of counsel in respect to the matter and the printed argument indicates that the point was not contested in such a manner as to stimulate a very careful consideration of a doubtful question. The proposition seems contrary to universal understanding, and ought to be deemed a matter of judicial cognizance without the aid of evidence or adjudged cases. We apprehend that when one buys merchandise of another to be shipped to him by rail from a distant point, the delivery to be made to him f. o. b. cars at the point of starting, such other, as a matter of course, is expected to obtain from the railway company the necessary cars upon which to load the subject of the deal. Yet the doctrine of the *Boyington Case* is not wholly without support. *Kunkle v. Mitchell*, 56 Pa. 100; *Dwight v. Eckert*, 117 Pa. 508, 12 Atl. 32; *Hocking v. Hamilton*, 158 Pa. 107, 27 Atl. 836. However, this court, in the recent case of *John O'Brien Lumber Co. v. Wilkinson*, 117 Wis. 468, 94 N. W. 337, expressly repudiated such doctrine, holding that a seller, in the circumstances stated, impliedly agrees to obtain the cars, and not hold the buyer to any obligation till the goods are loaded thereon. So far as *Boyington v. Sweeney* is to the contrary, it was, in effect, though not in express terms, there overruled. This language was used by Mr. Justice Dodge, speaking for the court:

"The general rule is that one who undertakes to accomplish a certain result, by necessary implication agrees to supply all means necessary to such result. . . . Under this general rule, it would seem pretty obvious that one undertaking to load logs upon railroad cars ordinarily assumes the duty of obtaining the cars on which to load the logs, as much as any other implements with which to do the work. Both are alike in the open market, as much at the command of one as another, and the obtaining

of each is equally essential to the accomplishment of the result."

"For the reasons stated, we cannot avoid the conclusion that the written contracts, upon their face, by necessary implication imposed on appellants the duty of obtaining the cars upon which they had agreed to load the logs."

That is supported by authorities generally holding that a sale f. o. b. cars means that the subject of the sale is to be placed on cars for shipment without any expense or act on the part of the buyer, and that as soon as so placed the title is to pass absolutely to the buyer, and the property be wholly at his risk, in the absence of any circumstances indicating a retention of such control by the seller as security for purchase money, by preserving the right of stoppage *in transitu*. *A. J. Neimeyer Lumber Co. v. Burlington & M. River R. Co.* 54 Neb. 321, 40 L. R. A. 534, 74 N. W. 670; *Condon v. Kendall*, 53 Neb. 282, 73 N. W. 659; *Capehart v. Furman Farm Improv. Co.* 103 Ala. 671, 40 Am. St. Rep. 60, 16 So. 627; *Sheffield Furnace Co. v. Hull Coal & Coke Co.* 101 Ala. 446, 14 So. 672; *Knapp Electrical Works v. New York Insulated Wire Co.* 157 Ill. 456, 42 N. E. 147; *Silberman v. Clark*, 90 N. Y. 522; *Ex parte Rosevear China Clay Co. L. R.* 11 Ch. Div. 560; *Miller v. Seaman*, 176 Pa. 291, 35 Atl. 134; Benjamin, Sales, 6th ed. 682; 1 Mechem, Sales, § 741, note: 4 Elliott, Railroads, § 1425. All of such authorities declare that a sale "f. o. b. cars" so plainly indicates that the seller, without expense to the buyer, is to deliver the subject of the sale on cars ready to be taken out by the carrier that the term is not open to construction. Some hold that evidence is admissible to show that the letters "f. o. b." as used in mercantile contracts stands for the words "free on board;" but, generally speaking, it is held that the courts will take judicial notice that such is the meaning, and that the import of the words is too plain to call for or permit judicial construction. It may be that such meaning would only *prima facie* include procurement by the seller of the carrier of cars, in place, ready for loading, and that a general custom, so well established as to become a part of the contract, might vary such *prima facie* meaning. But the burden would necessarily be upon the seller to establish such custom. It follows that the instruction under consideration is erroneous, and that, so far as such error led to the decision against appellant on the motion for a verdict, such decision is erroneous.

There was evidence on the part of the defendant to the effect that at the time of the verbal agreement preceding the making of the written contract, plaintiff said he

would furnish the cars. The learned trial court denied the motion for judgment, assuming that such evidence raised a question for the jury. That is plain, because he expressly referred to such evidence in submitting the cause as to whether the plaintiff did or did not agree to furnish the cars. In that it seems the rule, that a written contract cannot be varied by parol evidence of what was said between the parties prior to or at the time of the making of the writing, was overlooked. The final result of all negotiation eventuating in the making of a contract which is reduced to writing, in the absence of reliable fraud or mistake, is conclusively presumed to be embodied therein, unless the writing appears clearly to be merely a part execution of an entire verbal contract, which is not the case in the instance before us. Here was the ordinary occurrence of closing contractual negotiations by reducing the consequent verbal agreement to writing. If, in doing so, anything was left out, the party prejudiced is without remedy upon the contract except to appeal to equity for its reformation and the enforcement thereof as corrected. *John O'Brien Lumber Co. v. Wilkinson*, 117 Wis. 468, 94 N. W. 337; *Braun v. Wisconsin Rendering Co.* 92 Wis. 245, 66 N. W. 196; *Herbst v. Lowe*, 65 Wis. 316, 26 N. W. 751. In *Braun v. Wisconsin Rendering Co.* it was said that the exception mentioned, to the exclusion of evidence of what was said or occurred at the time of making a written contract, is never to be so extended as to permit evidence of mere contemporaneous stipulations or conditions, the writing being the agreement reached, and not a mere part performance or incident of it. It follows that the oral testimony as to what plaintiff said respecting who was to furnish the cars, when the contract was made, cannot be regarded as a justification for denying appellant's motion for a verdict.

Whether, in denying the motion, the learned circuit court was in doubt as to whether the term "f. o. b. cars" was ambiguous in that it might or might not mean that the seller was to place the lumber on cars and procure them to be put in place for that purpose, and that such doubt involved a question of fact, is not altogether certain. This language was used in the charge: "The evidence that 'f. o. b.' means free on board cars is not disputed. In deciding this case you must take into consideration the written contract, . . . and you will observe the letters 'f. o. b.' are used therein, and if you find 'f. o. b.' mean free on board cars, it was the duty of the defendant to furnish the cars."

There being no question, as we have seen, but that the meaning of "f. o. b." as used in

the contract is free on board cars, the court erroneously denied the motion for a verdict upon the theory that it was permissible for the jury to find some other meaning.

It does not seem to have occurred to the learned circuit court that "free on board cars" might not so conclusively indicate that the seller was to provide cars in place for him to load the lumber as to preclude evidence of a binding custom to the contrary. Witnesses were erroneously permitted to testify as to the meaning of "f. o. b." when, as we have seen, it is so plain that it was not permissible to explain it by custom or otherwise. The meaning of language used in a contract can only be shown by custom when it is ambiguous. Such evidence is permissible to interpret or explain or aid in that regard, not to contradict or add something not within the reasonable meaning of the language of the contract. Greenl. Ev. 294, 295. In *Sheffield Furnace Co. v. Hull Coal & Coke Co.* 101 Ala. 446, 481, 14 So. 672, and the other case to which we have referred, it is held correctly, as we believe, that the meaning of "f. o. b." and "free on board," as customarily used in mercantile contracts, is so obvious as not to be open to interpretation. Whether such meaning includes, under the circumstances of this case, the duty of the seller to procure the cars in place for his use in loading the merchandise, and that evidence is not permissible to show the existence of a custom which the parties contracted with reference thereto, is not altogether plain, but we are constrained to hold that it is. In any event, the inference from the use of such term could only be changed by clear proof of the existence of a custom, and that the buyer knew thereof at the time of contracting, or that it had existed so long that, presumably, he knew thereof. *Hall v. Storrs*, 7 Wis. 253. There was no such clear evidence here. There was no definite evidence at all in the matter.

The court correctly instructed the jury that plaintiff duly demanded of the defendant shipment of the lumber under the contract. That, in connection with what has heretofore been said, shows there was nothing to submit to the jury as to whether defendant was guilty of an actionable breach of the contract as alleged in the complaint. Therefore the court erred in refusing to take all the questions from the jury except such as related to the damages appellant was entitled to recover.

Complaint is made because the court permitted evidence to go to the jury as to the market value, at the agreed time and place for the delivery, of such lumber as that in question, though there was no evidence that there was a like quantity of such lumber

then and there, or in that vicinity, which could have been purchased. A careful examination of the record satisfies us that error was committed in this respect. Respondent's counsel refers to places where it is said evidence can be found supporting his contention, but we are unable to find it. It is not in the record. On the contrary, the evidence referred to establishes the contention of appellant. The statement is made that lumber like that in question could have been obtained in most any lumber yard in the vicinity of Butternut or along the Central Railroad, referring to the evidence of Mr. Altman, who testified, however, in effect, that no such quantity of lumber of the agreed quality was so obtainable. A like quantity of lumber of better quality could have been so obtained, but none of consequence of the same quality. As the evidence stood when the case was submitted to the jury, it seems that the rule in *Cockburn v. Ashland Lumber Co.* 54 Wis. 619, 12 N. W. 49, governed, as claimed by appellant's counsel. The general rule, as there stated, is: "In actions to recover damages for the breach of an executory contract to sell and deliver goods, . . . the difference between the market price of the goods at the time and place specified in the contract for delivering the same and the contract price is the measure of damages. The basis of this rule is that, on failure of the vendor to deliver, the purchaser may go into the market at the time and place of delivery, and supply himself with the same kind of goods at the market price. Hence, the difference between what he is compelled to pay for the goods, and what they would have cost him had the vendor performed his contract, justly measures the damages which he has sustained by the breach of the contract. But this rule presupposes that the purchasers may go into the market at the agreed time and place of delivery and obtain the goods."

But it is said that, where the basis for the rules does not exist, then some other rule must be applied that will, so far as practicable, satisfy the broad principle that recoverable damages for breach of contract are "such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

Respondent knew at the time the contract in question was made that the subject thereof was to be shipped to appellant at Milwaukee, Wisconsin. He must have apprehended that, if he failed to make the delivery according to agreement, and appel-

lant could not supply himself with the same amount and quality of lumber at or in the vicinity of the delivery point, he would probably suffer damages to the extent of the difference between the market value of such lumber at Milwaukee at the agreed time for delivery, and the contract price, less what it would have cost appellant for inspection fees and freight had the contract been performed, with interest on the principal sum of damages at the legal rate from the time of the breach to the date of the recovery.

That is the rule of damages contended for by appellant's counsel, and is approved.

Some other questions are presented by appellant's counsel, but they are all covered incidentally by the conclusions heretofore reached, or are rendered thereby immaterial, and therefore specific reference thereto and a discussion thereof becomes unnecessary and will be omitted.

The judgment is reversed and the cause remanded for a new trial.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Re BARBER ASPHALT PAVING COMPANY.

BARBER ASPHALT PAVING COMPANY,
Petitioner,
v.

Page MORRIS, District Judge.

(132 Fed. 945.)

- *1. The pendency in a state court of a prior action between the same parties for the same cause furnishes no ground for an abatement or for a stay of proceedings in a subsequent action brought by the same plaintiff in a Federal court, where no conflict arises between the courts over the custody or dominion of specific property. Wherever, however, one of the courts secures by proper process the custody or dominion of specific property which it is one of the objects of the suit in the other court to subject to its judgment or decree, the latter action should not be dismissed, but it should be stayed until the proceedings in the court which first obtained jurisdiction of the property are concluded, or ample time for their termination has elapsed.
2. The jurisdiction of the Federal courts may not be limited or impaired by state legislation which confers exclusive jurisdiction of litigation upon state courts or prescribes exclusive methods of invoking that jurisdiction. Wherever the citizens of a state may secure a trial of their controversies by its courts of general jurisdiction either by original process, or by appeal, or by other proceedings, the citizens of different states may obtain the trial of like controversies between them by some appropriate action in the Federal courts.
3. Section 80 of the charter of Duluth,

*Headnotes by SANBORN, Circuit Judge.

NOTE.—The authority of the appellate courts of the United States to issue to the subordinate courts writs of mandamus, and other necessary writs, in aid of their appellate jurisdiction, is discussed, and the cases given which illustrate when, and under what circumstances, the authority will be exercised, in div. V. of a note to State *ex rel.* Fourth Nat. Bank v. Johnson, 51 L. R. A. 33, 67 L. R. A.

which provides for appeals from the allowance or rejection of claims against that city to the district court of St. Louis county, Minnesota, and prohibits the payment of such claims while such appeals are there pending, does not restrict the jurisdiction of the Federal courts over claims of citizens of other states, or the power of those courts to enforce their judgments upon such claims; and actions by original process in the Federal courts may be maintained in controversies over such claims without presenting them to the city council.

4. The United States circuit courts of appeals have jurisdiction to issue writs of mandamus in the exercise of, and in aid of, their appellate jurisdiction.
5. The test of appellate jurisdiction in the exercise and aid of which the courts of appeals may issue writs of mandamus is the existence of that jurisdiction, not its prior invocation. It is the existence of a right to review by a challenge of the final decisions or otherwise in the cases or proceedings to which the applications for the writs relate, and not the prior exercise of that right by appeal or by writ of error.
6. Appeals from the allowance by the city council of Duluth of the claims of a citizen of the state of West Virginia were taken by the city to the district court of St. Louis county, Minnesota, and the charter of the city prohibited its officers from paying the claims pending the appeals, except upon the order of that court. Thereupon the petitioner sued the city upon its claims in the Federal court. The judge who was holding that court stayed all proceedings in the case pending in it until the final determination of the appeals in the state court. *Held*, this was error, remediless otherwise than by the writ of mandamus. The court of appeals has jurisdiction to issue its writ of mandamus, and to command the judge holding the circuit court to vacate the stay, and to proceed with all convenient speed to try and adjudicate the controversy and to enforce the judgment upon it. Writ accordingly issued.

(October 24, 1904.)

PETITION for a writ of mandamus to compel defendant to proceed with the trial of an action. *Granted.*

Statement by **Sanborn**, Circuit Judge:

The Barber Asphalt Paving Company, a corporation of the state of West Virginia, presents its petition to this court for a writ of mandamus to induce the Honorable Page Morris, District Judge holding the circuit court for the district of Minnesota, to proceed to the trial and determination of an action at law against the city of Duluth which the petitioner commenced in that court on May 31, 1904. In response to the order to show cause why the mandamus should not be issued the respondent has filed an answer, and by the petition and answer these facts are admitted: In May, 1902, the Barber company entered into a contract with the city of Duluth to pave one of its streets for the sum of \$54,760. Section 80 of the charter of that city provides that the city attorney may, and upon the request of seven taxpayers he must, appeal from the allowance by its common council of any claim exceeding \$25, except the claims of employees or officers for wages or salary, to the district court of St. Louis county, which shall thereupon have jurisdiction of the parties and of the subject-matter, and that thereafter no order shall be issued for the payment of any part of the claim thus challenged until a certified copy of the judgment of the district court is filed with the city clerk. The Barber company paved the street. On August 3, 1903, the mayor and common council of the city ordered the payment to that company of \$25,500 on account of labor and material furnished by it under its contract, and the city attorney, at the request of seven taxpayers, appealed from this allowance to the district court of St. Louis county, where this appeal is pending. On October 8, 1903, the mayor and council of the city allowed and ordered the payment to the Barber company of \$8,180 on the same account, and at the request of the same taxpayers the city attorney appealed from this allowance to the same court, where this appeal is also pending. The city charter provides that these appeals shall be placed upon the calendar of the court for trial, that the court may require pleadings, that issues of law shall be summarily heard, and that issues of fact shall be tried as other issues of that character are heard in that court. Orders for pleadings and trials have been made in these appeals, but the Barber company appeared specially in both and challenged the jurisdiction of the court, and in one failed to plead farther when its objections were overruled. In May, 1903, before the allowance of these appeals, certain taxpayers of the city of Duluth, some of whom subsequently instigated these appeals, brought a suit against that city and the

Barber company in the district court of St. Louis county to enjoin the city from paying anything to the petitioner on account of the work and material furnished by it under its contract. That suit was tried upon its merits, and in May, 1904, that court decided that the complainants were entitled to no relief, but stated in a memorandum filed with the decision that, if they had been diligent, they would have been entitled to an injunction, since, in the opinion of the court, the contract was invalid because there was not a sufficient amount in the permanent revolving fund at the time it was let to warrant its existence. In this state of the case the petitioner brought an action in the United States circuit court for the district of Minnesota against the city of Duluth on May 31, 1904, for the sum of \$38,316.14, which it alleged was due to it under its contract, and a portion of which had been allowed by the city council and was challenged by the appeals. The city moved the court to stay all proceedings in that action until the trial and final determination of the proceedings pending in the state court, and on July 26, 1904, Judge Morris made an order of the court that all proceedings in that action should be stayed until the final determination of the two appeals pending in the district court of St. Louis county.

Argued before **Sanborn**, **Van Devanter**, and **Hook**, Circuit Judges.

Messrs. Jared How and **Carl Taylor**, for petitioner:

Mandamus will lie to command an inferior court of the United States to hear and determine an action properly brought before it when it erroneously refuses to do so.

Ex parte Bradstreet, 7 Pet. 647, 8 L. ed. 815; *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 8 L. ed. 949; *Life & Fire Ins. Co. v. Adams*, 9 Pet. 571, 9 L. ed. 233; *Kendall v. United States*, 12 Pet. 622, 9 L. ed. 1220; *Ex parte Roberts*, 15 Wall. 384, 21 L. ed. 131; *Ex parte United States*, 16 Wall. 699, 21 L. ed. 507; *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 21 L. ed. 493; *Chicago & A. R. Co. v. Wiswall*, 23 Wall. 507, 23 L. ed. 103; *Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Harrington v. Holler*, 111 U. S. 796, 28 L. ed. 602, 4 Sup. Ct. Rep. 697; *Ex parte Morgan*, 114 U. S. 174, 29 L. ed. 135, 5 Sup. Ct. Rep. 825; *Ex parte Brown*, 116 U. S. 401, 29 L. ed. 676, 6 Sup. Ct. Rep. 387; *Ex parte Parker*, 120 U. S. 737, 30 L. ed. 818, 7 Sup. Ct. Rep. 767; *Re Parker*, 131 U. S. 221, 33 L. ed. 123, 9 Sup. Ct. Rep. 708; *Re Hohorst*, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221; *Re Atlantic City R. Co.* 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208; *Re Grossmayer*,

177 U. S. 48, 44 L. ed. 665, 20 Sup. Ct. Rep. 535; *United States ex rel. Iron County v. Severens*, 18 C. C. A. 314, 37 U. S. App. 622, 71 Fed. 768; *Kimberlin v. Commission to Five Civilized Tribes*, 44 C. C. A. 109, 104 Fed. 653; *Minnesota Moline Plow Co. v. Dowagiac Mfg. Co.* 61 C. C. A. 352, 126 Fed. 746.

The United States circuit court of appeals has jurisdiction to issue a writ of mandamus to compel an inferior court to try and determine an action pending before the circuit court, of which it has appellate jurisdiction.

Kendall v. United States, 12 Pet. 622, 9 L. ed. 1220; *Bath County v. Amy*, 13 Wall. 248, 20 L. ed. 541; *Marbury v. Madison*, 1 Cranch, 175, 2 L. ed. 72; *Ex parte Crane*, 5 Pet. 190, 8 L. ed. 92; *Re Green*, 141 U. S. 325, 35 L. ed. 765, 12 Sup. Ct. Rep. 11; *Ex parte Hoyt*, 13 Pet. 290, 10 L. ed. 167; *Virginia v. Rives (Ex parte Virginia)* 100 U. S. 327, 25 L. ed. 672; *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 21 L. ed. 493.

The petitioner is entitled, as a matter of right, to have its action in the circuit court tried in the ordinary course, without regard to the pendency of the proceedings in the state court.

Stanton v. Embrey, 93 U. S. 548, 23 L. ed. 983; *Gordon v. Gilfoil*, 99 U. S. 169, 25 L. ed. 383; *Merritt v. American Steel-Barge Co.* 24 C. C. A. 530, 49 U. S. App. 85, 79 Fed. 228; *Zimmerman v. So Relle*, 25 C. C. A. 518, 49 U. S. App. 387, 80 Fed. 417; *Green v. Underwood*, 30 C. C. A. 162, 57 U. S. App. 535, 86 Fed. 427; *Ogden City v. Weaver*, 47 C. C. A. 485, 108 Fed. 568; *Baltimore & O. R. Co. v. Wabash R. Co.* 57 C. C. A. 322, 119 Fed. 678; *Defiance Water Co. v. Defiance*, 100 Fed. 178.

A state cannot tie up a citizen of another state having property rights within its territory to suits for redress in its own courts.

Cowles v. Mercer County, 7 Wall. 118, 19 L. ed. 86; *Lincoln County v. Luning*, 133 U. S. 529, 33 L. ed. 766, 10 Sup. Ct. Rep. 363; *Chicot County v. Sherwood*, 148 U. S. 529, 37 L. ed. 546, 13 Sup. Ct. Rep. 695; *Edwards v. Hill*, 8 C. C. A. 233, 19 U. S. App. 493, 59 Fed. 723; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 391, 38 L. ed. 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

Mr. Bert Fesler, for respondent:

A writ of mandamus cannot be issued by the circuit court of appeals to command the circuit court to do an act, the doing of which cannot be reviewed on appeal or writ of error.

United States ex rel. Harless v. United States Ct. App. Judges, 29 C. C. A. 78, 56 U. S. App. 33, 85 Fed. 177; *United States ex rel. Iron County v. Severens*, 18 C. C. A. 67 L. R. A.

314, 37 U. S. App. 622, 71 Fed. 768; *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758; *Re Rice*, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149; *Ex parte Whitney*, 13 Pet. 404, 10 L. ed. 221; *People ex rel. McClelland v. Dowling*, 55 Barb. 197; *Ex parte Ostrander*, 1 Denio, 679.

The writ of mandamus, in the nature of a procedendo, should never issue unless the lower court has come to a full stop, or is perseveringly and arbitrarily delaying the final judgment.

Life & Fire Ins. Co. v. Adams, 9 Pet. 571, 9 L. ed. 233; *Re Parker*, 131 U. S. 221, 33 L. ed. 123, 9 Sup. Ct. Rep. 708; *Ex parte Parker*, 120 U. S. 737, 30 L. ed. 818, 7 Sup. Ct. Rep. 767; *Ex parte Brown*, 116 U. S. 401, 29 L. ed. 676, 6 Sup. Ct. Rep. 387; *Re Hohorst*, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221; *Livingston v. Dorgenois*, 7 Cranch, 577, 3 L. ed. 444; *Lewis v. Baltimore & L. R. Co.* 10 C. C. A. 446, 8 U. S. App. 645, 62 Fed. 218.

It is never granted in anticipation of an omission of duty, but only after actual default.

Ex parte Cutting, 94 U. S. 14, 24 L. ed. 49; *Ex parte Perry*, 102 U. S. 183, 26 L. ed. 43; *Ex parte Whitney*, 13 Pet. 404, 10 L. ed. 221; *Kimberlin v. Commission to Five Civilized Tribes*, 44 C. C. A. 109, 104 Fed. 653.

No question of jurisdiction of the court of appeals over the action is involved. The exercise of such jurisdiction may have been delayed, but it has not been denied.

Minnesota Moline Plow Co. v. Dowagiac Mfg. Co. 61 C. C. A. 352, 126 Fed. 746; *United States ex rel. Harless v. United States Ct. App. Judges*, 29 C. C. A. 78, 56 U. S. App. 33, 85 Fed. 177; *Kimberlin v. Commission to Five Civilized Tribes*, 44 C. C. A. 109, 104 Fed. 653.

In a case of doubtful right, the writ of mandamus will not issue.

Life & Fire Ins. Co. v. Wilson, 8 Pet. 291, 8 L. ed. 949; *Ex parte Davenport*, 6 Pet. 661, 8 L. ed. 537; *Ex parte Cutting*, 94 U. S. 14, 24 L. ed. 49; *Barrow v. Hill*, 13 How. 54, 14 L. ed. 48.

The writ of mandamus will not issue to compel the circuit court to reverse or revise its decision.

Ex parte Bradstreet, 8 Pet. 588, 8 L. ed. 1054; *Ex parte Hoyt*, 13 Pet. 279, 10 L. ed. 161; *Ex parte Whitney*, 13 Pet. 404, 10 L. ed. 221; *Ex parte De Groot*, 6 Wall. 497, 18 L. ed. 887; *Ex parte Newman*, 14 Wall. 152, 20 L. ed. 877; *Ex parte Taylor*, 14 How. 3, 14 L. ed. 302; *Ex parte Many*, 14 How. 24, 14 L. ed. 311; *Ex parte Flippin*, 94 U. S. 348, 24 L. ed. 194; *Ex parte Schwab*, 98 U. S. 240, 25 L. ed. 105; *Ex parte Denver & R.*

G. R. Co. 101 U. S. 711, 25 L. ed. 872; *Ex parte Perry*, 102 U. S. 183, 26 L. ed. 43; *Ex parte Burtis* (*New York & W. S. S. Co. v. Mount*) 103 U. S. 238, 26 L. ed. 351; *Ex parte Des Moines & M. R. Co.* 103 U. S. 794, 26 L. ed. 461; *Ex parte Hoard*, 105 U. S. 578, 26 L. ed. 1176; *Ex parte Baltimore & O. R. Co.* 108 U. S. 566, 27 L. ed. 812, 2 Sup. Ct. Rep. 876; *Re Burdett*, 127 U. S. 771, 3 L. ed. 321, 8 Sup. Ct. Rep. 1394; *Re Morrison* (*Morrison v. District Court*) 147 U. S. 14, 37 L. ed. 60, 13 Sup. Ct. Rep. 246.

Mandamus will not lie to control the conduct of a judge in proceedings which take place before the trial.

Ex parte Bradstreet, 8 Pet. 588, 8 L. ed. 1054.

Nor to compel a judge to proceed according to certain rules of practice which have already been established for his court by the appellate court.

Ex parte Whitney, 13 Pet. 404, 10 L. ed. 221.

The circuit court should not proceed with the trial of this action until the final determination of the appeals from the estimates pending in the state court.

Baltimore & O. R. Co. v. Wabash R. Co. 57 C. C. A. 322, 119 Fed. 678; *Ball v. Tompkins*, 41 Fed. 486.

Sanborn, Circuit Judge, delivered the opinion of the court:

The order which the petitioner challenges stays its action in the circuit court of the United States until the questions which that action presents shall have been finally determined by the courts of the state. That order is not reviewable by writ of error or by appeal, and the Barber company applies to this court for its writ of mandamus to direct the judge holding the court below to proceed to the trial of its case.

The plaint of the petitioner is that, by the order of the court below, it is practically prohibited from a trial and decision by the national courts of a controversy over \$38,316.14 between citizens of different states, which is pending in that court, and which involves nothing but the question of the existence and the amount of a simple contract debt. It is unnecessary to the determination of the issues now presented to consider or decide whether or not the district court of St. Louis county had acquired, by means of the appeals, jurisdiction of the subject-matter and of the parties to the action in the Federal court when that court ordered all proceedings in the action before it stayed until the final determination of those appeals. If the state court had not acquired such jurisdiction, there was no reason for staying the cause in the Federal court. If it had acquired juris-

diction, the order practically prohibits the trial of the controversy in the national courts, and remits its decision to the courts of the state, and the only reason urged in support of it is that the same controversy was pending in the district court of the state, that that court had jurisdiction of the subject-matter and of the parties, and that by the charter of the city its officers were forbidden to pay the claim of the petitioner until that court should so direct. It will accordingly be conceded—but it is not decided—that the district court of St. Louis county had acquired jurisdiction by means of the appeals of the parties to the action in the Federal court, and of the controversy there presented when that action was commenced, and before the order which enjoined its progress was made. It is also conceded for the purposes of this decision, although that question is not decided, that the petitioner might have removed the appeals to the Federal court, and that the question here presented stands as though the Barber company had first brought actions to collect its debt in the state court, and had afterwards brought one in the Federal court to enforce the same obligation.

The question, then, is, Would the pendency of such actions be, or was the pendency of the appeals, a sound reason for prohibiting the trial of the controversy between the petitioner and the city in the Federal court until the state courts had finally decided the questions which it involves? The general rule upon this subject has been so clearly announced and so often affirmed by the supreme court and by this court that it is no longer open to debate or consideration. It is that the pendency in a state court of an action brought by the plaintiff in a subsequent action between the same parties in the Federal court, and which involves the same subject-matter, presents no bar and furnishes no ground for the abatement of the later action. *Stanton v. Embrey*, 93 U. S. 548, 554, 23 L. ed. 983, 984; *Standley v. Roberts*, 8 C. C. A. 305, 314, 19 U. S. App. 407, 59 Fed. 836, 844; *Merritt v. American Steel-Barge Co.* 24 C. C. A. 530, 535, 49 U. S. App. 85, 79 Fed. 228, 233; *Green v. Underwood*, 30 C. C. A. 162, 164, 57 U. S. App. 535, 86 Fed. 427, 429; *Hughes v. Green*, 28 C. C. A. 537, 539, 56 U. S. App. 56, 84 Fed. 833, 835; *Hubinger v. Central Trust Co.* 36 C. C. A. 494, 496, 94 Fed. 788, 790; *Ogden City v. Weaver*, 47 C. C. A. 485, 490, 108 Fed. 564, 568; *Baltimore & O. R. Co. v. Wabash R. Co.* 57 C. C. A. 322, 324, 119 Fed. 678, 680; *Ball v. Tompkins*, 41 Fed. 486, 490. But where one of the courts has secured possession or dominion of specific property by proper process, the suit in the

co-ordinate jurisdiction to affect the same property should not be dismissed, but before a seizure of the property is made therein it should be stayed until the proceedings in the court which first obtained jurisdiction of the property are concluded, or ample time for their termination has elapsed. *Zimmerman v. So Relle*, 25 C. C. A. 518, 521, 49 U. S. App. 387, 80 Fed. 417, 420; *Gates v. Bucki*, 4 C. C. A. 116, 120, 12 U. S. App. 69, 53 Fed. 961, 965.

The contention of counsel for the respondent is that the action in the Federal court was properly stayed because by the charter of the city of Duluth the petitioner's claim is payable only out of the permanent revolving fund of the city, and the appeals to the state court have the effect to attach this fund, and to enjoin the officers of the city from paying it until the state court so directs. It does not, however, appear that the liability of the city to its contractor is in any way limited to the amounts which may at any time be found in its revolving fund, or that it is anything less than a direct contract liability. *Barber Asphalt Paving Co. v. Denver*, 19 C. C. A. 139, 143, 36 U. S. App. 499, 72 Fed. 336, 340; *Denver v. Barber Asphalt Paving Co.* 27 C. C. A. 677, 49 U. S. App. 633, 83 Fed. 1020; *United States ex rel. Masslich v. Saunders*, 59 C. C. A. 394, 401, 124 Fed. 124, 131. Moreover, it is not true that the appeals place any attachment or fasten any lien upon the revolving fund of the city. If that fund is charged with any lien or trust in favor of the petitioner, it is not by virtue of the appeals or of the suits which they evidence, but by virtue of the existence of the indebtedness of the city which those appeals challenge.

Nor does the provision of the city charter which prohibits the officers of the city from paying the claim of the Barber company pending the appeals without the order of the state court in any way restrict or impair the jurisdiction of the United States circuit court to proceed to the trial of the controversy before it, and to the enforcement of the judgment which it may render. The provisions of § 80 of the charter were not intended to limit or affect the jurisdiction of the Federal court. They furnish a convenient and speedy method of securing the opinion of the state courts of the validity of claims against the city, and, while they provide in terms that, when appeals are taken from the allowance of such claims, they shall be paid only upon the order of the appellate court, they do not exclude original suits or the enforcement of judgments upon them by the usual processes, even in the state courts (*Murphy v. Steele County*, 14 Minn. 67, Gil. 51), much less in the courts of the United States. Nor would

this prohibition of the charter have had the effect to restrict the power of the Federal courts if such had been the intention of the legislature of the state. The jurisdiction of the Federal courts is granted to them by the Constitution and laws of the United States, and no state legislation may impair, restrict, or destroy it. Wherever the citizens of a state may secure a trial and decision of their controversies in its courts either by original suits, by appeals, or by other proceedings, citizens of different states have the right to the determination by the courts of the United States of like controversies between them which involve the requisite amounts; and no state, by conferring exclusive jurisdiction of such controversies upon its own courts, by prescribing exclusive methods of commencing litigation, by prohibiting the payment of claims save upon the order of its own courts or by any other means, may strike down that right or take away the plenary power of the national courts to enforce their lawful adjudications. Act August 13, 1888, 25 Stat. at L. 433, 434, chap. 866, § 1. U. S. Comp. Stat. 1901, p. 508; *Davis v. Gray*, 16 Wall. 203, 221, 21 L. ed. 447, 453; *Ex parte McNeil*, 13 Wall. 236, 20 L. ed. 624; *Cowley v. Northern P. R. Co.* 159 U. S. 569, 583, 40 L. ed. 263, 267, 16 Sup. Ct. Rep. 127; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 157, 25 L. ed. 903, 904; *Gaines v. Fuentes*, 92 U. S. 10, 20, 23 L. ed. 524, 528; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 270, 278, 287, 20 L. ed. 571, 577; *Broderick's Will (Kieley v. McGlynn)* 21 Wall. 503, 520, 22 L. ed. 599, 605; *Gormley v. Clark*, 134 U. S. 338, 348, 33 L. ed. 909, 913, 10 Sup. Ct. Rep. 554; *Darragh v. H. Wetter Mfg. Co.* 23 C. C. A. 609, 616, 49 U. S. App. 1, 78 Fed. 7, 14; *Richardson v. Green*, 9 C. C. A. 565, 571, 578, 15 U. S. App. 488, 61 Fed. 423, 429, 435; *National Surety Co. v. State Bank*, 61 L. R. A. 394, 56 C. C. A. 657, 120 Fed. 593; *Sawyer v. White*, 58 C. C. A. 587, 591, 122 Fed. 223, 227. The provision of the city charter that, after the claims of the petitioner were challenged by appeals to the state court, they should never be paid by the officers of the city without the order of that court, was ineffective to deprive the court below of the power in a proper case before it to order those claims to be paid, or to relieve the officers of the city from the duty to obey such an order. *Cowles v. Mercer County*, 7 Wall. 118, 119, 19 L. ed. 86; *Chicot County v. Sherwood*, 148 U. S. 529, 533, 534, 37 L. ed. 546, 548, 13 Sup. Ct. Rep. 695; *Thompson v. Searcy County*, 6 C. C. A. 674, 680, 12 U. S. App. 618, 57 Fed. 1030, 1037; *Hess v. Reynolds*, 113 U. S. 73, 77, 78, 28 L. ed. 927-929, 5 Sup. Ct. Rep. 377; *Clark v. Bever*, 139 U. S. 96, 103, 35

L. ed. 88, 92, 11 Sup. Ct. Rep. 468; *Union Bank v. Vaiden*, 18 How. 503, 15 L. ed. 472; *Lawrence v. Nelson*, 143 U. S. 215, 36 L. ed. 130, 12 Sup. Ct. Rep. 440; *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; *Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 211, 227, 47 L. ed. 147, 154, 23 Sup. Ct. Rep. 52; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 111, 42 L. ed. 964, 968, 18 Sup. Ct. Rep. 526; *Re Stutsman County*, 88 Fed. 337, 340, 343. Thus the laws of the states relative to the administration and settlement of decedents' estates generally expressly limit the right to establish demands against such estates to proceedings in the probate courts of the states. But a creditor of another state may nevertheless establish his claim in an action against the personal representative of the deceased in the proper Federal court without first presenting it to the probate court. *Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 227, 47 L. ed. 154, 23 Sup. Ct. Rep. 52, and cases there cited.

By the law of their organization, counties in Illinois were exempt from suit elsewhere than in the circuit courts of the county. But a suit by a citizen of another state against such a county in the Federal court was sustained, and Chief Justice Chase said: "The power to contract with citizens of other states implies liability to suit by citizens of other states, and no statute limitation of suability, can defeat a jurisdiction given by the Constitution." *Cowles v. Mercer County*, 7 Wall. 122, 19 L. ed. 87.

The legislature of the state of Arkansas provided that no suit or proceeding against a county in that state should be maintained in any court otherwise than by a presentation of a verified claim to the county court for allowance or rejection, that the defeated party might appeal from the decision of that court to the state court of general jurisdiction, where the case should be tried in the usual course, but that, in the absence of the presentation of a verified claim to the county court, no case against or controversy with a county could arise of which any court, state or Federal, could take cognizance or jurisdiction. Citizens of New York brought an action against a county of the state of Arkansas in the Federal court by original process without presenting any claim to the county court. The Supreme Court sustained the action, and said: "Any other view of the subject would prevent citizens of other states from resorting to the Federal courts for the enforcement of their claims against counties of the state, and limit them to the special mode of relief prescribed by the act of February 27, 1879 [Ark. Stat. 1903, chap. 32, §§ 810-812]. The jurisdiction of the Federal courts is 67 L. R. A.

not to be defeated by such state legislation as this. In *Hyde v. Stone*, 20 How. 170, 175, 15 L. ed. 874, 875, it is said: 'But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. In many cases state laws form a rule of decision for the courts of the United States, and the forms of proceeding in these courts have been assimilated to those of the states, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. *Suydam v. Broadnax*, 14 Pet. 67, 10 L. ed. 357; *Union Bank v. Vaiden*, 18 How. 503, 15 L. ed. 472.' This principle has been steadily adhered to by this court." *Chicot County v. Sherwood*, 148 U. S. 529, 533, 534, 37 L. ed. 546, 548, 13 Sup. Ct. Rep. 695.

These principles and authorities render the following conclusions unavoidable: The petitioner's right of action in the circuit court to recover the debt which it alleges to be due to it from the city was not conditioned by its presentation of its claim to the city council, or by any of the other requirements of the charter of the city of Duluth relative to the method of its enforcement. The action upon it was cognizable by original process in the circuit court of the United States. There was nothing in the charter of the city which deprived that court of the power, or relieved it of the duty, to proceed with all convenient speed to the trial of the controversy between citizens of different states which the petitioner presented to it, to a judgment upon that controversy, and to the enforcement of that judgment by the usual processes of the court. This, then, was the situation when the order which stayed the action in the circuit court until all the questions in it should have been finally determined by the state courts was made. The suit of the taxpayers for an injunction against the payment of the claim of the petitioner had been decided in its favor, and that proceeding constituted no reason to delay the Barber company's collection of its demand. The appeals from the allowance of its claim and the action upon it in the Federal court presented no existing or prospective conflict of jurisdiction between the state court and the Federal court over any specific property. They involved no lien, no attach-

ment, no injunction or prohibition, which could have any effect upon the power of the Federal court to hear and adjudge the controversy before it, and to redress the wrongs of the parties to it. The appeals and the action in the circuit court involved nothing but the single question, How much is the city of Duluth indebted to the Barber Asphalt Paving Company? The case, therefore, fell clearly under the first rule relative to the pendency of actions for the same cause in courts of concurrent jurisdiction, and the appeals present no ground for the abatement of the action in the United States circuit court.

It is, however, earnestly argued that the order of the court below constituted neither a bar nor an abatement of the action before it, but that it was a mere discretionary order staying proceedings for a definite time, and hence not subject to challenge upon an application for a writ of mandamus. The answer is that it stayed proceedings until they would in all probability be futile, until the petitioner would probably be estopped by the final judgments of other courts from any hearing or trial of its controversy upon the merits in the courts of the nation. *Mutual L. Ins. Co. v. Harris*, 97 U. S. 331, 336, 338, 24 L. ed. 959, 962, 963. The reason for the rule that the pendency of an action in a state court is no bar and furnishes no ground for the abatement of another action for the same cause between citizens of different states in the Federal court is that the latter court has concurrent jurisdiction of such controversies with the courts of the state, and that citizens of different states have the constitutional right to the independent opinion and judgment of the judges of the national courts upon the questions presented by their controversies, at least until those questions have become *res judicata* by the judgments of other competent courts. Orders that such citizens shall secure no such opinions until they are conclusively estopped from obtaining them by the final judgments of other courts upon their controversies as effectually deprive them of their rights to adjudications in the national courts as judgments sustaining pleas in bar or in abatement. Nay, they deprive them of those rights more effectually, because such judgments are reviewable by appeal or by writ of error, while such stays may not be so challenged. The power is granted to the judges of the circuit court, and the duty is imposed upon them by the Constitution and the acts of Congress, to form and express their independent opinions upon controversies between citizens of different states over which the jurisdiction of their courts is properly invoked. However grateful to 67 L. R. A.

them and courteous to others it would be in cases of concurrent jurisdiction to await the opinions of the respected and able jurists who adorn the benches of the courts of the states, and then to be bound by their decisions, that power may not be lawfully abdicated, nor may that duty be legally renounced, by the judges of the Federal courts. The order staying the proceedings in the action in the circuit court until the final determination of the appeals in the state courts is violative of these principles, is calculated to deprive the petitioner of its right to the independent decision of the Federal court upon the questions involved in its controversy, and it cannot be sustained.

But it is said that the error may not be corrected by the writ of mandamus, and we turn to the consideration of that question. Section 12 of the act of March 3, 1891, chap. 517, 26 Stat. at L. 829 (U. S. Comp. Stat. 1901, p. 553), provides that "the circuit courts of appeals shall have the power specified in § 716 of the Revised Statutes of the United States." Section 716 (U. S. Comp. Stat. 1901, p. 580), provides that "the Supreme Court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law." Writs of mandamus are among those "not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions" within the meaning of this section. *Bath County v. Amy*, 13 Wall. 244, 249, 20 L. ed. 539, 541; *Kendall v. United States*, 12 Pet. 622, 9 L. ed. 1220. The power to issue writs of mandamus was granted to the Supreme Court by § 688 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 565), but the limit of the power of that court and of this is the same. Each court has jurisdiction to issue the writ to a subordinate court or judge in the exercise of and in aid of its appellate jurisdiction. It is without power to issue it in a case which is not reviewable in that court by appeal or writ of error challenging its final decision, or otherwise, or to issue it to create a case for the exercise of its appellate jurisdiction.

In *United States ex rel. Harless v. United States Ct. App. Judges*, 29 C. C. A. 78, 80, 56 U. S. App. 33, 85 Fed. 177, 179; this court, in discussing the limits of its power to issue this writ, declared that it was without authority to do so unless the right of appeal had been actually exercised, and the case to which the writ related was pending

in this court on appeal or writ of error. It is now insisted by counsel for respondent, upon the authority of that decision, that no writ can issue in this case, because no writ of error is pending to review the action in the court below. The argument is unanswerable if the limits of the jurisdiction of this court were correctly drawn in our former opinion. Expressions of the Supreme Court may be found in the cases cited in that opinion broad enough to sustain the view there taken. In *M'Clung v. Silliman*, 6 Wheat. 598, 600, 5 L. ed. 340, 341, it is said that "the 14th section of the act under consideration [Act September 24, 1789, chap. 20, 1 Stat. at L. 81] (now § 716, Revised Statutes, U. S. Comp. Stat. 1901, p. 580) could only have been intended to vest the power . . . in cases where the jurisdiction already exists, and not where it is to be created or acquired by means of the writ proposed to be sued out." And in *Bath County v. Amy*, 13 Wall. 244, 249, 20 L. ed. 539, 541, the Supreme Court said: "The writ cannot be used to confer a jurisdiction which the circuit court would not have without it. It is authorized only when ancillary to a jurisdiction already acquired." These declarations, however, were made, not only in cases in which no appellate jurisdiction had been actually invoked, but in cases in which the courts to which the applications for the writs of mandamus were made had no appellate jurisdiction which ever could be invoked. The former case arose on an application for a writ of mandamus to compel the register of a land office to issue certain documents to a pre-emptor, and the latter upon an application to compel the officers of a county to levy a tax to pay bonds upon which no suit had ever been commenced.

There is no dissent among courts or lawyers from the proposition that the national courts may issue the writ either in the exercise of, or in aid of, their appellate jurisdiction. The only question here is whether they may issue it in aid of that jurisdiction whenever it exists, or only when it has been actually invoked by a writ of error or by an appeal. This question has now been ably and exhaustively argued by counsel for the respective parties to this application. All the authorities upon it appear to have been called to our attention, and it has again received the thoughtful and deliberate consideration of the court in the light of the numerous decisions which have been cited. It is obvious that the primary reason for the grant to the Federal appellate courts of the dominant power to issue their writs of mandamus to the inferior courts in the exercise of and in aid of their appellate jurisdiction was to enable them

to protect that jurisdiction against possible evasions of it. It is not less evident that the grant must in many, nay, in most, cases, fail to accomplish its chief end if the power to issue the writ can be exercised only after the appellate jurisdiction has been actually invoked by an appeal or by a writ of error. Under the acts of Congress the proceedings in every suit in the circuit court of the United States are now reviewable either in the Supreme Court or in the circuit court of appeals. The moment such a suit is commenced, the appellate jurisdiction over it exists, the power and the right to ultimately review the proceedings in it are vested in one of the appellate courts. But in the great majority of cases it is only by an appeal or by a writ of error which challenges the final decision in the case that any of the proceedings in it may be reviewed. The opportunities for subordinate courts to evade the jurisdiction of the appellate courts, to prevent the exercise of this jurisdiction, and to destroy or make ineffectual the right of the unsuccessful party to review their rulings by failures to settle bills of exceptions, by unreasonable delays, by stays of proceedings, and by direct and indirect refusals to proceed to final judgments and to their enforcement, are far more numerous before the writs of error or the appeals can be taken than they can be thereafter. Few, indeed, are the cases in which appellate jurisdiction is disregarded after the right to it has been actually exercised. But many cases arise in which the acts or orders of the inferior courts, unless corrected by the writ of mandamus, prevent the exercise of appellate jurisdiction and destroy its effect before any final decision which may be challenged by appeal or writ of error has been reached.

Thus, in *Livingston v. Dorgenois*, 7 Cranch, 577, 588, 3 L. ed. 444, 448, an action which was reviewable by the Supreme Court by a writ of error to challenge the final judgment which should be rendered in it, but which had been indefinitely stayed by an order of the court below before judgment was rendered, the plaintiff in error dismissed his ineffective writ of error which had been issued to challenge the stay, and the Supreme Court awarded its writ of mandamus nisi in the nature of a *procedendo*.

In *Ex parte Bradstreet*, 7 Pet. 634, 644, 8 L. ed. 810, 814, the district court, upon whose final judgment upon the merits the cases in question were then reviewable in the Supreme Court, erroneously refused to receive certain evidence essential to establish its jurisdiction, dismissed the actions, and refused to make records of the orders and judgments so that the plaintiffs might

bring the cases before the Supreme Court by writs of error. No writs of error had been procured, no appeals had been taken; yet the Supreme Court issued a writ of mandamus to the district judge, and commanded him to reinstate the cases and to proceed to try and adjudicate them.

In *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 303, 8 L. ed. 949, 953, the district judge refused to sign a final judgment which had been made by his predecessor in office, and without which no appeal or writ of error would lie and no execution could issue. The Supreme Court issued its writ of mandamus, and directed him to sign the judgment, although the appellate jurisdiction of that court had been invoked in no other way than by the motion for the mandamus.

In *Ex parte Roberts*, 15 Wall. 384, 386, 21 L. ed. 131, 132, the court of claims refused to entertain and decide a motion for a new trial under the erroneous impression that an allowance of an appeal which had been revoked had deprived it of jurisdiction, and the Supreme Court commanded it by its writ of mandamus to hear, entertain, and decide the motion.

In *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 270, 21 L. ed. 493, 498, the circuit court erroneously dismissed an appeal from the district court upon the ground that it was without jurisdiction to hear it. The Supreme Court held that a writ of error which had been sued out would not lie to review this judgment of dismissal, but that it had plenary power to issue the writ of mandamus to the court below to require it to reinstate the appeal and to proceed to try and adjudge the issues it presented.

In *Virginia v. Rives* (*Ex parte Virginia*) 100 U. S. 313, 316, 323, 327, 329, 25 L. ed. 667, 668, 671, 673, the circuit court had erroneously taken jurisdiction by removal from the state court of criminal prosecutions and the custody of the accused. The Supreme Court issued its writ of mandamus, and therein directed the judge of the court below to remand the prisoners to the custody of the state officers, although its appellate jurisdiction had been invoked by the application for the writ alone.

In the case of *Re United States*, 194 U. S. 194, 48 L. ed. 931, 24 Sup. Ct. Rep. 629, the district judge had refused to direct the clerk of the district court to file the necessary papers to make a record which would be reviewable by writ of error in the Supreme Court, and that court held that the petitioner was entitled to its writ of mandamus to compel him to do so.

The reasons and decisions to which we have now adverted have impelled our minds with irresistible force to the conclusion that the true test of the appellate jurisdiction in

the exercise or in the aid of which the circuit court of appeals may issue the writ of mandamus is the existence of that jurisdiction, and not its prior invocation; that it is the existence of a right to review by a challenge of the final decisions, or otherwise, of the cases or proceedings to which the applications for the writs relate, and not the prior exercise of that right by appeal or by writ of error; and that the power of those courts to issue the writ is not restricted as was stated in *United States ex rel. Harless v. United States Ct. App. Judges*, 29 C. C. A. 78, 56 U. S. App. 33, 85 Fed. 177, to cases in which their jurisdiction has already been invoked by other proceedings. All the other authorities sustain this rule, those to which reference has already been made where the writ was issued although appellate jurisdiction had not been otherwise successfully invoked, as well as those which are now to be cited, many of which are relied upon by counsel for respondent, and in which the courts to which the applications were made had no present or prospective right to review the cases to which the applications related, and in which the applications for the writs of mandamus were accordingly denied. *Marbury v. Madison*, 1 Cranch, 137, 175, 2 L. ed. 60, 72; *M'Intire v. Wood*, 7 Cranch, 504, 3 L. ed. 420; *Kendall v. United States*, 12 Pet. 524, 9 L. ed. 1181; *Ex parte Hoyt*, 13 Pet. 279, 10 L. ed. 161; *Riggs v. Johnson County* (*United States ex rel. Riggs v. Johnson County*) 6 Wall. 166, 197, 198, 18 L. ed. 768, 776, 777; *Ex parte City Bank*, 3 How. 296, 332, 11 L. ed. 605, 621; *Ex parte Gordon*, 1 Black, 503, 505, 17 L. ed. 134; *Ex parte Perry*, 102 U. S. 183, 26 L. ed. 43; *Re Green*, 141 U. S. 325, 35 L. ed. 765, 12 Sup. Ct. Rep. 11; *United States ex rel. Iron County v. Severens*, 18 C. C. A. 314, 37 U. S. App. 622, 71 Fed. 768. The case under consideration is of the former class. The action in the circuit court to which the application of the petitioner relates is within the appellate jurisdiction of this court. It may be reviewed here by a writ of error to reverse any final judgment that may be rendered in it. The order which stays that action until the final determination by the state courts of the questions it involves prevents both the independent adjudication of those questions by the United States circuit court and the review of that adjudication by this court, and thus destroys, or greatly impairs, the appellate jurisdiction of this court in that case. The very purpose of the grant to this court of the power to issue the writ of mandamus was to enable it to protect and maintain this jurisdiction, and that grant not only conferred the power, but it necessarily imposed upon

this court the duty, to issue its writ of mandamus to impel the court below to proceed with all convenient speed to the trial and adjudication of the controversy between citizens of different states in which its jurisdiction has been invoked to the end that the appellate jurisdiction to this court over its action may be seasonably and effectually exercised.

Finally, it is insisted that the writ of mandamus should not issue in this case because that writ may not be used to compel a subordinate court to reverse or revise its decision of a question properly submitted for its consideration in the progress of a case before it, or to direct it how to decide or by what rules to proceed. *Ex parte Whitney*, 13 Pet. 404, 10 L. ed. 221; *Ex parte Bradstreet*, 8 Pet. 588, 8 L. ed. 1054; *Barrow v. Hill*, 13 How. 54, 14 L. ed. 48. It is undoubtedly the general rule that a court has no power by writ of mandamus to compel a subordinate judicial officer to reverse a conclusion already reached, to correct an erroneous decision, or to direct him in what particular way he shall proceed or shall decide a specified question. But it is equally a part of this general rule that the court always has the power by means of such a writ to compel such an officer to proceed to try and decide a controversy within his jurisdiction, or to perform any other plain duty imposed by law. *Kimberlin v. Commission to Five Civilized Tribes*, 44 C. C. A. 109, 111, 104 Fed. 653, 655; *Minnesota Moline Plow Co. v. Dowagiac Mfg. Co.* 61 C. C. A. 352, 126 Fed. 746. The power to compel such an officer to proceed to the trial and determination of a case which it is his duty to hear and decide necessarily includes within it the power to compel him to reverse and set aside any erroneous decision he may have made to the effect that he will not proceed to such a trial and judgment. *Living-*

ston v. Dorgenois, 7 Cranch, 577, 588, 3 L. ed. 444, 448; *Ex parte Bradstreet*, 7 Pet. 634, 649, 8 L. ed. 810, 816; *Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 303, 8 L. ed. 949, 953; *Ex parte Roberts*, 15 Wall. 384, 386, 21 L. ed. 131, 132; *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 270, 21 L. ed. 493, 498.

The petitioner invoked the jurisdiction of the United States circuit court in an action *in personam* to determine the simple question, debt or no debt, between him and a citizen of another state. Actions for the same cause between the same parties were pending in the state court. It was the duty of the judge who held the circuit court to proceed with convenient speed to try, and by means of the exercise of his own independent judgment to adjudicate, the petitioner's controversy. He stayed all proceedings in the cause before him until that controversy should be finally determined by the courts of the state. This stay deprived the petitioner of its right to the independent judgment of the national courts upon the merits of its action, and destroys the jurisdiction of this court to review the adjudication which may be made upon it in the court below. Against this error the petitioner is remediless save by means of the writ of mandamus of this court. The power is conferred and the duty is imposed upon this court by the acts of Congress to issue the writ and to command the judge holding the circuit court for the district of Minnesota to set aside and vacate the order which stays proceedings in that court in the case of the Barber Asphalt Paving Company against the city of Duluth, and to proceed with all convenient speed to a trial, a judgment, and a just enforcement of the judgment which may be rendered in that action.

Let a writ of mandamus issue accordingly.

ARKANSAS SUPREME COURT.

SUPREME LODGE KNIGHTS OF
PYTHIAS, *Appt.*,

v.

Maria BRADLEY.

(.....Ark.....)

A clause in an insurance policy relieving the insurer from liability in case death is caused by violation of any

criminal law is not applicable where insured was shot while attempting in good faith to escape from a personal difficulty, although he had begun it by assaulting his opponent with a weapon capable of producing great bodily harm, if not death.

(Battle and McCulloch, JJ., dissent.)

(December 10, 1904.)

NOTE.—On the general subject of death caused by crime as affecting liability of insurance company, see also cases in note to *Darrow v. Family Fund Soc.* 6 L. R. A. 495; *Sheanon v. Pacific Mut. L. Ins. Co.* 9 L. R. A. 67 L. R. A.

685, and the later cases in this series of *Wells v. New England Mut. L. Ins. Co.* 53 L. R. A. 327; *Shipman v. Protective Home Circle*, 63 L. R. A. 347; and *Royal Circle v. Achterath*, 63 L. R. A. 452.

A PPEAL by defendant from a judgment of the Circuit Court for Ashley County in favor of plaintiff in an action brought to enforce payment of the amount alleged to be due on a life-insurance policy. *Affirmed.*

Statement by **Hill**, Ch. J.:

In January, 1901, at the entrance of the courthouse in Hamburg, Charles O. Morscheimer shot and killed Charles H. Bradley. The appellee is the widow of Bradley and the beneficiary in a policy for \$1,000 in the appellant order, a fraternal insurance association. The facts, as reflected through the verdict of the jury, were: Ill feeling over a trivial matter existed between Bradley and Morscheimer, at least on Bradley's part. On the morning of the tragedy they came face to face at the north entrance of the courthouse, as Morscheimer was entering, and Bradley leaving, the building. Some words passed, and Bradley struck Morscheimer on the ear with a piece of iron held in his hand. Morscheimer staggered, or stepped back a few paces, drew his pistol, and commenced firing on Bradley. The first shot, or one of the first shots, passed through right breast and came out of the fleshy part of the arm, near the shoulder joint, and was not a fatal wound, and did not cause the death. Immediately upon Morscheimer opening fire, Bradley turned and ran back into the courthouse, and fell into the arms of the sheriff, as he was attempting to enter the sheriff's office, 24 feet south of the entrance where the rencounter began. He had received a fatal wound in the back, entering below the right shoulder blade and ranging diagonally through the body to the left side, and not coming out. He expired almost immediately. Appellee insists from the nature of the wound that it was received just as Bradley was turning into the sheriff's office from the hall in which he was running. Whether that contention is sustained or not, it was evidently received after he turned and fled from the rencounter. The verdict necessarily implies it, and the evidence fairly establishes it. The contract of insurance contained the following clause: "If the death of any member of the Endowment Rank heretofore admitted into the first, second, third, or fourth classes, or hereafter admitted, shall result from suicide, either voluntary or involuntary, whether such member shall be sane or insane at the time, or if such death shall be caused or superinduced by the use of intoxicating liquors, narcotics, or opiates, or in consequence of a duel or at the hands of justice, or in violation, or attempted violation, of any criminal law, then the amount to be paid on such member's certificate shall be a sum only in 67 L. R. A.

proportion to the whole amount as the matured life expectancy is to the entire expectancy at date of admission to the Endowment Rank." The court gave the following instruction: "(4) Even though you believe, from the evidence, that Bradley assaulted Morscheimer and brought on the rencounter between himself and Morscheimer, yet, if you further believe from the evidence that at the time Bradley was killed he had in good faith abandoned the rencounter, and was in good faith retreating to avoid further difficulty with Morscheimer, then he was not, at the time he was killed, violating, or attempting to violate, any criminal law, and your verdict will be for plaintiff for amount sued for." The court refused to give the following instruction asked by appellant: "(5) The jury are instructed that, if they believe from the evidence in this case that C. H. Bradley, on the morning of January 1, 1901, made an assault on Charles Morscheimer with a weapon with which he was capable of inflicting great bodily harm on him, and that, as a result of said assault, said Bradley was killed, it makes no difference whether he was trying to escape, or was continuing the assault when he received the mortal wound, if the assault and the shooting were parts of the same difficulty." The jury rendered a verdict for the plaintiff for \$1,000 and interest, judgment was entered thereupon, appellant saved its exceptions and brought the case here. If the fourth instruction above set out was the law, and the requested fifth instruction not the law, there is no error prejudicial to appellant; otherwise there is.

Mr. Carlos S. Hardy, with *Messrs. Pugh & Wiley*, for appellant:

The clause in the policy should be construed to embrace any act of the insured which might be denominated a crime, and, if his offense was of that character, whether it was a felony or not, and he lost his life in consequence of it, and under circumstances which made the killing justifiable homicide, then a forfeiture ought to be declared.

Brown v. Supreme Lodge K. of P. 83 Mo. App. 633; *Wolff v. Connecticut Mut. L. Ins. Co.* 5 Mo. App. 236; *Cluff v. Mutual Ben. L. Ins. Co.* 99 Mass. 317, 13 Allen, 308; *Bloom v. Franklin L. Ins. Co.* 97 Ind. 478, 49 Am. Rep. 469.

It does not make any difference whether Bradley was retreating or not, if the assault was sufficient reasonably to provoke Morscheimer to shoot, and the shooting was caused wholly by the attack, and was done in the sudden heat of passion aroused by

the assault, and not in a spirit of revenge after the assault was over.

Murray v. New York L. Ins. Co. 96 N. Y. 614, 48 Am. Rep. 658; *Bloom v. Franklin L. Ins. Co.* 97 Ind. 478, 49 Am. Rep. 469; *Neill v. Travellers' Ins. Co.* 31 U. C. C. P. 394; *Hatch v. Mutual L. Ins. Co.* 120 Mass. 550, 21 Am. Rep. 541; *Travellers' Ins. Co. v. Seaver*, 19 Wall. 531, 22 L. ed. 155; *Duran v. Standard Life & Acci. Ins. Co.* 63 Vt. 437, 13 L. R. A. 637, 25 Am. St. Rep. 773, 22 Atl. 530; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Ellkott v. Chicago, M. & St. P. R. Co.* 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. Rep. 1125; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; *Pleasants v. Fant*, 22 Wall. 116, 22 L. ed. 780.

Mr. Robert E. Craig, for appellee:

The tendency of the court is to construe these forfeiture clauses strictly, and hold the insurer to the letter of the contract.

Goetzman v. Connecticut Mut. L. Ins. Co. 3 Hun, 515; *Griffin v. Western Mut. Benev. Asso.* 20 Neb. 620, 57 Am. Rep. 848, 31 N. W. 122; *Harper v. Phoenix Ins. Co.* 19 Mo. 506; *Overton v. St. Louis Mut. L. Ins. Co.* 39 Mo. 122, 90 Am. Dec. 455.

HILL, Ch. J., delivered the opinion of the court:

Is a death received while retreating from a personal difficulty (and not retreating for the purpose of gaining a vantage ground to renew it), where the encounter is begun by an assault by the deceased upon his slayer with a weapon capable of inflicting great bodily harm, or death, according to its use, a death within the meaning of an insurance clause exempting against liability for a death "in violation, or attempted violation, of any criminal law?" Instruction numbered 4 said it was not, and the appellant asked instruction numbered 5, that it be declared within the exemption. The cases on this exact question are not numerous, but they are well considered, and come from courts of high standing. The following authorities sustain the instructions given by the circuit court: *Harper v. Phoenix Ins. Co.* 19 Mo. 506, Reiterated in *Overton v. St. Louis Mut. L. Ins. Co.* 39 Mo. 122, 90 Am. Dec. 455; *Cluff v. Mutual Ben. L. Ins. Co.* 13 Allen, 308, Reaffirmed in the same case in 99 Mass. 318; and *Bradley v. Mutual Ben. L. Ins. Co.* 45 N. Y. 422, 6 Am. Rep. 115. It is insisted that, if there is a causative connection between the assault and the death, then the death is the proximate result of the assault. Such reasoning contains the fallacy that an assault will be

repelled with more than lawful force. Such is often, perhaps usually, the rule, where blood is hot and the strength sufficient or the weapon handy enough. But such is not the result naturally to be expected under the law. An assault calls for a repulsion of it by just such force as necessary to overcome it, and more than that is unlawful, and unlawful consequences are not to be presumed to follow the act. When Bradley attacked Morscheimer with a piece of iron, then Morscheimer was justified in overcoming that attack, and, if necessary to overcome it, to take Bradley's life, and a death resulting while so lawfully resisting the attack would be the natural result expected to flow from such attack, and there would be a causative connection between the assault and the death. In other words, the attack would then be the proximate cause of the death. Cases applying the doctrine of causative connection between an unlawful act and the death, the latter being held to be within the consequences flowing from the unlawful act, are cited. *Bloom v. Franklin L. Ins. Co.* 97 Ind. 478, 49 Am. Rep. 469; *Murray v. New York L. Ins. Co.* 96 N. Y. 614, 48 Am. Rep. 658; and others of kindred nature in appellant's brief. The doctrine of the cases referred to as sustaining this instruction does not impinge upon the established principles announced in those relied upon by appellant. For instance, take the case of a husband killing the paramour of his wife. If caught in the act of adultery, the paramour dies "in violation of law;" if killed subsequently, he dies as the natural result of his unlawful act,—in consequence of it, and a consequence naturally to be expected,—and this is true whether killed an hour or a year after the adultery; and yet it is held, and properly so, that the paramour is not killed "in violation of law," within the meaning of an insurance contract. *Goetzman v. Connecticut Mut. L. Ins. Co.* 3 Hun, 515. There must be a line drawn somewhere between consequences proximately, and those remotely, flowing from an unlawful assault; and the safe place to draw that line is where the law draws the line of lawful resistance to the unlawful assault. In a similar case to this one the court of appeals of New York, through Mr. Justice Rapallo, said: "So long as the evidence falls short of establishing that the homicide was legally justifiable, I can see no safe rule by which the court could be guided in deciding that the provocation proved was the cause of the killing, and in withdrawing that question from the consideration of the jury." *Bradley v. Mutual Ben. L. Ins. Co.* 45 N. Y. 422, 6 Am. Rep. 115. In this case Bradley fled from the conflict and received his death wound in

the back while escaping. Clearly Morscheimer was not legally justified in taking Bradley's life then, and his act in so doing was unlawful. Therefore the first violation of the law by Bradley was not the proximate cause of his death; but the subsequent unlawful act of Morscheimer, in shooting his retreating assailant, was the proximate cause. Therefore the instruction was correct, and *the judgment is affirmed.*

Battle and McCulloch, JJ., dissent.

STATE of Arkansas, Appt.,
v.
W. B. MALLORY.

(.....Ark.....)

A state cannot forbid a nonresident landowner to take fish and game upon his property within the state while according such privilege to resident landowners, in view of the provisions of the Federal Constitution forbidding denial of the equal protection of laws, and the deprivation of property without due process of law.

(Hull, Ch. J., and Battle, J., dissent.)

(December 3, 1904.)

A PPEAL by the State from a judgment of the Circuit Court for Crittenden County in favor of defendant in a prosecution for violating the game laws. *Affirmed.*

The facts are stated in the opinions.

Messrs. George N. Murphy, Attorney General, **S. R. Simpson, Cantrell & Loughborough, H. M. Armistead**, and **George N. Williams** for appellant.

Messrs. Rose, Hemingway, & Rose, T. K. Riddick, and **James P. Clarke**, for appellee:

It is improbable that the legislature intended to forbid anyone to hunt or fish on his own grounds perpetually.

People v. Conrad, 125 Mich. 1, 83 N. W. 1012; *Venning v. Steadman*, 9 Can. S. C. 210; *Murphy v. Ryan*, 1r. Rep. 2, C. L. 143; *Queen v. Robertson*, 6 Can. S. C. 116; *Maney v. State*, 6 Lea, 218; *Aldrich v. Wright*, 53 N. H. 398, 16 Am. Rep. 339; *Com. v. Gilbert*, 160 Mass. 157, 22 L. R. A. 439, 35 N. E. 454.

The right to take fish in waters running by or through one's land, or to hunt on one's

land, is property, though held in subordination to the right of the state to regulate its use.

Re Parrott, 1 Fed. 481; *Strother v. Lucas*, 12 Pet. 436, 9 L. ed. 1147; *Bingham v. Salene*, 15 Or. 208, 3 Am. St. Rep. 153, 14 Pac. 523; 2 Washb. Real Prop. 400, 632; Wood, Stat. Fr. § 6; *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190; *Mantooth v. Burke*, 35 Ark. 547.

Defendant owned the fish in the lake surrounded by his own land as completely as he might own cattle or reclaimed deer which he had placed in a pen.

There is a distinct right of fishing and hunting on one's own lands that has always been recognized as an incorporeal hereditament, and which has always been recognized and protected by the law.

Sterling v. Jackson, 69 Mich. 488, 13 Am. St. Rep. 405, 37 N. W. 845; *Hall v. Alford*, 114 Mich. 165, 38 L. R. A. 205, 72 N. W. 137; *June v. Purcell*, 36 Ohio St. 396; *State v. Shannon*, 36 Ohio St. 423, 38 Am. Rep. 599.

The grant of a right to hunt or fish on one's lands is an interest in the lands, and hence within the statute of frauds.

Wood, Stat. Fr. § 3; *Wood v. Leadbitter*, 13 Mees. & W. 838; *Collins v. Benbury*, 27 N. C. (5 Ired. L.) 118, 42 Am. Dec. 155.

As to non-navigable rivers, the right of fishing to the thread of the stream is exclusively vested in the riparian owner.

Hooker v. Cummings, 20 Johns. 90, 11 Am. Dec. 249; *Com. v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386; *Duncan v. Sylvester*, 24 Me. 482, 41 Am. Dec. 400; *Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 333; *Com. v. Alger*, 7 Cush. 53; *State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199; *Rearoth v. Coon*, 15 R. I. 35, 2 Am. St. Rep. 863, 23 Atl. 37; *Re Ah Chong*, 6 Sawy. 451, 2 Fed. 733.

A man may grant the right of fishing in a pond or stream apart either from the land or the water on it.

Co. Litt. 4b; *Turner v. Hebron*, 61 Conn. 175, 14 L. R. A. 386, 22 Atl. 951; *Cobb v. Davenport*, 32 N. J. L. 369; *Albright v. Cortright*, 64 N. J. L. 330, 48 L. R. A. 616, 81 Am. St. Rep. 504, 45 Atl. 634; *Smith v. Andrews* [1891] 2 Ch. 678, note.

The right to fish in non-navigable waters "is a right which attaches to the ownership of the land as an appurtenance."

Heckman v. Sicett, 99 Cal. 303, 33 Pac.

NOTE.—As to property rights in animals *feræ naturæ*, see also, in this series, *James v. Wood*, 8 L. R. A. 448, and note; *State v. Repp*, 40 L. R. A. 687, with note as to property rights in bees; and *State v. Shaw*, 60 L. R. A. 481, with note as to right to fish.

As to constitutionality of game laws generally, see *Territory v. Evans*, 7 L. R. A. 288; *American Exp. Co. v. People*, 9 L. R. A. 138, 67 L. R. A.

Com. v. Gilbert, 22 L. R. A. 439; *State v. Mrozinski*, 27 L. R. A. 76; *State ex rel. Corcoran v. Chapel*, 32 L. R. A. 131; *People v. O'Neill*, 33 L. R. A. 696; *Haggerty v. St. Louis Ice Mfg. & Storage Co.* 40 L. R. A. 151; *State v. Schuman*, 47 L. R. A. 153; *State v. Snowman*, 50 L. R. A. 544; and *Smith v. State*, 51 L. R. A. 404.

1099; *Brink v. Richtmyer*, 14 Johns. 255; *People v. Platt*, 17 Johns. 195, 8 Am. Dec. 382.

The right over marine fisheries depends solely on the fact that the state owns the land under the sea for the distance of 3 miles from the shore line.

Gould, Waters, § 2; *Miles v. Cedar Point Club*, 29 C. C. A. 5, 54 U. S. App. 668, 85 Fed. 50; *McCready v. Virginia*, 94 U. S. 395, 24 L. ed. 248.

The act is unconstitutional because it discriminates between the citizens of this state by denying to a certain class the equal protection of the law.

Krone v. Cooper, 43 Ark. 547; *Ex parte Kenneke*, 136 Cal. 527, 89 Am. St. Rep. 177, 69 Pac. 261; *Paul v. Virginia*, 8 Wall. 180. 19 L. ed. 360.

The owner of lands bordering on a non-navigable stream has a freehold interest as in the use of the stream,—an incorporeal hereditament,—of which he cannot be deprived without just compensation.

Hough v. Doylestown, 4 Brewst. (Pa.) 333; *McCord v. High*, 24 Iowa, 336; *Organ v. Memphis & L. R. R. Co.* 51 Ark. 272, 11 S. W. 96; *Riggs v. Martin*, 5 Ark. 506, 41 Am. Dec. 103.

McCulloch, J., delivered the opinion of the court:

The general assembly of the state enacted a statute approved April 24, 1903 (Acts 1903, p. 306), entitled "An Act to Protect the Game and Fish of the State, and Provide for the Appointment of Game Wardens," and the prosecution in this case is based on the 4th section of that act as follows: "Sec. 4. It shall be unlawful for any person who is a nonresident of the state of Arkansas to shoot, hunt, fish, or trap at any season of the year." In other sections of the act the open and closed seasons for killing certain kinds of game, and prescribing penalties for violations thereof, are declared; the exportation of game or fish out of the state is prohibited, and penalties therefor prescribed; and the sheriffs of the state are made game wardens for their respective counties, with power to make arrests and prosecute offenders against the statute. The appellee, Mallory, was tried upon the charge of hunting in the state, being a nonresident at the time; and from a finding of not guilty by the court, and judgment discharging him, the state has appealed.

The case was tried below before the court sitting as a jury, by consent of parties, and upon the following agreed statement of facts: (1) The defendant, Mallory, is a native of the state of Virginia, and a bona fide resident and citizen of the city of Memphis, L. R. A.

phus and the state of Tennessee. (2) That he is the owner in fee of a large body of land in the county of Crittenden, state of Arkansas, by successive deeds, the title thereto originating by a grant from the state, on which he has continuously carried on planting and farming operations for many years prior to this date, and in the prosecution of his said farming operations he has had occasion to make frequent visits to said land. (3) That on said tract of land there is a pond, or nonmeandered lake, surrounded entirely by the land of the defendant, without outlet or inlet except at times of overflow, in which body of water fish are to be found, and may be taken therefrom by ordinary methods. (4) That on said tract of land squirrels and other game are to be found. (5) That for many years the defendant has been in the habit of hunting for game on said lands, and taking fish from said waters, both by himself and those who had his permission so to do, and that the right to kill said game and to take such fish is valuable, and adds to the value of the lands. (6) That on the 18th day of June, 1903, the defendant engaged in hunting on said lands for squirrels. (7) That on the 18th day of June, 1903, the defendant engaged in fishing in the said waters above described, and took therefrom, by means of hook and line, fish found therein.

It is contended here on the part of the state that the wild game and fish in this state are its absolute property, and that it may lawfully prohibit the taking of game and fish by all nonresidents, and that the act in question is a valid prohibition against nonresidents owning lands in the state hunting or fishing thereon. The appellee insists, on the other hand, among other things, that his right to take game and fish while on his own lands is a valuable property right, which inheres by reason of his ownership of the soil, and, being so, there is an unjust discrimination against him as a property owner of the state, in violation of that part of the 14th Amendment to the Constitution of the United States as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The proper solution of these questions involves an inquiry as to the ownership of game, a consideration of the nature of the property therein,—whether exclusive, or absolute or qualified,—and the extent of the authority which the state has a lawful right to exercise in relation thereto.

It can be stated without question that

primarily the title to game and fish is and has for all time been in the sovereign, but the nature and extent of that title, and the purposes for which it is held, are not altogether free from doubt. Originally the title seems to have been regarded as vested in the sovereign as a personal prerogative, but as civilization advanced it grew to be differently regarded,—not as a personal right of Kings, but as a portion of the common property of subjects. It is said that by the Roman law animals *feræ naturæ* were classified as common property, which, having no owner, were considered as belonging to all the citizens of the state; yet the right of an owner of land to forbid another from killing game on his property was recognized as a part of the rights of ownership of the land. Inst. Just. bk. 2, pt. 1. The ownership of such animals seems to have been assumed by British sovereigns, up to and including King John, as a personal prerogative of the Crown, until Magna Charta and the Charter of the Forest, by which the assertion and exercise of those rights were distinctly limited. Since then the ownership of wild animals, so far as vested in the sovereign, has been uniformly regarded as a trust for the benefit of the people; and we think that clearly, in effect, the title and ownership of the sovereign has been held to be only for the purposes of protection, control, and regulation. Mr. Justice White, speaking for the court in *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600, says: "The practice of the government of England from the earliest time to the present has put into execution the authority to control and regulate the taking of game. Undoubtedly this attribute of government to control the taking of animals *feræ naturæ*, which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters or in conflict with grants of the royal prerogative." But nowhere do we find that in modern times has the absolute and unqualified ownership of such animals by government been asserted and exercised further than for the purposes of controlling and regulating the taking of the same. On the other hand, we find frequent denial of the right of government to do more. In *Bristow v. Cormican*, 24 Moak, Eng. Rep. 431, it was decided that "the Crown has no *de jure* right to the soil or fisheries of an inland, nontidal lake," and that "a general grant by the Crown of a several fishery in a nontidal lake is not, without more, sufficient to establish the title thereto." In *Venning v. Steadman*, 9 Can. S. C. 210, the right of riparian owners of land on a non-navigable river to fish for salmon was involved, in the face of a statute

providing that "fishing for salmon in the Dominion of Canada, except under the authority of leases or licenses from the department of marine and fisheries, is hereby prohibited;" and it was there held that the prohibition of this statute did not extend to such riparian owners. In the state of Wisconsin a statute was passed prohibiting the cutting of ice from any meandered lake for shipment out of the state, except by those permitted to do so by a license issued by the Secretary of State; and the supreme court, in the case of *Rossmiller v. State*, 114 Wis. 169, 58 L. R. A. 93, 91 Am. St. Rep. 910, 89 N. W. 839,—a prosecution for violation of this act,—held that the title to the lakes and the waters thereof was in the state for the purpose of regulating the common use and enjoyment, yet the state had no such proprietary interest as implied the right to sell or grant special privileges for the use. The court, speaking through Mr. Justice Marshall, says: "Is ice formed naturally upon the public waters of the state, state property, in a proprietary sense,—property which it can deal with as a private person deals with his property rights? . . . Obviously there can be no difference between public water in a liquid condition and in the form of ice, or between water and the land covered thereby, or the fish or fowls which inhabit the same, or any of the animals *feræ naturæ*, in respect to sovereign authority over the same. If one may be dealt with as the absolute property of the state, the others may be." After an exhaustive review of the authorities, the learned justice continues: "It seems clear that, if the state cannot sell the bed of a navigable lake, it cannot sell the waters thereof, or the fish therein, or the fowls that resort to its surface, or the ice that forms thereon. The rules that limit its rights as to one of those matters limit its power as to all. The foregoing seems not only to leave no reasonable, but no possible, doubt as to the conclusion which ought to be reached in this case. It stamps the act in question indelibly, as the result of a misconception of the state's interest in navigable lakes, and as being baseless and unconstitutional. The title to the beds of such lakes is in the state, but not for its own use as an entity. The mere naked legal title rests in the state, but the whole beneficial use thereof, including the use of the ice formed thereon, is vested in the people of the state as a class." See also *Sanborn v. People's Ice Co.* 82 Minn. 43, 51 L. R. A. 829, 83 Am. St. Rep. 401, 84 N. W. 641; *People's Ice Co. v. Davenport*, 149 Mass. 322, 14 Am. St. Rep. 425, 21 N. E. 385; *Rowell v. Doyle*, 131 Mass. 474; *Brown v. Cunningham*, 82 Iowa, 512, 12 L. R. A. 583, 48 N. W. 1042; *Barrows v. McDermott*,

73 Me. 441; *Woodman v. Pitman*, 79 Me. 456, 1 Am. St. Rep. 342, 10 Atl. 321; *Prieve v. Wisconsin State Land & Improv. Co.* 93 Wis. 534, 33 L. R. A. 645, 67 N. W. 918; *McLennan v. Prentice*, 85 Wis. 427, 55 N. W. 764; *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110.

We assume, therefore, as firmly established by authority, that the state's ownership of fish and game is not such a proprietary interest as will authorize a sale thereof, or the granting of special interests therein or license to enjoy, but is solely for the purposes of regulation and preservation for the common use, and is not inconsistent with a claim of individual or special ownership by the owner of the soil, if it be found that there can be any such individual or special ownership. We next inquire whether the owner of lands in the state has any title to, or property rights in, the fish or game thereon.

By the common law of England the owner of land had no absolute property in animals *feræ naturæ* while at liberty in the wild state, but had a qualified interest or property in such as were found, and so long as they remained, on his territory, and, when killed or captured thereon, became his absolute property. Blackstone's treatment of this subject is not altogether clear, though he seems to have considered the complete ownership of game, in the strictest proprietary sense, to have been in the Crown, as a personal prerogative, even since *Magna Charta*. Yet he recognized the right or privilege of one to take game or fish on his own premises without restraint as a substantial and valuable one. 2 Bl. Com. 418, 419. Mr. Christian, in his learned notes, combats, with the approval of Mr. Justice Coleridge, the doctrine apparently laid down by Blackstone to the effect that the sole right to take game rests primarily with the King, and maintains that at common law every person, *ratione soli*, had a right to take game on his own land. 2 Bl. Com. p. 419, note 8. In *Blades v. Higgs*, 11 H. L. Cas. 621, Lord Westbury says: "Property *ratione soli* is the common-law right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land, and, as soon as this right is exercised, the animal so killed or caught becomes the absolute property of the owner of the soil." And Lord Cranworth, in the same case, said: "Wild animals, whilst living, though they are, according to Lord Holt, the property of the owner of the soil on which they are living, are not his personal chattels, so as to be the subject of larceny. They partake, while living, of the quality of the soil, and are, 67 L. R. A.

as growing fruit was, considered as part of the realty." In *Falkland Islands Co. v. Reg.* 10 Jur. N. S. 807, where there arose the question of the construction of the grant of land made by the Crown without reservation, except the right to re-enter for the purpose of making roads, canals, and other works of public utility, and the right to cut timber and take stone for keeping such works in repair, it was held that "the grant of land in fee, and the demise of 10,000 acres for the term, conferred on the appellants the exclusive right of killing and taking game, beasts of the chase, and animals which are properly *feræ naturæ*, which might at any time be upon the land during the time such land was granted." Mr. Serjeant Stephen, after discussing the various distinctions in claims to this character of property after being reduced to possession, by reason of the difference of place where the game is found or started and where killed, says: "These distinctions seem to show that in general the property is acquired by the seizure and occupancy, though that cannot prevail against the better claim of him on whose grounds the animal is both killed and started (and who therefore may be said to be entitled *ratione soli*) or of him who has already a qualified property in it, *ratione privilegii*." 2 Stephen, *Laws of England*, 20-22.

The American cases not only generally treat the right of the owner of land to take game thereon as a property right inhering from the ownership of the soil, but recognize the establishment of that right at common law. In *Venning v. Steadman*, 9 Can. S. C. 210, the learned chief justice, in discussing the right of government to prohibit salmon fishing, except under license from the Department of Marines, says: "Such an absolute prohibition of the enjoyment of their property by riparian proprietors, or, what might be still worse, by granting a license to one proprietor and withholding it from another, thereby destroying the value of the property of the one and enhancing the value of the property of the other, would simply be an arbitrary interference with the rights of property, pure and simple." Mr. Justice Strong, in this same case, speaking of the right of riparian landowners to fish in a stream, says: "Then nothing can be better settled than the proposition that no restraint upon the ordinary rights of property, no derogation from the fullest enjoyment of these rights, can be imposed by statute, except by express words." The same court held that the right of riparian proprietors upon streams above tide water (un-navigable waters), and whose titles were such as to give them, according to the common-law

principles, the ownership of the beds of the streams to the middle line, to fish therein within the limits of their own land, was a private and exclusive right of property,—a proprietary right of the same character as that to herbage or trees growing on the land, or the minerals or game to be found upon it. *Queen v. Robertson*, 6 Can. S. C. 52. The right of private ownership in game, so far as recognized as such at all, is of two kinds, denominated as the right or interest *ratione soli* (meaning, as the term implies, a right by reason of and growing out of the ownership of the soil) and the right or interest held by grant from the owner of the soil, called “profits à prendre,” the latter being defined to be “a right to take something out of the soil of another, . . . as the right of common, and also some minor rights, as a right to take drifted sand, or a liberty to fish, fowl, hunt, hawk.” 1 Crabb, Real Prop. 125; Phear, Waters, 57. The latter right is not a mere easement, but is held to be a right in the soil. Black, Law Dict.; *Post v. Pearsall*, 22 Wend. 425; Washb. Easements, p. 7; *Pickering v. Noyes*, 4 Barn. & C. 639; *Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 333; *Webber v. Lee*, L. R. 9 Q. B. Div. 315; *Bingham v. Salene*, 15 Or. 208, 3 Am. St. Rep. 152, 14 Pac. 523; *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597. In *Bingham v. Salene*, 15 Or. 208, 3 Am. St. Rep. 152, 14 Pac. 523, a grant of the right to hunt and kill wild fowls upon lakes within the boundaries of the owner of the soil is held to be a right of profit in the soil, and not a mere revocable license. *Payne v. Sheets*, 75 Vt. 335, 55 Atl. 656, which is an exceedingly well-considered and instructive opinion, holds that one not the owner of the land, who has a right to shoot game, fish, etc., has not a mere easement, but an interest in the soil, within the meaning of the term “owner,” used in a statute authorizing an action of trespass *quare clausum fregit* against one entering upon lands without permission of the owner or occupant for the purpose of shooting. Mr. Justice Watson, who delivered the opinion of the court, clearly distinguished, with express approval, the former decision of that court in the case of *State v. Theriault*, 70 Vt. 617, 43 L. R. A. 290, 67 Am. St. Rep. 695, 41 Atl. 1030; wherein the constitutionality of a law regulating the right of the owner of land to fish on his own premises was upheld as a proper exercise of the police power; it having been stated in the former case that “fish are *feræ naturæ*, and the common property of the public or the state.” The learned justice says: “To state it otherwise, the general ownership is in the people in their united sovereignty, but, when such animals

go upon private grounds, then the qualified or special right of property in the owner of the soil attaches by virtue of his exclusive right to hunt, kill, or capture them while there; and this upon the principle that property which a person has a special right to acquire to the exclusion of others is private property.” The basis of the decision of the Supreme Court of the United States in *McCready v. Virginia*, 94 U. S. 301, 24 L. ed. 248, upholding the power and right of the state of Virginia to prohibit nonresidents from planting oysters in the soil covered by her tide waters, is the fact that the state owned the bed of all tide waters or navigable streams within its jurisdiction. Chief Justice Waite, speaking for the court, says: “The right which the people of the state thus acquire comes, not from their citizenship alone, but from their citizenship and property combined. It is in fact a property right, and not a mere privilege or immunity of citizenship.” See also *Sterling v. Jackson*, 69 Mich. 488, 13 Am. St. Rep. 405, 37 N. W. 845; *Hall v. Alford*, 114 Mich. 165, 38 L. R. A. 205, 72 N. W. 137; *Cobb v. Davenport*, 32 N. J. L. 369; *Heckman v. Swett*, 99 Cal. 303, 33 Pac. 1099.

It is insisted that these questions generally arise in suits between individuals, involving only individual rights, and that the recognized right to take game on one's own land, and to prevent others from so doing, is merely a right to prevent a trespass on the land, and not a right of property growing out of the soil. But this is not a correct estimate of the force of these authorities, for the cases all hold that it is a right inhering in the soil, and not a mere right to prevent an invasion of the possession of the owner. In *Sterling v. Jackson*, 69 Mich. 488, 13 Am. St. Rep. 405, 37 N. W. 845, the court says: “The defendant claims that he had the right to shoot the wild fowl from his boat, because, as the waters were navigable where he was, he had the right to be there; that, there being no property in wild fowl until captured, if he committed no trespass in being where he was no action will lie against him for being there and shooting the wild duck. There is a plausibility in the position, which, considered in the abstract, is quite forcible, and if applied to waters where there is no private ownership of the soil thereunder would be unanswerable. But, so far as the plaintiff is concerned, defendant had no right to be where he was, except for the purpose of pursuing the implied license held out to the public of navigating the waters over his land. So long as that license continued, he could navigate the water with his vessel, and do all things incident to such navigation.

He could seek the shelter of the bay in a storm, and cast his anchor therein, but he had no right to construct a 'hide,' nor to anchor his decoys for the purpose of attracting ducks within reach of his shotgun." In *State v. Shannon*, 36 Ohio St. 423, 38 Am. Rep. 599, the same doctrine is well illustrated, and the court therein says: "True, navigable streams in this state are declared to be public highways, but the right to use a public highway is not abridged by protecting the owner of the fee in the exclusive right of killing game therein." So it is held that a license to shoot or fish for a term amounts to a demise of an incorporeal hereditament, and comes within the statute of frauds, and can only be granted by deed. Wood, Stat. Fr. § 5.

We therefore conceive it to be settled by authority and by long recognition in the law that the owner of land has a right to take fish and wild game upon his own land, which inheres in him by reason of his ownership of the soil. It is a property right, as much as any other distinct right incident to his ownership of the soil. It is not, however, an unqualified and absolute right, but is bounded by these limitations: That it must always yield to the state's ownership and title, held for the purposes of regulation and preservation for the public use. These two ownerships or rights—that is to say, the general ownership of the state for one purpose, and the qualified or limited ownership of the individual, growing out of his ownership of the soil—are entirely consistent with each other, and in no wise conflict. The transitory nature of the property renders the benefits so diffusive that all may join in the enjoyment thereof, and for that reason the sovereign holds as the representative of the public, so as to regulate and protect the common use. Still the right of the landowner to hunt and fish on his own lands is to that extent a special property right, though subordinate to the other.

The cases of *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600, and *Organ v. State*, 56 Ark. 267, 19 S. W. 840, are pressed upon our attention with great force and earnestness by the learned counsel for the state, as conclusive of the case at bar. In both those cases the general doctrine of state ownership of wild game and fish is declared, but the language of the courts in those cases, when limited to the question under consideration, as must always be done when testing the soundness of a declared doctrine, is undoubtedly correct, and in no degree inconsistent with the views herein expressed. The cases were almost identical upon the facts, being criminal prosecutions for the unlawful exportation of game out of the state in violation of 67 L. R. A.

a statute prohibiting the same. We see no reason whatever in the opinion we now express for receding from the law declared by this court in *Organ v. State*. On the contrary, we adhere to it. The fullest latitude of power in the state to regulate and preserve the game for the common enjoyment is conceded, and no such private property right therein which we hold to exist can retard or obstruct the exercise of that undoubted power. But we have another and altogether different question to deal with in this case,—whether, finding that landowners have a right to hunt and fish upon their own lands, which is a property right, they are entitled to equal protection in the enjoyment of that right with other landowners, or whether it be destroyed by a statute passed under the guise of a police regulation to preserve the fish and game, and the right of enjoyment prohibited for the sole reason that they are nonresidents of the state. It is not the fact that appellee is excluded from enjoyment of the common right of the citizen to fish and hunt because of his nonresidence that he may complain, but of the exclusion by reason of his nonresidence from such special right which he should enjoy in common with other landowners. Does the curtailment of this right fall within the prohibition of the 14th Amendment? A complete answer to the inquiry is made in the affirmative when the conclusion is reached that the right denied is a property right. Nonresident landowners may be called upon to share the public burdens, and property rights in some instances must yield to the public demands; but the burden must rest equally upon all, and no discrimination in that respect be made against the nonresidents as such. *Eldridge v. Trezevant*, 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345. In so far as the statute under consideration prevents the same enjoyment by appellee of the property right afforded the more fortunate resident landowner, it is a denial of "equal protection of the law," within the meaning of the constitutional guaranty, and cannot be enforced, and the taking away of this right because of his nonresidence is without due process of law.

Affirmed.

HILL, Ch. J., dissenting:

The act of April 24, 1903 (Acts 1903, p. 306), and the agreed statement of facts, present broadly this question: Has the state the power to make it unlawful for nonresident owners of real estate to shoot and hunt game and to fish on their own or the state's property at any season, while permitting residents to shoot and hunt and fish on their own and the state's property during seasons not

prohibited by general and special game laws, known as the "open season." This question must be answered in the affirmative, unless there is a property interest in fish and game found on, over, or under the surface of the real estate owned by such nonresidents, for the manifest intention of the general assembly, as evidenced by the 4th section of said act, and the object and purpose of the act as a whole, is to make unlawful hunting and fishing by nonresidents. No exception is made in favor of nonresidents on their own land, and hence it must be concluded that the general assembly intended to exclude nonresidents from the privilege or property interest, as it may be construed, of hunting and fishing on their own lands, while granting the right to residents, within certain seasons, of hunting and fishing on their own lands and the lands and waters of the state. To restrict the plain language of the act to hunting and fishing on the public lands and waters would simply be judicial legislation. Therefore the question must be met, Has the state power to do this?

If the right to hunt and fish on one's own land is a property right inhering to the ownership of the soil, then this act is offensive to the clause in the 14th Amendment to the Constitution of the United States, and the same clause in § 8, art. 1, Ark. Const., providing that no person shall be deprived of "life, liberty, or property without due process of law." This "due process of law" clause is the mudsill of constitutional government. The rough barons of England wrote it, almost with their swords, into Magna Charta. in these words: "No freeman shall be taken, or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we pass upon him nor condemn him, but by the lawful judgment of his peers, or by the law of the land." These principles have lost no force in their more concise statement in our Bill of Rights, state and Federal. Counsel for appellee eloquently say: "These few but pregnant lines, fortified as they are by the Federal Constitution, are all that stand between us and the abyss of despotism or the hell of anarchy." Therefore a court must pause and carefully consider whether the legislation under review seeks to undo the work done at Runnymede. The Supreme Court of the United States is the final arbiter on all questions involving rights asserted under the Constitution of the United States, and its decision on such questions, whether in form to be reviewed by it from this court or not, should be conclusive.

In the case of *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600, 67 L. R. A.

every question here involved was considered and determined adversely to the contention of the appellee, as will be herein shown. The contest was over a statute of the state of Connecticut which provided (briefly speaking) an open and closed season for hunting and killing game, and, further, that at no time should certain game be killed for the purpose of shipment beyond the state, and further made it unlawful to transport or have in possession for transportation beyond the state any such game killed at any season. Geer was arrested for violating this statute, and, under the agreed statement of facts upon which he was tried, it was found that he was in possession of game killed during the open season for the purpose of transportation without the state, and that the game was not unlawfully killed for the purpose of transportation beyond the state. The case is stronger on the facts to support the contention of the appellee than the one at bar, because it was only dead game which was in the hands of Geer to be transported beyond the state, and it had not been killed for that purpose. Evidently, under the case made, after the game was lawfully killed Geer came into possession of it for the purpose of shipping it without the state. Mr. Justice Field and Mr. Justice Harlan dissented from the opinion of the majority upon the grounds that game, after being killed or captured, was then reduced to possession, and the taker or possessor had a property right in it, which he would not have so long as it was uncaught. The Connecticut court "decided that the state had power to make it an offense to have in possession, for the purpose of transportation beyond the state, birds which had been lawfully killed within the state during the open season; and that the statute, in creating this offense, did not violate the interstate commerce clause of the Constitution of the United States." The Federal Supreme Court said: "In other words, the sole issue which the case presents is, Was it lawful, under U. S. Const. art. I, § 8, for the state of Connecticut to allow the killing of birds within the state during a designated open season, to allow such birds, when so killed, to be used, to be sold, and to be bought for use within the state, and yet to forbid their transportation beyond the state? Or, to state it otherwise, had the state of Connecticut the power to regulate the killing of game within her borders, so as to confine its use to the limits of the state, and forbid its transmission outside of the state?" It is true that in that case and the one at bar different clauses of the Federal Constitution were invoked against the validity of the statute,—in that case the "interstate commerce clause," and in this the "due process of law." This was

owing to the varying facts and terms of the statutes. But the solution of each of the questions depends solely upon whether there is property interest in game. If there is, then the Connecticut statute would fall, because in restraint of an interstate shipment of property; in this case, because it takes the property right from the landowner without due process of law. The Supreme Court of the United States considered the question as turning on whether there was a property right in game. Mr. Justice White, after stating the facts and issues presented, as above quoted, then said: "In considering this inquiry, we, of course, accept the interpretation affixed to the state statute by the court of last resort of the state. The solution of the question involves a consideration of the nature of the property in game, and the authority which the state had a right lawfully to exercise in relation thereto." Then the learned justice takes up the subject of the ownership of fish and game from the earlier times known to the laws of civilized countries. He traces it through the Grecian, Roman, and Salic laws, and gives an extract from the Code Napoleon, which he says summed up an unbroken line of law and precedent, as follows: "There are things which belong to no one, and the use of which is common to all. Police regulations direct the manner in which they may be enjoyed. The faculty of hunting and fishing is also regulated by special laws." He further says that the fundamental principles on which property in game rests pervade the laws of Germany, Austria, Italy, and, indeed, all the countries of Europe. Then passing to the common law of England, he says: "The common law of England also based property in game upon the principle of common ownership, and therefore treated it as subject to governmental authority." Then follow quotations from Blackstone, showing the paramount authority of the government over fish and game, while recognizing a qualified property in the way of the privilege of hunting and fishing on his own ground to the exclusion of others, but the minute the game passes his boundary that fugitive right is also gone. The court proceeds to declare that this attribute of the government to control animals *feræ naturæ* was vested by inheritance in the colonies founded in America by the English people, and passed from the colonies to the several states on the formation of the Union, and remains in the states to the present day, in so far as its exercise may be not incompatible with, or restrained by, the rights granted the Federal government. Then the court proceeds to a review of the numerous decisions of the Supreme Court of the United States and of the several states recogniz-

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ing the absolute right of the states to control and regulate the common property in game and fish. The court cites and approves many cases, not only of regulation, but of control, of the common property in game. Among others so cited is *Organ v. State*, 56 Ark. 270, 19 S. W. 840, in which Mr. Justice Hemingway, for this court, said: "The ownership of fish is in the state for the benefit of its people in common, and the legislature has the right to permit individuals to catch them upon such terms and conditions as it may impose, and to restrict the property acquired in them, when caught, to such extent as it deems proper. *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248; *American Exp. Co. v. People*, 133 Ill. 649, 9 L. R. A. 138, 23 Am. St. Rep. 641, 24 N. E. 758; *Magner v. People*, 97 Ill. 333." In the case of *Magner v. People*, cited with approval by Judge Hemingway, the Illinois court said: "No one has a property in the animals and fowls denominated 'game' until they are reduced to possession. . . . Whilst they are untamed and at large the ownership is said to be in the sovereign authority,—in Great Britain, the King, . . . but with us, in the people of the state. . . . The ownership being in the people of the state,—the repository of the sovereign authority,—and no individual having any property rights to be affected, . . . the representative of the people of the state may withhold or grant to individuals the right to hunt and kill game, or qualify and restrict it, as, in the opinion of its members, will best subserve the public welfare. Stated in other language, to hunt and kill game is a boon or privilege granted, either expressly or impliedly, by the sovereign authority,—not a right inhering in each individual; and consequently nothing is taken away from the individual when he is denied the privilege, at stated seasons, of hunting and killing game. . . . But in any view, the question of individual enjoyment is one of public policy, and not of private right." This is reiterated and approved in *People v. Bridges*, 142 Ill. 30, 16 L. R. A. 684, 31 N. E. 115. The above excerpt, and more, from *Magner v. People*, is quoted by Mr. Justice White in the *Geer Case* as expressing the correct doctrine. Thereupon the case comes as authority approved by this court, and approved and copied at length as part of its opinion by the Supreme Court of the United States. Coming thus accredited, it is conclusive and binding authority to the effect that there is no property right in fish and game in individuals, as against the state, and the state may, as a boon or privilege, permit hunting and fishing to anyone, or withhold it from

anyone, and affect no property interest whatever.

Returning to the *Organ Case*, Mr. Justice Hemingway continued: "It [referring to the state] may prohibit catching them entirely or for a specified season, or it may permit them to be caught for the use of the person who makes the catch, and withhold the right to sell them or ship them for sale. When preserved for the common benefit of the people of the state, they are not articles of commerce, in any sense, and we cannot see that they become such simply because the legislature permits them to be caught by individuals for use within the state only." Counsel for appellee, to break the force of this decision as authority here, says of it that it "merely follows *Geer v. Connecticut*. The fish were taken from public waters, and the case has no resemblance to this." It would be more accurate to say that *Geer v. Connecticut* followed the *Organ Case*, as it is twice cited approvingly therein. But the argument of counsel is answered in the opinion itself, wherein it says: "One who catches them had originally no separate property in them, and no right to acquire it except as the legislature might provide. As all right of property in them is derived from the state, it is subject to such terms as the legislature imposes. . . . The restriction was imposed by right of ownership, and not in the exercise of any assumed power to regulate the commercial uses of private property." Thus, the power of regulation is placed upon its only true basis,—the right of ownership of the fish and game in the state; and it matters not where it is found, except reclaimed game in parks, and fish in private ponds, which have a property right impressed in them by being reduced to personal possession, and are no longer *feræ naturæ*. But a more complete answer than is here given to the position of counsel that the *Organ Case* does not control as to game on private property, but only in public domain, is given in *American Exp. Co. v. People*, 133 Ill. 649, 9 L. R. A. 138, 23 Am. St. Rep. 641, 24 N. E. 758. This case is cited as authority by Mr. Justice Hemingway in the *Organ Case*, and by Mr. Justice White in the *Geer Case*. It grew out of a statute of Illinois prohibiting the exportation of quail killed anywhere in the state, whether on private or public domain, and the court said: "It is, however, argued that where quail have been killed the dead animals become property, and the taker becomes the absolute owner of such property, and an act to prevent a sale or transportation for sale within the state would be an interference with private right, amounting to a destruction of the right of property without due process of law." This is not distinguishable from the position of appellee herein, who insists that the right to take game on his own property is a property right, which cannot be taken from him without being a "destruction of the right of property without due process of law." But the Illinois court answered this argument as follows: "The fallacy of the position consists in the supposition that the person who may kill quail has an absolute property in the dead animals. In the *Magner Case*, 97 Ill. 333, it was held, as has been seen, that no one has a property in animals and fowls denominated game,—the ownership was in the people of the state. . . . The act, therefore, does not destroy a right of property, because no such right exists." Mr. Justice White, after fully reviewing the adjudications of many states on this subject, deduces these propositions: That the qualified property interest in game is derived from the sovereign grant of it, and it may be withheld, restricted, or regulated; that a state may permit its own people to enjoy their own property, and withhold from them the right to deal with it as an article of interstate commerce; that there may be an internal commerce in the dead animals, which does not conflict with the right of Congress to regulate interstate commerce; and further: "The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction, for every purpose." In speaking of cases from Kansas and Idaho contrary to the decision reached in the *Geer Case*, Justice White said: "But the reasoning which controlled the decision of these cases is, we think, inconclusive, from the fact that it did not consider the fundamental distinction between the qualified ownership in game and the perfect nature of ownership in other property, and thus overlooked the authority of the state over property in game killed within its confines, and the consequent power of the state to follow such property into whatever hands it might pass with the conditions and restrictions deemed necessary for the public interest." This ultimate conclusion that decisions to the contrary of this one are based on a confusion of the nature of the qualified property right in game may account for some decisions conflicting with this view, but in the main there is no serious conflict in the decisions. Take, for instance, *Payne v. Sheets*, 75 Vt. 335, 55 Atl. 656, which appellee's counsel present as the best considered opinion dealing with the question of ownership of game. The action was trespass *quare clausum fregit*, brought under a statute of Vermont giving such action to the owner or occupant of land against a person going thereon without per-

of law." This is not distinguishable from the position of appellee herein, who insists that the right to take game on his own property is a property right, which cannot be taken from him without being a "destruction of the right of property without due process of law." But the Illinois court answered this argument as follows: "The fallacy of the position consists in the supposition that the person who may kill quail has an absolute property in the dead animals. In the *Magner Case*, 97 Ill. 333, it was held, as has been seen, that no one has a property in animals and fowls denominated game,—the ownership was in the people of the state. . . . The act, therefore, does not destroy a right of property, because no such right exists." Mr. Justice White, after fully reviewing the adjudications of many states on this subject, deduces these propositions: That the qualified property interest in game is derived from the sovereign grant of it, and it may be withheld, restricted, or regulated; that a state may permit its own people to enjoy their own property, and withhold from them the right to deal with it as an article of interstate commerce; that there may be an internal commerce in the dead animals, which does not conflict with the right of Congress to regulate interstate commerce; and further: "The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction, for every purpose." In speaking of cases from Kansas and Idaho contrary to the decision reached in the *Geer Case*, Justice White said: "But the reasoning which controlled the decision of these cases is, we think, inconclusive, from the fact that it did not consider the fundamental distinction between the qualified ownership in game and the perfect nature of ownership in other property, and thus overlooked the authority of the state over property in game killed within its confines, and the consequent power of the state to follow such property into whatever hands it might pass with the conditions and restrictions deemed necessary for the public interest." This ultimate conclusion that decisions to the contrary of this one are based on a confusion of the nature of the qualified property right in game may account for some decisions conflicting with this view, but in the main there is no serious conflict in the decisions. Take, for instance, *Payne v. Sheets*, 75 Vt. 335, 55 Atl. 656, which appellee's counsel present as the best considered opinion dealing with the question of ownership of game. The action was trespass *quare clausum fregit*, brought under a statute of Vermont giving such action to the owner or occupant of land against a person going thereon without per-

mission of the owner or occupant for the purpose of hunting thereon. The plaintiff alleged that he was the owner and occupant of the land for the purpose of shooting, trapping, fishing, etc. He was not the owner of the fee, but of these hunting and fishing rights, and the question was presented whether he was an owner or occupant of the land within the statute. In an earlier Vermont case (*State v. Theriault*, 70 Vt. 617, 43 L. R. A. 290, 67 Am. St. Rep. 695, 41 Atl. 1030) the court had held: "Fish themselves are *feræ naturæ*—the common property of the public or of the state—in this country. From this common property the owner of the soil over which the nonboatable stream flows has the right to appropriate such as he may capture and retain, but this right of capture and appropriation is subject to regulation and control by the representatives of the people, so that there shall continue to be a common property. . . . Not a decision in this country, state or national, has been brought to our attention by the respondent, nor by quite an extensive examination of such cases, which holds that such acts of the state legislature in regard to this class of property, and in restraint of the right of the riparian owner to take and appropriate fish therefrom, are unconstitutional. They have uniformly been held to be, not a taking of private property or private rights for public use, for which compensation, . . . but an exercise of the police power of the state to preserve or increase a common property," etc. The court, in *Payne v. Sheets*, commenting on this decision, said: "The sole question in *State v. Theriault* was, as considered, the constitutionality of the law regulating the right of the owner of land to fish on his own premises. The law was upheld as a proper exercise of the police power, under the provisions of the Constitution." Thus this class of cases was approved and held not to be in conflict with the views entertained in the case then before the court, which was a mere question between individuals as to the rights permitted by the state. The court held that there was a qualified ownership in the soil for the purpose of hunting and fishing, separate from the ownership of the land itself. This is technically known as a "*profit à prendre*." It is a well-recognized and valuable right. As pointed out by counsel for appellee, vast game preserves in the north of England and Scotland are annually let to rich Americans and other parties of means and leisure. 67 L. R. A.

These game preserves are not unknown in this country, and in *Payne v. Sheets* the *profit à prendre* was protected to the extent of holding the owner of it an "owner or occupant," within the trespass statute of Vermont. But this valuable incident to real estate is held subject to the right of the sovereign authority. It is conceded on all sides that the enjoyment of it may be restricted by regulations, like the open and closed seasons. And it is thought that the authorities here adduced establish that it may also be absolutely forbidden by the sovereign, or granted as a boon or privilege to whom the sovereign chooses. Therefore the qualified ownership in game—the *profit à prendre* in land for purpose of hunting or fishing thereon—is a valuable right between individuals. Trespassing will not be allowed to destroy it or interfere with it; but it is subject to the dominance of the people, who have the perfect, not qualified, property interest therein.

The argument is also made that this act discriminates unlawfully by denying equal privileges to citizens of other states. *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248, puts this question at rest. This same question came up in Tennessee under a statute forbidding fishing anywhere except by rod or line, and excepting private ponds, and was thus disposed of by the supreme court of that state: "Finally, it is insisted that this act is void because violative of the 1st section of the 14th Amendment of the Constitution of the United States in that it unwarrantably interferes with the property rights of the owners of lakes, etc. We think this contention equally unsound. It overlooks the fact that fish in streams or bodies of water have always been classed by the common law as *feræ naturæ*, in which the riparian proprietor, or the owner of the soil covered by the water, even though he may have the sole and exclusive right of fishing in said waters, has at best but a qualified property, which can be rendered absolute only by their actual capture, and which is wholly divested the moment the fish escape to other waters." *Peters v. State*, 96 Tenn. 682, 33 L. R. A. 114, 36 S. W. 399.

In the opinion of the minority of the court in this case, the act is constitutional, and the 4th clause effective against nonresidents hunting and fishing in their own premises, and therefore the judgment should be reversed.

Battle, J., concurs herein.

KANSAS SUPREME COURT.

Re Harriet KING.

(66 Kan. 695.)

*The judgment of a court in a proceeding in habeas corpus with regard to the custody of a child will not prevent another court from afterwards making a different order, where the welfare of the child requires it, even though no material change of circumstances is shown.

(April 11, 1903.)

APPPLICATION for a writ of habeas corpus to obtain the custody of Harry J. Hines and Edith May Hines who were alleged to be illegally detained from the rightful custody of petitioner. *Denied*.

The facts are stated in the opinion.

Mr. David Ritchie, for petitioner:

The proceedings of the district court of Saline county and the probate court are a bar to further inquiry into this case.

State ex rel. Lembke v. Bechdel, 37 Minn. 360, 5 Am. St. Rep. 854, 34 N. W. 334; *Re Sneden*, 105 Mich. 61, 55 Am. St. Rep. 435, 62 N. W. 1009; 9 Am. & Eng. Enc. Law, p. 238; Church, *Habeas Corpus*, 2d ed. 575; Freeman, *Judgm.* 4th ed. § 324; *Mercein v. People*, 25 Wend. 64, 35 Am. Dec. 653; *McConologue's Case*, 107 Mass. 170; *State ex rel. Malone v. Malone*, 3 Sneed, 413; *Bonnett ex rel. Newmeyer v. Bonnett*, 61 Iowa, 199, 47 Am. Rep. 810, 16 N. W. 91.

Mr. Z. C. Millikin for respondent.

*Headnote by MASON, J.

NOTE.—*Habeas corpus* decreed as to custody of infant as *res judicata*.

- I. Doctrine of *res judicata* generally applicable, 783.
- II. Former judgment only conclusive upon same state of facts, 784.
- III. Conclusiveness as to issues involved, 787.
- IV. Parties or persons concluded, 787.
- V. Foreign judgment as *res judicata*, 788.
- VI. Dismissal of writ without decision or prejudice, 788.

I. Doctrine of *res judicata* generally applicable.

The general rule deducible from the authorities is that a proper and final adjudication on habeas corpus, as to the custody of an infant, conclusively determines all questions necessarily involved, as between the same parties and upon the same state of facts.

In *Com. v. Murray*, 1 Legal Record Rep. 272, Cited in 10 Pepper & Lewis's (Pa.) Dig. col. 16765, a writ of habeas corpus for the custody of a child was dismissed on the ground that the controversy had been decided in favor of the respondent after a full hearing in the same court on a prior writ.

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Mason, J., delivered the opinion of the court:

This is an original proceeding, brought by Harriet King to obtain the custody of Harry J. Hines, aged six years, and Edith May Hines, aged four years. The parents of these children were married in 1895, the mother being then about seventeen years of age. They lived near Brookville, in Saline county, Kansas, until 1897, when they went to Kansas City, Kansas, where, in February, 1900, the mother was granted a divorce from the father on the ground of nonsupport and abandonment. The decree made no reference to the children, who had been left with the father's mother, Harriet King, the petitioner in this case, in Saline county. In March, 1901, the mother was married to James E. Peck. In the following July she applied to the probate court of Saline county for a writ of habeas corpus by which she sought to have the custody of the children restored to her. Mrs. King, the respondent in that proceeding, resisted the order sought, and, after hearing testimony, the court, on August 4th, remanded the children to her custody, and awarded her their care and control until "changed in the manner prescribed by law." On August 15, 1901, Mrs. Peck made another attempt to procure the custody of the children by applying to the district court of Saline county for a writ of habeas corpus. Mrs. King, as the respondent, made return, setting up, among other matters, the proceedings in the probate court. This part of the return was de-

In *Brooke v. Logan*, 112 Ind. 183, 2 Am. St. Rep. 177, 13 N. E. 669, holding an adverse decision rendered in an application by a father for the removal of a statutory guardian appointed for his child, and for the appointment of himself in his stead, is not conclusive against the father in a subsequent proceeding by habeas corpus to obtain possession of his child on the ground that the cause of action was not the same, the court said: The question of the custody of a minor child, once properly and finally adjudicated, whether in a habeas corpus proceeding or otherwise, is settled for all time, unless there is an appeal and the judgment rendered is impregnable as against a collateral assault. A subsequent writ may be awarded, but upon the subsequent hearing evidence will not be heard which goes back of the previous adjudication.

An adjudication, made at special term, awarding the custody of an infant in a habeas corpus proceeding, is a bar to the prosecution of a similar proceeding so long as it remains unreversed, where in the former proceeding the matter was postponed upon a stipulation that no other writ would be sued out or action taken until the decision of the pending proceeding, and subsequently an attempt to discontinue the proceeding was made by the

murred to, and the court overruled the demurrer, and dismissed the cause. On the 21st of July, 1902, Mrs. Peck and her husband went to the home of Mrs. King, took the children, and removed them to their home. The present proceeding was begun August 5, 1902. Much testimony has been taken on behalf of each of the contending parties, the grandmother and the mother, to show that the other is unfit to be intrusted with the care of the children.

The petitioner claims that the orders of the probate and district courts form a bar to the present proceeding; that the whole matter here presented for litigation has been already determined by a court of competent jurisdiction, and is not subject to further judicial investigation. It has frequently been held that the doctrine of *res judicata* applies to the decisions of courts in habeas corpus cases where the purpose of the writ is to obtain the custody of children. 15 Am. & Eng. Enc. Law, 2d ed. p. 213. See also the case of *Re Hamilton*, 66 Kan. 754, 71 Pac. 817, and cases there cited. Granting the correctness of the legal proposition stated, it only applies so long as the situation of the parties is the same. In the present case there is testimony with regard to the treatment the children received at the hands of their grandmother after the termination of the proceedings in the probate and district courts, which, if accepted as true, would justify this court in changing their custody upon the theory that a new condition had arisen, materially different from

that existing when the former adjudication was had. But there is also presented testimony to the contrary, and, as the testimony is all in writing, it would be difficult to reach a satisfying conclusion to the actual facts in this regard, and we shall not attempt it, but shall decide the case upon other considerations.

A proceeding in habeas corpus, relating to the custody of a child, must be viewed in two aspects. In form, the writ purports to afford an inquiry into the question whether the child is unlawfully restrained of its liberty. In fact, it is ordinarily a means for investigating and determining which of two parties has the better right to the custody of a child. Some of the decisions—and perhaps all of them—in which it has been held that a ruling upon one application is an absolute bar to all inquiry upon a second application based upon the same state of facts assume that the matter is to be treated merely as a private controversy between adverse claimants to the custody of the child. A typical case is that of *State ex rel. Lembke v. Bechdel*, 37 Minn. 360, 5 Am. St. Rep. 854, 34 N. W. 334, where it is said: "In *Re Snell*, 31 Minn. 110, 16 N. W. 692, this court held that a decision under one writ of habeas corpus, refusing to discharge a prisoner, is not a bar to the issuing of another writ, based upon the same state of facts, nor to a hearing and discharge thereon. While there is room for a difference of opinion, and in fact a conflict of decisions, upon this question, yet, in view of the ori-

petitioner, who, upon the court's refusal to permit a discontinuance, made default upon the adjourned day. *Re Price*, 12 Hun, 508.

For cases holding that a former adjudication on habeas corpus as to the custody of an infant is *res judicata* while the state of facts remain the same, see *infra*, II.

But it is held in *RE KING* that the judgment of a court, in a proceeding in habeas corpus, with regard to the custody of a child, will not prevent another court from afterwards making a different order, where the welfare of the child requires it, although no material change of circumstances is shown. This decision is discussed and disapproved in *CORMACK v. MARSHALL*.

And see *Slack v. Perrine*, 9 App. D. C. 128, under *infra*, IV.

II. Former judgment only conclusive upon same state of facts.

The principle of *res judicata* applies to a decision as to the custody of a child on a writ of habeas corpus while the state of facts remains the same. *Weir v. Marley*, 99 Mo. 484, 6 L. R. A. 672, 12 S. W. 798; *Re Sneden*, 105 Mich. 61, 55 Am. St. Rep. 435, 62 N. W. 1009.

A former adjudication on the question of the right to the custody of an infant child, brought up on habeas corpus, may be pleaded as *res judicata*, and is conclusive upon the

same parties upon the same state of facts. *State ex rel. Lembke v. Bechdel*, 37 Minn. 360, 5 Am. St. Rep. 854, 34 N. W. 334; *Mercein v. People*, 25 Wend. 64, 35 Am. Dec. 653. Cited with approval in *Dubois v. Johnson*, 96 Ind. 6.

The decision of a judge on habeas corpus refusing to transfer the custody of an infant child from its mother to the father on the ground of its tender age is at most conclusive in respect to facts and circumstances then existing, but not as to such as may arise afterwards; and, in a subsequent similar proceeding instituted by the father, he may allege as a new and material circumstance the advanced age of the child. *People ex rel. Barry v. Mercein*, 3 Hill, 399, 38 Am. Dec. 644.

An adverse determination made in habeas corpus proceedings, instituted by a father to obtain the custody of his minor child, settles and concludes all matters in issue arising upon the same state of facts, and precludes their consideration in a subsequent habeas corpus proceeding instituted by him. *Re Hamilton*, 66 Kan. 754, 71 Pac. 817.

An adjudication on habeas corpus that a minor, who had enlisted in the Army without the consent of his parents, could not be held as an enlisted soldier, is a conclusive determination of all questions of law and fact necessarily involved in that result, and conclusively settles, on the hearing on a subsequent writ of habeas corpus, that he was not liable

gin, history, and purposes of this writ as a 'writ of liberty,' we adopted this rule in this class of cases in which the liberty of the citizen is the question directly involved. But such cases are clearly distinguishable, we think, both upon principle and authority, from those in which the writ is sued out merely for the purpose of determining which of two parties is entitled to the custody of an infant child. In the latter the question is not really whether the infant is restrained of its liberty, but, Who is entitled to its custody? It is true that the charge is that the child is unlawfully restrained, etc.; but the gist of this charge is, not that the child is unlawfully deprived of its liberty, but that such restraint is in prejudice of the right of the relators to its custody. The case is really one of private parties contesting private rights under the form of proceedings on habeas corpus." We agree that, so far as such a proceeding is to be considered as a mere trial of conflicting private rights, there is no reason, in the nature of things, why the doctrine of estoppel by former adjudication should not apply. But we think that the proceeding is in a measure just what it purports to be,—an investigation into a charge that a child is illegally restrained of its liberty; that is, that it is restrained by a custody that is illegal in the sense that it is not for the child's best interest. In such a view, the interest of the child being as sacred as the liberty of the citizen, the question of the effect of a former adjudication might be de-

termined upon the same considerations as in an ordinary habeas corpus case. Although in *Weir v. Marley*, 99 Mo. 484, 6 L. R. A. 672, 12 S. W. 798, the court holds to the accepted rule of estoppel, it uses this language: "The distinction thus made between judgments remanding and those discharging the prisoner grows out of the nature of the writ, whose *raison d'être* is the protection of personal liberty. It loses none of its characteristics when used for the purpose of obtaining the custody of children, and the same analogies ought to obtain in such cases as when used simply for the purpose of discharging a prisoner from illegal restraint." Regardless of the analogy to the ordinary habeas corpus proceeding, however, we hold that the doctrine of estoppel does not preclude a court in any case where it has acquired jurisdiction from making such order with regard to the custody of a child as shall be for the child's best interest. The parents have, ordinarily, a legal right to the custody of their children. It is not an absolute and unqualified right, but it is a real right, with which a court may interfere only upon a showing of exceptional circumstances. When a court, in a proper proceeding, wherein conflicting claims to the right to the custody of a child are litigated, takes the custody from the parents, and bestows it upon some other person, the legal right of the parent is to that extent extinguished, and the new custodian has in that respect the same right formerly held by the parents. The parents may not

to be held in custody upon the existing state of facts. *McConologue's Case*, 107 Mass. 170.

So, the determination on habeas corpus that a minor, who enlisted in the army without the consent of his parents, was not entitled to his discharge, is *res judicata* upon the same facts; and the only mode of correcting it, if wrong, is by certiorari. *People ex rel. Allen v. Burnett*, 5 Park. Crim. Rep. 113, 13 Abb. Pr. 8.

A decision, in a habeas corpus proceeding, awarding the custody of an infant as between its parents, is at most conclusive in respect to the facts and circumstances then existing, and does not preclude the court from making a decree as to the custody of the child in a subsequent suit for divorce between the parents. *Everitt v. Everitt*, 29 Ind. App. 508, 94 Am. St. Rep. 276, 64 N. E. 892.

A judgment rendered in a habeas corpus proceeding temporarily awarding the custody of a child to its mother, in preference to its father, while it may be recognized as *res judicata* as to the matters and issues then existing, does not compel a temporary award of the child's custody in the adverse judgment rendered in a subsequent action instituted by the child's father to have her restored to his possession, and can have no legal effect where different conditions prevail. *Lemunier v. McCearly*, 37 La. Ann. 138.

In *Edwards v. Edwards*, 84 Mo. App. 552, on a proceeding by habeas corpus brought by a 67 L. R. A.

mother to recover possession of her infant daughter, who had been awarded to her paternal grandfather in a previous habeas corpus proceeding instituted by the father against the mother, in which the grandfather intervened as a claimant for the custody of the child, the court committed the infant to the care of her mother on the ground that an essentially different state of facts had arisen since the submission of the case in the former proceeding.

So, in *People ex rel. Ludden v. Winston*, 34 Misc. 21, 69 N. Y. Supp. 452, the court refused to take a child from the custody of her father, to whom she had been committed in a former habeas corpus proceeding, and transfer her to her mother, where the facts remained the same, and the mother was cohabiting with one whom she had married after procuring a void foreign divorce from the child's father. But subsequently, in *People ex rel. Winston v. Winston*, 65 App. Div. 233, 72 N. Y. Supp. 456, upon a showing that the mother, upon the affirmation by the court of appeals of the decision declaring her foreign divorce invalid, had ceased to cohabit with her second husband, and was conducting a boarding house for a living, and was able to support and educate the child, its custody was awarded to her.

A decision rendered by a judge of the superior court, in which he doubts his authority to make an order disposing on habeas corpus of the custody of a child, is not *res judicata* on a subsequent proceeding by habeas corpus in-

dispute such right, nor relitigate it, except upon a new state of facts. But the court has the same power to change the custody as against the new custodian as it had originally against the parents. *Re Bort*, 25 Kan. 308, 37 Am. Rep. 255. It is true that in the cases where the doctrine of *res judicata* is applied in its widest scope the welfare of the child is given great, and even controlling, effect, this consideration being treated as qualifying the legal rights of the claimants. Yet in other cases it is said that the custody of a child will be awarded as its own welfare may require, because the interest of the child will override the legal right, and authorize an order in spite of such right. See 15 Am. & Eng. Enc. Law, 2d ed. p. 187, and cases there cited. Whether the welfare of the child is properly spoken of as modifying the legal right, or as justifying an order in opposition to the right, may not be important. But the distinction between a question as to the comparative rights of two conflicting claimants, and one as to what is for the best interest of a child, is real and vital. The former may be controlled by a prior adjudication, but the latter is always open.

In the present case, then, we assume that the judgment of the probate court of Saline county determines the respective legal rights of the grandmother and the mother, and, as against the mother, places the right to the care of the children with the grandmother; and that the mother is estopped by such determination, and cannot relitigate the mat-

ter in this court, unless upon a showing of a material change of conditions since that judgment was rendered. But, nevertheless, the responsibility is cast upon this court, which it cannot avoid if it would, of deciding what order herein is for the best interest of these children. In a matter of such importance to them and of such inherent delicacy, it is to be regretted that more adequate means of information as to the exact facts are not afforded. This court cannot undertake to say just what portion of a mass of contradictory testimony is to be believed. From the spirit of bitterness that characterizes much of it, it is entirely probable that both charges and counter charges are untrue. The decision of the probate court is entitled to weight, but, as the evidence in that court is not before us, such decision must be considered in the light of the depositions on file here, which seem to cover all phases of the controversy. We shall reach a determination upon a general view of the situation, rather than upon an attempted resolution in detail of the disputed issues of fact. The custody is asked by the grandmother, who is sixty-two years of age, and who is living alone. The children are now, and have been for over nine months, with their mother, who is living with her present husband, a man of good habits, against whom nothing is alleged, and who professes an interest in and affection for the children as though they were his own. It is too clear for argument that in the case of children of such tender years,

stituted in the supreme court,—especially where evidence of restraint exercised since the former proceeding is given. *People ex rel. Trainer v. Cooper*, 8 How. Pr. 288.

In *Ferguson v. Ferguson*, 36 Mo. 197, in speaking of a decision rendered on habeas corpus awarding the custody of minor children, the court said: The decision is not of the nature of a final judgment. It concerns only the present actual condition of things, and the order of the court is at once executed and accomplished beyond recall; and, in reference to any new state of facts existing afterwards, the parties have the same remedies as before, whether by writ of habeas corpus or other proceeding in any court of competent jurisdiction.

In a contest by habeas corpus for the custody of an infant the court intimated that any order that it might make as to the disposition of the child would be in its nature temporary. That it could not, in that proceeding, determine the question of guardianship; but could only exercise its discretion on general principles of justice, after full consideration of all the circumstances, and with a view mainly to the child's interest. *Re Doyle*, 16 Mo. App. 159.

It is said in *Derlinger v. Derlinger*, 5 Legal Gaz. 329, 30 Phila. Leg. Int. 336, 10 Phila. 190, that an order of the court, made on habeas corpus, disposing of the custody of a minor child, is not *res judicata*, and is intended

ed only for the condition of things as they exist at the time of the hearing. It may be revoked or modified whenever required by a change of circumstances.

In *Green v. Campbell*, 35 W. Va. 698, 29 Am. St. Rep. 843, 14 S. E. 212, the court states that a decree awarding on habeas corpus the custody of an infant does not establish a permanent custody, but one intended to continue until a change of circumstances shall, in respect of the infant's welfare, require a change of custody, or until the infant has reached such an age that, by statute, he may nominate his own guardian, subject to the parent's right and to confirmation by the court.

On habeas corpus proceedings instituted to obtain possession of her infant daughter, by a wife who had left her husband, the custody of the child was, by the court of appeals, adjudged to the father; but, after the return of the case to the circuit court, and entry of mandate, the latter court declined to restore the infant to the custody of the father on the ground of his immoral conduct since the original judgment was rendered. This was held not to be a disregard of the mandate of the court of appeals, where the circuit court was directed to reserve in its judgment the power to take the child from its father and give it to the mother if sufficient cause was shown for it. *Bonney v. Bonney*, 10 Ky. L. Rep. 454, 9 S. W. 404.

See also *Com. ex rel. Thompson v. Ebert*, 24

having regard alone to their own welfare, leaving all other matters out of consideration, their proper place is with their mother, unless it be found that she is unfit for the trust, or incapable of caring for them; and the evidence in this case does not warrant such a finding.

The children will be committed to the

custody of Emma Peck, their mother. The costs of this proceeding, in view of all the circumstances of the case, will be taxed to respondents James E. Peck and Emma Peck.

Burch, J., having been of counsel, not sitting.

All the other Justices concur.

ILLINOIS SUPREME COURT.

Joseph M. CORMACK, *Petitioner*,
v.

Thomas MARSHALL.

(211 Ill. 519.)

An unreversed judgment of a court of competent jurisdiction in a habeas corpus proceeding for the custody of a child is, while the facts are unchanged, binding upon the parties, and will bar independent proceedings in another court, even though it be one of higher jurisdiction.

(*Wilkin, Cartwright, and Scott, JJ., dissent.*)

(October 24, 1904.)

PETITION for writ of habeas corpus to obtain the custody of petitioner's infant son. *Denied.*

The facts are stated in the opinion.

Mr. A. D. Early for petitioner.

Messrs. Carnes, Dunton, & Faissler and Cliffe & Cliffe, for respondent:

In controversies over the custody of children the decision of the court in a habeas corpus proceeding becomes *res judicata*.

Pa. Co. Ct. 648; *Re Barnes*, 30 Ohio L. J. 164, —*infra*, V.

III. Conclusiveness as to issues involved.

A decision, in a habeas corpus proceeding, awarding the custody of a child as between two contestants, does not conclude the defeated party from disputing, on his subsequent application to be appointed guardian of the child, an alleged contract between the child's deceased father and the adverse party, under which the latter claims the child was permanently relinquished to him, where the former adjudication was put in part, and might have been put altogether, on the ground that the applicant for guardianship was estopped from raising the question. *James v. Cleghorn*, 63 Ga. 335. The court remarks: Another reason, perhaps, why a judgment rendered between two contestants for the possession of a child on a writ of habeas corpus should not stand in the way of future proceedings, looking to the supplying the child with regular guardianship, is that in the latter the child's need of a guardian and its right to have a guardian are the great and controlling elements, whilst in the former these elements are not necessarily involved.

That a decree on habeas corpus awarding the custody of an infant is *res judicata* as to the issues involved, see *Re Hamilton*, 66 Kan. 754, 71 Pac. 817; *McConologue's Case*, 107 Mass. 170; *Lemunier v. McCearly*, 37 La. Ann. 133, —*supra*, II.
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9 Enc. Pl. & Pr. p. 1070; 15 Am. & Eng. Enc. Law, 2d ed. p. 211; *Freeman*, Judgm. 3d ed. § 324; *Church*, Habeas Corpus, 2d ed. § 387; *Mercein v. People*, 25 Wend. 64, 35 Am. Dec. 653; *Re Hamilton*, 66 Kan. 754, 71 Pac. 817; *Re Sneden*, 105 Mich. 61, 55 Am. St. Rep. 435, 62 N. W. 1009.

The right of successive applications for the writ of habeas corpus in cases involving the custody of children does not depend upon the question whether appeal or writ of error lies, but is denied on other grounds.

Re Sneden, 105 Mich. 61, 55 Am. St. Rep. 435, 62 N. W. 1009; *State ex rel. Lembke v. Bechdel*, 37 Minn. 360, 5 Am. St. Rep. 854, 34 N. W. 334; *Re Stockman*, 71 Mich. 180, 38 N. W. 876; *Re Snell*, 31 Minn. 110, 16 N. W. 692; *Church*, Habeas Corpus, 2d ed. § 387; *Re Hamilton*, 66 Kan. 754, 71 Pac. 817.

Ricks, Ch. J., delivered the opinion of the court:

This is an original proceeding in this

IV. Parties or persons concluded.

That a former adjudication as to the custody of an infant, brought up on habeas corpus, is conclusive upon the same parties upon the same state of facts, is held by *State ex rel. Lembke v. Bechdel*, 37 Minn. 360, 5 Am. St. Rep. 854, 34 N. W. 334, and *Mercein v. People*, 25 Wend. 64, 35 Am. Dec. 653, contrary to *RE KING*.

But an adjudication, in a habeas corpus proceeding sued out by a husband, awarding the custody of a minor child to another person, is not binding upon the wife, and does not estop her from suing out a like proceeding against the same person to obtain the custody of such infant, who was not the child of either of the parties. *Taylor v. Nelther*, 108 Ga. 765, 33 S. E. 420.

An order made on habeas corpus, giving a mother the custody of two of her children of tender years, is not conclusive against the rights of the father in a subsequent proceeding on habeas corpus, instituted by the mother to obtain possession of another child nearly seven years of age, then in the possession of its maternal grandmother, with the consent of the father, where there does not seem to have been any adjudication in the former proceeding as to the father's character and conduct, and he did not appear in either proceeding. *Re Reynolds*, 28 N. Y. S. R. 538, 8 N. Y. Supp. 172.

A decree awarding the custody and control of children, though *res judicata* as to the par-

court upon a writ of habeas corpus issued upon the petition of Joseph M. Cormack for the custody of his infant son, Kimball James Marshall Cormack, in which it is alleged that said son is illegally detained by the respondent, the grandfather of said child. The respondent, by his return, admits the possession of the child, and avers that he is legally entitled to have and keep said child in his custody by virtue of an order of the circuit court of De Kalb county entered at the October term, 1903, of said court, upon a habeas corpus proceeding by the petitioner in this cause against this respondent for the custody of this same child; that, upon a writ, return, traverse, and full hearing upon both the facts and law before said court, it was found that it was for the best interests and welfare of said child that the respondent have the care, custody, and control of him, and it was so ordered; and that said child was remanded to the care, custody, and control of the respondent. The petition, return, and record of said former proceeding are set out in the return *in hæc verba*, and it is further averred therein that "there has been no change in the situation of said child, or the circumstances governing and controlling the question as to the right of his custody, since said hearing and order in said circuit court;" and said for-

mer proceeding and order are pleaded in bar as *res judicata*. Respondent also reasserts and repleads the facts and circumstances set forth in his return to the former writ, wherein are stated at large the circumstances under which said child first came into his custody and control, and why he did retain, and deemed himself still entitled to retain, said child. Petitioner answers the return as made to the writ in this court, and admits the proceedings had in the circuit court; does not deny that there has been no change in the conditions, etc., as they existed at the time of the former suit, but says the order of the circuit court was not warranted, and denies that it can operate as *res judicata*. Petitioner then traverses and controverts some of the allegations of fact as to the manner and claim under which respondent originally obtained the custody of said child, and the circumstances under which he retained the same. The cause was referred, and the evidence taken and reported, and the cause heard by this court upon written testimony and printed and oral arguments by counsel for both parties.

From the view we feel impelled to take of the law in this case it would seem unnecessary to enter into a discussion of the evidence, as it might affect the rights of the

ties to the proceeding, is not conclusive as to the rights of the infants themselves, and does not preclude a court of competent jurisdiction from removing them, when necessary for their welfare, from the custody of the person to whom they were committed by the decree. *Slack v. Perrine*, 9 App. D. C. 128. See also *supra*, III.

V. Foreign judgment as *res judicata*.

A decree, rendered in a habeas corpus proceeding by a court having jurisdiction of the subject-matter and of the parties, awarding the custody and control of infants, is *res judicata* as to the rights of the respective parties upon the state of facts then existing,—especially where the court has general jurisdiction over infants; and should be given the same effect in a foreign jurisdiction that it has by law and usage at home. *Slack v. Perrine*, 9 App. D. C. 128, Followed in *Slack v. Slack*, 9 App. D. C. 184.

So, a decree made by a court of the state in which a husband and wife resided, awarding the custody of their infant daughter to the wife as against the husband, will be respected by the courts of a sister state to which the child had been removed by the wife, in a subsequent proceeding by habeas corpus instituted therein by the husband, where the conditions remain unchanged, except that the wife is better able to provide for the child than at the time the former decree was rendered in her favor. *Com. ex rel. Thompson v. Ebert*, 24 Pa. Co. Ct. 648.

A decision rendered by the court of chancery of one state, awarding on a habeas corpus proceeding the custody of a child to its father in preference to its mother, will not be disregarded in a subsequent habeas corpus proceeding between the same parties in another state. 67 L. R. A.

where no circumstances have arisen since the former adjudication which put a different complexion upon the case or call for a different disposition of the custody of the infant,—and especially where the mother, who had procured a void foreign divorce from the father, had married again, and was still living with her supposed second husband. *People ex rel. Ludden v. Winston*, 34 Misc. 21, 69 N. Y. Supp. 452.

But a decision of the supreme court of a sister state awarding the custody of a child to her maternal grandparents in preference to her father, and reversing the decision of the circuit court which had given judgment in favor of the father, will not be regarded as *res judicata* by the court of another state to which the father removed with the child before the reversal of the judgment of the circuit court; but the court of the state of the father's residence will consider the facts and circumstances, and, if they have so changed that the child's welfare requires that she remain with her father, the court will so decree. *Re Barnes*, 30 Ohio L. J. 164.

VI. Dismissal of writ without decision or prejudice.

In proceedings by habeas corpus, instituted by a father to obtain possession of his child, who was then in the care of her maternal grandparents, the court, being equally divided in opinion as to what judgment should be entered, dismissed the writ without any decision upon the rights of the parties, and without prejudice, either to any existing right or adjudication, or to any future remedy. *Stockman's Case*, 56 Mich. 218, 22 N. W. 321.

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parties upon a hearing of the case upon its merits. We will therefore but give a brief outline of the more salient matters. The petitioner was born in 1855, and at twelve years of age began to work to support himself. He was born in Kansas, and in his youth attended the common schools of that state. By his labors and industry, and without other assistance, he was enabled to attend the State Agricultural College of Kansas five terms, beginning in 1872. After teaching school for a while, he entered the Northwestern University, at Evanston, where he remained seven or eight years, graduating from the preparatory department, the university proper, and the Garrett Biblical Institute, where he fitted himself for service in the ministry of the gospel, receiving the order of elder in 1883. In one capacity or another he has been preaching since 1877. While at Evanston he met Jennie Marshall, the daughter of the respondent and the classmate of the petitioner. They were married in 1884. By this union two children are living,—Joseph, eleven years old, and Kimball, the child now in controversy, who was born in February, 1900. The mother of Kimball, prior to his birth, entered the Presbyterian Hospital of Chicago for the purpose of confinement, and after the birth of Kimball died on March 3, 1900, in that hospital. Following the death and funeral services of his wife, petitioner received notice of the illness of his father in Kansas, and immediately went to his father, who died on the 19th day of the same month. The child, Kimball, was left in the hospital, upon the suggestion of those in charge of it, that it could be better taken care of there. Though no well-defined ailment developed in the child, it did not seem to thrive while at the hospital, and petitioner arranged with Mary Ernest, a sister of the deceased wife, to take the child and care for it. She received the child on the 10th of April, 1900, and petitioner employed a lady to assist her in her household duties in order that she might care for the child. Petitioner lived about 40 miles from Mary Ernest, and Mary Ernest lived within 5 or 6 miles of respondent. Mary Ernest kept the child but two or three weeks, when she visited the home of respondent with it, and respondent and his wife insisted upon keeping the child, and Mary Ernest left it with them without any knowledge or arrangement between her and petitioner that it should be done. The first knowledge that petitioner had that the child was at the home of respondent was while on his way to visit it on the 23d of April, 1900, when he was so informed, and went to the home of respondent, and visited the child. The child, Kimball, has remained with the re-

spondent thence hitherto. Notwithstanding the fact that petitioner has at no time received a salary of more than \$750, he purchased and owns unimproved city lots in Chicago for which he paid \$3,000, has saved and loaned out at interest over \$3,500, has accumulated a library of the value of \$2,000, and is possessed of horses and buggies and ample household effects. In these accumulations of property and money petitioner was aided to the extent of about \$500 by his wife. Petitioner was remarried in September, 1902. His present wife is now twenty-nine years of age, was reared on a farm, has good health, was educated in the district schools and the Northwestern University, has taught school, is without children, and, as far as the evidence discloses, is a woman of estimable character, economical and industrious, and has at all times been willing to receive and care for Kimball. After the death of his wife and up to the time of his remarriage the petitioner kept up his household, his family consisting of himself and a young lady who had lived with the family prior to the death of his wife, and his son Joseph, whose care and custody he kept all the time. Respondent and his wife are past seventy years of age, have reared a family of seven children, the youngest of which is about thirty years of age, and is the only one remaining at home. Respondent and his wife are both members of the same denomination of which petitioner is a minister. Respondent is possessed of about 700 acres of valuable farm land, free from encumbrance, and also possessed of a large amount of personal and other property.

So far as the social and moral fitness of either of these parties is concerned for the care of the child, there would seem to be no question, and the record sufficiently shows that all concerned are attached to this child, and, if the record were open to our consideration, and we felt free to act upon the facts, we would have no hesitancy in holding that this father is entitled to the custody of his child. As before said, we feel constrained to hold that the proceedings and order of the circuit court in relation to the custody of this child are well pleaded as a bar to this proceeding. At the time the petition was filed, the court was in some doubt upon the question, and therefore allowed the case to proceed to the taking of the evidence. It is now with some reluctance that we declare our conclusion that we are unable to consider the case upon its merits. We regard the rights of the parent as superior to those of any other person, when that parent is a fit person to have the custody of children and is so circumstanced that he can provide the necessities of life and administer to the re-

quirements of such a charge. The mere fact that some other person may have more money or property in any form is not one that appeals to us. The divine injunction to multiply and replenish the species was not confined to the rich, nor was it intended that the poor should beget the children and the rich should rear them. To recognize such doctrine would be little less than monstrous, and would be in utter disregard of those natural instincts of love and care and interest found in the breast of the parent. And, while it is said in the books that the interest of the child is the controlling question, it is not meant thereby to say that the financial interests, only, of the child shall predominate. The courts cannot be unmindful of the great fact standing prominently in all our biographies and histories, that the greater number of the men and women of real worth in our nation and throughout the world have come up through circumstances that required a struggle upon the part of their parents and themselves to make themselves what they were. While the financial interests of the child are not to be disregarded, they are, likewise, not to be controlling. Neither the day laborer, nor the minister of the gospel, is to be discriminated against in the consideration of this one of the highest natural rights with which man is endowed merely because of the wealth of those who are contending against him. Until it becomes contrary to law that people in poor or moderate circumstances shall produce children, the courts must recognize and enforce the sacred rights and the legal rights they have to their custody, control, and society.

In the consideration of all rights, however, the unbroken custom of ages, the good of society, and the very necessities of the case require that the courts shall observe the rules of established law. If the question here presented were one between the individual seeking his liberty from alleged unlawful restraint and the people or the state insisting upon such restraint, then, by an unbroken line of decisions in this state, we would be free and bound to hold that an order in one proceeding before either a court or a judge thereof is not a final order from which an appeal or writ of error would lie, and could not be pleaded as a bar to another or further proceeding. *Hammond v. People*, 32 Ill. 446, 83 Am. Dec. 286; *Ex parte Thompson*, 93 Ill. 89; 9 Enc. Pl. & Pr. p. 1070. But in contentions arising over the custody of a child, between the parents or other parties asserting rights thereto, the proceeding is held to be but a private suit, in which the public is not concerned, and upon this question the authorities are so uniform that it can hardly be said that the

question is open. It is not regarded in the light of the infant contending for his own liberty, but in the true light of other persons interested, or claiming to be, contending for the custody of the infant; and, until the infant arrives at the age of discretion, his wishes are neither considered nor consulted. Adopting this view of the nature of the proceeding, the courts, and text writers as well, have uniformly taken the view that in such proceeding the order of the court or judge having competent jurisdiction is a final order, and is binding upon the parties under the same facts and so long as the same conditions exist as did at the time of the hearing and order. 2 Spelling, Extr. Rem. § 1198; *Church, Habeas Corpus*, 2d ed. § 387; 9 Enc. Pl. & Pr. 1071; 15 Am. & Eng. Enc. Law, 2d ed. p. 213; *Tyler, Infancy & Coverture*, 291; *Freeman, Judgm.* 3d ed. § 324; *Mercein v. People*, 25 Wend. 64, 35 Am. Dec. 653; *State ex rel. Lembke v. Bechdel*, 37 Minn. 360, 5 Am. St. Rep. 854, 34 N. W. 334; *Dubois v. Johnson*, 96 Ind. 6; *Brooke v. Logan*, 112 Ind. 183, 2 Am. St. Rep. 177, 13 N. E. 669; *Re Hamilton*, 66 Kan. 754, 71 Pac. 817; *Weir v. Marley*, 99 Mo. 484, 6 L. R. A. 672, 12 S. W. 798; *Re Sneden*, 105 Mich. 61, 55 Am. St. Rep. 435, 62 N. W. 1009.

Mr. Spelling, in his work on Extraordinary Remedies, after stating in § 1197 the general rule that, "in the absence of statutory provisions on the subject, the refusal to discharge one restrained of his liberty does not bar issuance of a second writ by another court or officer," notes the exception here adverted to in the following language: "But to the rule that, in the absence of statutory provisions, a party in confinement or custody is at liberty to make subsequent applications at will, there is an exception in the case respecting the custody of children, and the determination of the court upon the first application is conclusive in these cases. An application for the writ will be denied in the absence of new and subsequent facts being presented by which the state of the case or the relative claims of the parents to the custody of the child are altered in some material respect. Where, however, new and important facts can be presented, there is no estoppel upon a second or an indefinite number of applications, even in the cases of children." § 1198. The language used by the author just quoted is practically the same in all the authorities cited and examined by us, and to further quote from them would but extend this opinion without aiding it in explicitness of statement or clearness in the announcement of the rule. Against this array of authorities, to which others might be added, we are not cited to, nor have we found, any authority, save one,

either in the text-books or a well-considered case, where the rule is stated adversely to what is above announced; and we may properly conclude, from the earnestness and care with which this case has been presented, and with the undoubted knowledge on the part of counsel for petitioner that the rule is as we have stated it, that, if there had been authorities at variance with those cited, or noting an exception to the rule, they would have been called to our attention.

Our attention is directed to *Re King*, 66 Kan. 695, ante, 783, 97 Am. St. Rep. 399, 72 Pac. 263, which was an original proceeding in the supreme court of Kansas. In that case the mother had applied for a writ in the probate court of Saline county, in that state, to obtain the custody of her children from their grandmother, and on a hearing the children were remanded to the custody of the grandmother. Afterwards the mother applied for another writ. The prior proceedings were pleaded, to which a demurrer was interposed, overruled, and the proceedings dismissed. Later the mother applied to the supreme court, and upon the subject of *res judicata* the court said: "Regardless of the analogy to the ordinary habeas corpus proceeding, however, we hold that the doctrine of estoppel does not preclude a court, in any case where it has acquired jurisdiction, from making such order with regard to the custody of a child as shall be for the child's best interest. . . . It is true that in the cases where the doctrine of *res judicata* is applied in its widest scope the welfare of the child is given great, and even controlling, effect, this consideration being treated as qualifying the legal rights of the claimants. Yet in other cases it is said that the custody of a child will be awarded as his own welfare may require, because the interest of the child will override the legal right, and authorize an order in spite of such right. . . . Whether the welfare of the child is properly spoken of as modifying the legal right, or as justifying an order in opposition to the right, may not be important; but the distinction between a question as to the comparative rights of two conflicting claimants, and one as to what is for the best interest of a child, is real and vital. The former may be controlled by a prior adjudication, but the latter is always open."

So much of the above quotation as is italicized must be regarded as the basis upon which that court felt authorized to make a distinction between the rights of those claiming the custody of the child and the interests of the child itself, and to found upon that distinction jurisdiction in that court to reconsider the case upon its merits,

although it had twice before been considered by other courts. We cannot give our assent to the distinction as a jurisdictional question. We recognize the distinction made, and understand it to be the duty of any court, in considering the question of the disposition of the custody of a child, to keep that distinction before it. The parent has the superior right to the child, but the superior right of the parent must yield to the best interest of the child. There is a recognition of both the rights, although the parent has the superior right, which is a true statement of an abstract proposition. He only has that superior right when it accords with the best interest of the child. All things being equal, as between the parent and strangers or other persons bearing a different relation to the child, the parent's right is superior; but we can readily imagine a parent who may be possessed of great wealth, and surrounded by all the luxuries that money can acquire, or of artistic tastes, to which he has given full reign, and yet there may be in his social life such glaring defects and such disregard of morals as would compel the court, in the discharge of its high duty to the infant, to place it in the hands of one in moderate circumstances, whose social and moral record were such as fitted him for such charge, and whose influence and attentions would be calculated to be more beneficial to the welfare of the child. As we have said, these considerations are presented to the court in every instance where the custody of children is involved; and we must presume that the court to whom previous applications have been made did not overlook them.

When the court in *Re King*, 66 Kan. 695, ante, 783, 97 Am. St. Rep. 399, 72 Pac. 263, said that upon the question as to the custody of a child the claimants might be estopped by a previous adjudication, but that the question as to the best interests of the child was always open, if it meant by that declaration that such question could be raised at any time by either of the claimants who had previously litigated it before a court of competent jurisdiction upon the same state of facts, we are unwilling to follow that court and adopt that rule. Infants are the wards of the state and of the courts of the state, and it may be that, although some court had disposed of an infant upon the contentions of parties then before it, upon a sufficient showing someone not a party to that proceeding might, in the interest of the child, invoke the action of the court, and the court might entertain the question; but to do so could only be justified in extreme cases, where it was apparent that either the court who originally

passed upon the case had been imposed upon by the collusion of parties, or by perjury, or some other extraordinary matter that would warrant the court in declaring an exception to the rule.

The rule announced in *Re King* by the supreme court of Kansas seems not to be the uniform rule of that court. *Re Hamilton*, 66 Kan. 754, 71 Pac. 817, which is contained in the same volume of Reports, and was rendered a month prior to the *King Case*, seems not to be in accord with the latter case. An original writ was sued out of the supreme court by the father against the mother and father of the insane wife of the petitioner for the custody of the petitioner's child. A former application had been made to the district court, and the child, upon a full hearing in that court, had been remanded to the custody of the grandparents. The petition in the supreme court was denied, and the rule stated thus: "After a careful examination of the authorities we are inclined to the opinion that, in cases of this character, where the controversy arises over the custody of a child, the real issue is one between private parties contesting a question of private right under the form of habeas corpus proceedings, in which there arises no question of personal liberty, and, in consequence, all matters in issue arising upon the same state of facts determined in the prior proceeding should be regarded as settled and concluded." And in support of the rule thus announced appear many of the authorities above cited by us. Without more substantial reasons for a departure from the rule there announced by that court, we cannot accept the departure made in the *King Case* as the better rule, or one that should be of general application.

The contention of the petitioner that the rule we have adopted is only applicable in those states where an appeal or writ of error will lie is, we think, only half correct. As applied to all of the states where the rule of the common law obtains and the proceeding is in any inferior court of record, if the judgment be deemed final a writ of error will lie (*Haines v. People*, 97 Ill. 161), while the weight of authority is that the right of appeal is statutory, and only lies where expressly authorized.

The fact that *Weir v. Marley*, 99 Mo. 484, 6 L. R. A. 672, 12 S. W. 798, was considered upon its merits after the announcement of the rule that we have adopted does not strengthen petitioner's contention, as the opinion states that the consideration of the rights of the parties upon the merits was at the special request of both parties, and the question mostly considered by the court in that case was as to the effect of a

parol contract between the petitioner and respondents touching the custody of the child. There the father had been awarded the custody of his child by the district court, and a new writ was sued out of the supreme court by the grandparents, who were respondents in the former proceeding, insisting upon a parol contract between the dying mother of the child and the grandparents, to which it was claimed the father had assented. That court, holding that the parol contract was not binding, said: "And no well-considered case will be found where the custody of a minor child was by habeas corpus taken from the father and given to another upon the sole ground that the legal right of the father had passed to and vested in such other person by parol contract." The court evidently intended to make no change in the former order, and, to comply with the request of both parties, considered that legal proposition. And while in the *Mercein Case*, 25 Wend. 64, 35 Am. Dec. 653, there seems to be some ground for argument that the rule of *res judicata* was applied because an appeal or writ of error might have been had, we do not think, upon a careful study of the case, that the rule rested upon that proposition. The return in the case at bar states that no change of conditions or new facts have arisen affecting the child since the former hearing, and the answer to the return admits, or at least does not deny, that allegation; so that the case is not brought within the exception to the rule as stated.

We have, perhaps, said more than is necessary to the proper disposal of this case, but as this is the first time the question has come before us, and the case is fraught with some general interest, we have felt at liberty to give it a somewhat extended consideration.

The custody of the child, Kimball James Marshall Cormack, will be remanded to the respondent.

Writ denied.

Wilkin, Cartwright, and Scott, JJ., dissenting:

We dissent from the foregoing opinion so far as it holds that a writ of error will lie to review a decision of a judge or court in a habeas corpus proceeding, and that such a decision is *res judicata*. A habeas corpus proceeding may be before a judge in vacation, in which case there is no record to be certified to an appellate court for review. An order as to the custody of a child in a habeas corpus proceeding is in its nature temporary and interlocutory, and we do not see how it can be *res judicata* in a subsequent proceeding in this court.

CALIFORNIA SUPREME COURT.

Sarah BLUNT, Appt.,

v.

FIDELITY & CASUALTY COMPANY,
Resp't.

(.....Cal.....)

1. The acceptance, retention, and renewal, for successive terms, of an accident insurance policy, preclude the personal representatives of the insured from claiming that there were provisions in it to which the insured had not agreed.
2. A condition in an insurance policy is not void because not referred to in the application.
3. One issuing an accident insurance policy may stipulate that it shall not cover injuries received while assured is insane.
4. Injuries to an insane person need not be intentionally inflicted to relieve the insurer from full liability under a policy providing that in case of injuries intentionally inflicted upon himself by the assured, or inflicted upon himself or received by him while insane, the measure of liability shall be a sum equal to the premiums paid.

(November 10, 1904.)

APPEAL by plaintiff from a judgment of the Superior Court for Alameda County in favor of defendant in an action brought to enforce payment of the amount alleged to be due on an accident insurance policy. *Affirmed.*

The facts are stated in the opinion.

Messrs. **H. V. Morehouse** and **J. E. Alexander** for appellant.

Mr. **A. E. Shaw**, for respondent:

The cause of death does not come within the class of risks insured against, since death was not caused by an external, violent, and accidental means, operating independently of all other causes.

Bigelow v. Berkshire L. Ins. Co. 93 U. S. 284, 23 L. ed. 918; *Chapman v. Republic L. Ins. Co.* 6 Biss. 238, Fed. Cas. No. 2,606.

If assured is insane at the time of the injury he has ceased to be covered by the policy.

Adkins v. Columbia L. Ins. Co. 70 Mo. 27, 35 Am. Rep. 410; *De Gogorza v. Knickerbocker L. Ins. Co.* 65 N. Y. 232; *Chapman v. Republic L. Ins. Co.* 6 Biss. 238, Fed. Cas. No. 2,606; *Pierce v. Travelers' L. Ins. Co.* 34 Wis. 389; *Eastabrook v. Union Mut. L. Ins. Co.* 54 Me. 224, 89 Am. Dec. 743;

NOTE.—For the somewhat similar question of validity of provision in insurance policy against liability in case of suicide, even while insane, see *note* to *Billings v. Accident Ins. Co.* 17 L. R. A. 89, and *note* to *Mutual L. Ins. Co. v. Wiswell*, 85 L. R. A., on page 262.
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Mutual Ben. L. Ins. Co. v. Daviess, 87 Ky. 541, 9 S. W. 812; *Bigelow v. Berkshire L. Ins. Co.* 93 U. S. 284, 23 L. ed. 918.

The company and the assured had a right to enter into this contract.

De Gogorza v. Knickerbocker L. Ins. Co. 65 N. Y. 282; *Mutual Ben. L. Ins. Co. v. Daviess*, 87 Ky. 541, 9 S. W. 812; *Bigelow v. Berkshire L. Ins. Co.* 93 U. S. 284, 23 L. ed. 918; *Chapman v. Republic L. Ins. Co.* 6 Biss. 238, Fed. Cas. No. 2,606.

Renewal must be held to be an acceptance of all the terms and conditions of the policy.

American Ins. Co. v. Neiberger, 74 Mo. 167; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837.

Shaw, J., delivered the opinion of the court:

The plaintiff appeals from the judgment. The suit is upon a policy of insurance, of the kind usually designated as an "accident policy," issued by the defendant to John P. Blunt for the term of twelve months. It provided that, if death should result from an injury within ninety days from the time the injury was received, the defendant would pay to the wife of the insured, if she survived him, the sum of \$5,000. The fourth clause of the policy was as follows: "(4) In case of injuries, fatal or otherwise, intentionally inflicted upon himself by the assured, or inflicted upon himself or received by him while insane, the measure of this company's liability shall be a sum equal to the premium paid, the same being agreed upon as in full liquidation of all claims under this policy." At the end of twelve months the policy was renewed for the same period, and at the end of that time it was again renewed. During the last year of the insurance, John P. Blunt became insane, and was committed to the Mendocino State Hospital. During the term of insurance, and while insane, he fell against a steam radiator in the hospital, and thereby received injuries from which, within ninety days thereafter, he died. The plaintiff is the surviving wife of the assured. Before the action was begun, the defendant tendered her the full amount of the premium paid, and in its answer it offered to allow judgment for that sum in favor of the plaintiff. The court found these facts, and gave judgment in favor of the plaintiff for the sum tendered, and against the plaintiff, in favor of the defendant, for its costs.

In contracts of insurance, as in other contracts, the rights of the parties are determined from the terms of the contract, so far as it is lawful. The contract here in

question consisted of the application for insurance made and delivered by the assured to the defendant, and the policy of insurance made and delivered by the defendant to the assured. It cannot be conceded that the company was not at liberty to insert conditions in the policy which were not mentioned in the application. The application contained the affirmative stipulations and warranties made by the assured, and the policy contained the stipulations and limitations made by the insurer. The two together constitute the contract. If the policy of the company, which was issued by the company upon receipt and approval of the application, had contained any clause to which the assured did not agree, he, of course, would have been at liberty to reject it, and either demand a rescission and return of the premium paid, or insist upon a policy without the clause to which he did not assent. But when he received the policy and accepted it without objection, and especially when, as the record here shows, with the policy in his possession, he twice renewed it for an additional year, neither he nor the beneficiary can with good reason claim that there is anything contained in it to which he did not fully consent and agree. The fourth clause above quoted is not unlawful, and it cannot be eliminated on the ground that it is not expressly referred to in the application. The effect of this clause is that the defendant did not agree to insure the policy holder against injuries from accidents received by him during such part of the time covered thereby as the assured should be insane, except to the amount of the premium paid; and this regardless of the question whether the injuries were inflicted by himself, intentionally or otherwise, or were received by him from some other cause. Insurance during such insanity, except to that extent, was simply not a part of the contract; and the agreement, in that contingency, was that the company should be liable only for a sum equal to the premium paid. Language could not express this idea more clearly than it is expressed in the policy. The courts have always construed in favor of the assured every ambiguity and uncertainty in contracts of insurance. But where the words are clear and free from uncertainty, and the meaning plain, the contract as made by the parties is beyond the power of the courts to change by a forced construction. There was good reason for the insertion of the clause. A sane man will naturally and in-

stinctively protect himself from injury, while if insane he might unconsciously expose himself thereto. It is to be presumed that, in fixing the amount to be paid as a premium, the company took into consideration its proposed exemption from full liability during such insanity, if it should occur, and reduced the premium accordingly. The assured received the benefit of this clause in the reduced amount of the premium, and hence the contract cannot be deemed inequitable or unfair.

The appellant contends that the fourth clause should be construed by interpolating the word "intentionally" a second time, making it read thus: "In case of injuries fatal or otherwise intentionally inflicted upon himself by the assured; or intentionally inflicted upon himself or received by him while insane," etc. It is obvious that this would be an unfair and forced construction. The natural inference from the context is that the element of intent was designedly omitted with respect to injuries happening to him while insane, so that in case of injury while he was insane, either consciously or unconsciously inflicted by himself, or received by him while in that condition, whether by reason of his consequent inability to avoid injury, or from causes entirely apart from his insanity, the company should be liable only to the amount of the premium. The language used seems well adapted to convey this meaning, and it is apparent that the word "intentionally" was purposely omitted from the second clause in order to avoid any question on that point.

The cases holding that a provision exempting an insurance company from liability if the assured shall commit suicide while insane does not give exemption where the suicide is the result of the insanity go upon the theory that the use of the term "suicide," or other similar description of the mode of death, implies a conscious and voluntary self-destruction, and not an act impelled by the insane delusion, and in that sense involuntary. They do not apply to this policy, which makes the insane condition, and not the volition of the assured, the test of nonliability.

The judgment is affirmed.

We concur: **Angellotti, J.; Van Dyke, J.**

Petition for rehearing denied December 10, 1904.

GEORGIA SUPREME COURT.

S. W. HEWIN *et al.*, *Plffs. in Err.*,

v.

City of ATLANTA.

(.....Ga.....)

*1. An agreement between a number of merchants and a corporation provided that the latter should print the names of the former in its subscribers' directory, and circulate a number of copies of the book in a named city, and that the merchants should purchase of the corporation a number of so-called trading stamps, to be delivered to customers with their purchases (and not to be otherwise disposed of), and by them preserved and pasted in the books furnished by the corporation until a certain number had been secured, when they should be presented to the corporation in exchange for the customers' choice of certain articles kept in stock by the corporation. *Held:* (1) That the furnishing of the trading stamps by a merchant to his customers did not constitute a business separate and distinct from that of selling merchandise, but was merely an instrumentality in or an incident to that business, being in its nature incapable of such separate existence as to constitute of itself a business in either a commercial or a legal sense. (2) That authority in a municipal charter "to make just and proper classification of business for taxation," and "to classify business, and arrange the various business, trades, and professions carried on in said city into such classes of subjects for taxation as may be just and proper," did not authorize the passage of an ordinance separating from the business of selling merchandise the incident of furnishing trading stamps for the purpose of increasing the sale of merchandise, and classifying the furnishing of such stamps as a separate business, subject to taxation. (3) That, whether the furnishing of the trading stamps be treated as a gift, or as a part of the contract of sale of the merchandise, which is delivered at the time the stamps are furnished, the furnishing of the stamps does not constitute a business subject to be taxed under charter authority to classify and tax business. (4) That the word "business," in a commercial or legal sense, means something done or carried on for a livelihood, profit, or the like. (5) That, even if the general assembly is authorized to impose a tax upon one who gives away his property, the giving away of property is not a business, within the meaning of a charter provision authorizing the taxation of business.

*Headnotes by COBB, J.

NOTE.—As to imposition of tax on merchants furnishing trading stamps to their customers, see also, in this series, *Fleetwood v. Read*, 47 L. R. A. 205.

As to imposition of tax upon concern selling trading stamps to merchants, see *Winston v. Beeson*, 65 L. R. A. 167.

As to constitutionality of statute prohibiting use of trading stamps, see *State v. Dalton*, 48 L. R. A. 775.

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2. An application for an injunction, filed jointly by the trading-stamp company and one or more merchants who are its customers, seeking to enjoin the collection of a tax imposed under an ordinance of the character above referred to, is not bad for misjoinder of parties.
3. Persons against whom an unlawful exaction in the form of a tax is sought to be made may unite in an application for an injunction to restrain the collection of the tax, and are not compelled to pay the same, and bring separate suits against the tax officer for damages.

(January 27, 1905.)

ERROR to the Superior Court for Fulton County to review a judgment denying an injunction to restrain the enforcement of a tax. *Reversed.*

Statement by COBB, J.:

S. W. Hewin and the Atlanta Trading Stamp Company, a corporation, filed a petition against the city of Atlanta, in which an injunction was prayed to restrain the city from enforcing an ordinance under which a business tax had been levied upon all persons furnishing "trading stamps to their customers." W. D. Payne filed an intervention, and was duly made a party. The Atlanta Milling Company, a corporation, also filed an intervention, and was made a party, but its name was subsequently stricken from the case. The defendant filed both a demurrer and an answer. At the hearing the judge refused the injunction prayed for, and Hewin, Payne, and the Atlanta Trading Stamp Company excepted.

The trading-stamp company entered into an agreement with its complainants and other merchants in the city of Atlanta, the material parts of which are as follows: The trading-stamp company agrees "to print in the directory of their subscribers' book the name, business, and address of the party of the second part. To deliver to the people of ——— said books, soliciting the trade of such persons and explaining to them how to use the same. To advertise, and in every way to use their best endeavor to promote the business interest and trade of the party of the second part." The merchant agrees: "(1) To receive of the party of the first part a sufficient number of trading stamps to be supplied as discounts for cash trade to all persons who may call for them, and the party of the second part also agrees to give out such stamps as follows: One stamp to be given for each and every 10 cents represented in a purchase; 10 stamps for \$1, etc. Said party of the second part also agrees not to

sell said stamps or dispose of them in any other way. (2) To pay the party of the first part 50 cents per hundred for all stamps disposed of; and to make weekly settlements with the party of the first part for each full page of stamps used. (3) To co-operate in every way possible with the party of the first part in promoting the best interests of all merchants named in said subscribers' book." The nature of the trading-stamp business, and the elements which compose it, are fully set forth in the record, and it appears that three distinct factors co-operate to produce the business: (1) The trading-stamp company; (2) the retail merchant; and (3) the stamp collector.

The stamp company maintains a store in which is kept a large number of articles commonly used as necessities and adornments for the house and kitchen. These articles are matters of general commerce. Their sale is not prohibited by the state, nor do they affect the public health or safety. They are not sold by the stamp company. The stamp company issues small books, which contain a directory of the merchants who give its stamps, with the address of the merchant and the character of his stock. These books contain a sufficient number of blank pages in which are pasted the stamps as collected by the retail purchaser. A book is completed when it contains 990 of the stamps. Canvassers are sent out into the city by the stamp company, who invite the proposed retail purchaser to visit the store and inspect the stock of goods carried by the company. When he does this, it is explained to him that, by paying cash for his purchases from any of the merchants whose names are in the book, he will be given a stamp for each 10 cents, 10 stamps for \$1, and so on. He is informed that, in order to obtain the stamps, he will pay no more for the article actually purchased than he would pay if he purchased either on credit, or the same article from a merchant who did not give the stamp; the cash purchase, with a request for the stamp, does not increase the price paid for the article which is the subject-matter of the sale. He is told to paste his stamps in the book given him, and when he has accumulated 990 stamps he will then be free to select any article he may desire in the store of the company. The company explains to the merchant that it will sell him the pad of stamps for \$5; that by using the stamps he will increase his cash trade; his business will be advertised by the stamp company through its canvassers, by its books, and by it in the newspapers. He contracts to give the stamps at the ratio of one for each 10 cents only upon cash purchases. He stipulates that he will not give the stamps for credit purchases, nor will he sell the stamp by itself.

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Briefly stated, the company sells to the merchant a pad of stamps, and, in return, advertises his business. The merchant gives the stamps to his customers for cash purchases. The customer, when he obtains a book, presents it to the trading-stamp company, and takes away the article selected by him. There are advantages derived by each of the three parties to this transaction. The pad of stamps costs the company but little for the printing. They are upon common paper, with mucilage applied to the back. From a mere sale of the stamp it derives a large gross profit. Its expenses consist of taxes, license fee, clerk hire, canvassers, salaries, insurance, and the price paid for the articles with which it redeems the book. The merchant, by getting cash, is enabled to discount his own bills by the payment of cash. He is saved the losses which are incident to a credit business, such as failure, expense of litigation incurred in the attempt to collect accounts, bookkeeper's hire, stationery, and so on. But the chief benefit derived by the merchant is the novel way in which his business is advertised. In place of paying a high price for an advertisement in the newspaper, which is read by but a few of the total subscribers, and followed up by a still less number, he pays, by using the trading stamps, only for an advertisement which actually produces a customer with cash. It is a system of advertising which is claimed to involve no waste, and to be direct, effective, and immediate in producing material results. The consumer pays no more for the article purchased when the stamp accompanies it than he does by purchasing the article either for credit, or from a merchant who does not give the stamp. By paying cash he avoids, to a large extent, the evils which are incident to credit purchases. By merely preserving the stamps until his book is completed, he ultimately obtains an article of considerable value. When the cost of conducting the business is deducted, the trading-stamp company realizes whatever profit is derived from the sale of the stamps to the merchant. The business is one into which the element of chance does not enter in any of its various steps. The price paid by the merchant to the company is uniform. It is \$5 for a book of stamps. The stamps are all alike. None of them possess any inherent value. One is the exact equivalent in every respect of all the others. No chance is injected between the merchant and the collector. The merchant is required to give at the ratio of one stamp for every 10 cents. One hundred dollars spent at separate times in dime purchases will produce exactly the same number as \$100 spent in one purchase. No chance appears in the transaction between the collector and the

company. When the book is produced and marked "Canceled." the one producing it wanders at will throughout the store of the company, and, when he has determined which article he will take, it is pointed out by him, his address taken, and the article delivered. The article desired by the purchaser is not selected by any turn of dice or cards. His right to any article which he may desire is determined alone by the physical fact of producing a book containing 990 stamps.

The Atlanta Trading Stamp Company opened its store in Atlanta, and a number of merchants bought stamps, and were using the same in their business according to the method outlined in the foregoing summary. In March, 1904, the mayor and general council of Atlanta adopted an ordinance, those portions of which are material to the present case being as follows:

"Section 1. Be it ordained by the mayor and general council that any person, firm, or corporation who furnish trading stamps, coupons, gift schemes, rebate checks, or punch cards, or similar stamps or cards, as a part of or premium upon the sales of goods, wares, or merchandise, shall pay an annual license therefor of one hundred (\$100) dollars, no license to be issued for less than the sum named for one year.

"Sec. 2. Be it further ordained that the furnishing of the stamps, coupons, etc., named in section one (1) of this ordinance is hereby classified as a separate business, and the above license is fixed thereon for the furnishing of said articles, alone or in connection with another business, and provided further that this ordinance shall not be enforced until on and after July 1, 1904."

This ordinance was attacked in the petition upon numerous grounds, and the bill of exceptions assigns error upon the refusal of the judge to grant an injunction upon each of the grounds upon which the ordinance is attacked. The assignments of error which are referred to in the opinion are as follows:

"Because the mere gift of the stamp was not a business, trade, calling, avocation, or profession, and could not be classified as such by the city of Atlanta, nor could said city, under its charter, require the license in question, or any other license, for the furnishing of such stamps by the merchant."

"Because the furnishing of stamps by the merchant was a mere incident or method of conducting the business, and no power was conferred upon the city of Atlanta to require a license for the incidents of a business, or the methods or means by which it was carried on."

"Because, under the charter of said city, 67 L. R. A.

the power of the city to require a license for a business which paid an ad valorem tax was limited to \$50."

"Because the attempted classification by said ordinance was purely arbitrary and fanciful, and neither just nor proper."

Messrs. Rosser & Brandon and John L. Hopkins & Sons, for plaintiffs in error:

The business is merely a method of advertising, and one which is therefore obviously legitimate.

State v. Ramsayer (N. H.) 58 Atl. 958; *State v. Dodge* (Vt.) 56 Atl. 983; *State v. Dalton*, 22 R. I. 77, 48 L. R. A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; *People ex rel. Madden v. Dycker*, 72 App. Div. 308, 76 N. Y. Supp. 111; *Winston v. Beeson*, 135 N. C. 271, 65 L. R. A. 167, 47 S. E. 457; *Young v. Com.* 101 Va. 853, 45 S. E. 327; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Com. v. Sisson*, 178 Mass. 578, 60 N. E. 385; *State v. Shugart*, 138 Ala. 86, 100 Am. St. Rep. 17, 35 So. 28; *Long v. State*, 74 Md. 565, 12 L. R. A. 425, 28 Am. St. Rep. 268, 22 Atl. 4; *Com. v. Emerson*, 165 Mass. 146, 42 N. E. 559; *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916.

The mayor and council of a city have not, under legislative grant of "authority to levy and collect a license tax . . . upon all persons exercising any profession, trade, or calling within said city," the power to impose upon a useful and legitimate business a prohibitory tax.

Morton v. Macon, 111 Ga. 162, 50 L. R. A. 485, 36 S. E. 627; *Mankato v. Fowler*, 32 Minn. 364, 20 N. W. 361; *St. Paul v. Traeger*, 25 Minn. 248, 33 Am. Rep. 462; *Hirshfield v. Dallas*, 29 Tex. App. 242, 15 S. W. 124; *State v. Moore*, 113 N. C. 698, 22 L. R. A. 472, 18 S. E. 342; *State v. Bean*, 91 N. C. 554; *Caldwell v. Lincoln*, 19 Neb. 569, 27 N. W. 647; *State v. Rowe*, 72 Md. 548, 20 Atl. 179; *Jackson v. Newman*, 59 Miss. 385, 42 Am. Rep. 367; *State, Mühlenbrinck, Prosecutor, v. Long Branch*, 42 N. J. L. 364, 36 Am. Rep. 518; *Sipe v. Murphy*, 49 Ohio St. 536, 17 L. R. A. 184, 31 N. E. 884; *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642; *Bloomington v. Wahl*, 46 Ill. 489.

It is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuits—not injurious to the community—as he may see fit, without unreasonable regulation or molestation.

Live Stock Dealers' & B. Asso. v. Crescent City L. S. L. & S. H. Co. 1 Abb. (U. S.) 398. Fed. Cas. No. 8,408; *Chicago v. Netcher*, 183 Ill. 104, 48 L. R. A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L. R. A. 265, 77 Am. St. Rep. 765, 55 S. W. 627.

Atlanta has power to tax business only. The furnishing of trading stamps was an incident, not a business, and because unable to tax an incident the ordinance falls.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. St. Rep. 255; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Vanzant v. Waddel*, 2 Yerg. 260; *Stratton Claimants v. Morris Claimants (Dibrell v. Lanier)* 89 Tenn. 497, 12 L. R. A. 70, 15 S. W. 87; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533.

The power to tax incidents must be specifically given.

Com. v. Pearl Laundry Co. 105 Ky. 259, 49 S. W. 26; *Savannah v. Dehoney*, 55 Ga. 33; *Rogers v. Sandersville*, 120 Ga. 192, 47 S. E. 557.

Injunction is the proper remedy.

Vanover v. Davis, 27 Ga. 354; *Herrington v. Tolbert*, 110 Ga. 532, 35 S. E. 687; *Albany Bottling Co. v. Watson*, 103 Ga. 508, 30 S. E. 270; *Wright v. Southwestern R. Co.* 64 Ga. 783, 68 Ga. 311; *Savannah, F. & W. R. Co. v. Morton*, 71 Ga. 30; *Decker v. McGowan*, 59 Ga. 805; *Keely v. Atlanta*, 69 Ga. 586; *Dill. Mun. Corp. § 923*; *Chicago v. Collins*, 175 Ill. 445, 49 L. R. A. 408, 67 Am. St. Rep. 224, 51 N. E. 907.

Messrs. J. L. Mayson and William P. Hill, for defendant in error:

Municipal legislation of the kind now before the court is proper.

Fleetwood v. Read, 21 Wash. 547, 47 L. R. A. 205, 58 Pac. 665; *Humes v. Ft. Smith*, 93 Fed. 857; *Landsburgh v. District of Columbia*, 11 App. D. C. 512; *McQuillin, Mun. Ord.* 653, 659; *Dill. Mun. Corp. § 357*.

The city might classify the furnishing of stamps as a business.

Keely v. Atlanta, 69 Ga. 585; *Macon Sash, Door, & Lumber Co. v. Macon*, 96 Ga. 23, 23 S. E. 120; *Johnson v. Macon*, 114 Ga. 429, 40 S. E. 322; *Savannah, T. & I. of H. R. Co. v. Savannah*, 112 Ga. 164, 37 S. E. 393; *McQuillin, Mun. Ord. p. 653*; *Alexander v. State*, 86 Ga. 246, 10 L. R. A. 859, 12 S. E. 408; *Weaver v. State*, 89 Ga. 639, 15 S. E. 840.

The reasonableness of the charge, or of the ordinance, is a question solely for the court, and the evidence offered on this point was irrelevant and properly excluded.

Dill. Mun. Corp. 327; *Heerwagen v. Cross-town Street R. Co.* 90 App. Div. 288, 86 N. Y. Supp. 218; *Political Code, § 47*; *Coleman, B. & W. Co. v. Dannenberg Co.* 103 Ga. 784, 41 L. R. A. 470, 68 Am. St. Rep. 143, 30 S. E. 639; *Kingsbery v. Love*, 95 Ga. 546, 22 S. E. 617.

The court will not undertake to question the policy of the legislature.

McQuillin, Mun. Ord. § 81; *Dill. Mun. 67 L. R. A.*

Corp. § 328; *Danville v. Hatcher*, 101 Va. 523, 44 S. E. 723; *Anderson v. State (Neb.)* 96 N. W. 149; *Chesapeake & O. R. Co. v. Maysville*, 24 Ky. L. Rep. 615, 69 S. W. 728; *Alexandria v. Morgan's L. & T. R. & S. S. Co.* 109 La. 50, 33 So. 65.

There was a misjoinder of parties plaintiff and causes of action.

Code, § 4938; *Governor use of Moore v. Hicks*, 12 Ga. 189; *Stuck v. Southern Steel & Aluminum Alloy Co.* 96 Ga. 95, 22 S. E. 592.

Injunctions against the enforcement of ordinances, providing for the collection of license fees or taxes, are not granted, in the absence of strong equitable grounds.

Cooley, Taxn. 1411, 1415; 15 Enc. Pl. & Pr. 441; *Rice v. Macon*, 117 Ga. 401, 43 S. E. 773; *Johnston v. Macon*, 62 Ga. 652; *Decker v. McGowan*, 59 Ga. 807; *Martin v. Statesboro*, 100 Ga. 423, 28 S. E. 450; *Morris Canal & Bkg. Co. v. Jersey City*, 12 N. J. Eq. 252; *Poyer v. Des Plaines*, 20 Ill. App. 30, 123 Ill. 111, 5 Am. St. Rep. 494, 13 N. E. 819; *Finegan v. Allen*, 46 Ill. App. 553; *Chicago, B. & Q. R. Co. v. Ottawa*, 47 Ill. App. 73; *Sheldon v. Weeks*, 51 Ill. App. 314; *Marrin Safe Co. v. New York*, 38 Hun. 146; *Wertheimer v. Boonville*, 29 Mo. 254.

Cobb, J., delivered the opinion of the court:

The legality of the trading stamp business has been the subject of numerous decisions. It has been held in a number of cases that there is nothing in the business which subjects it to the control of the state or its subordinate public corporations under the police power. While the question has never been before this court, rulings in other states seem with practical, even if not entire, unanimity to concur in the conclusion, not only that the business is legitimate, but that the right to engage in it without undue interference from states and municipalities is guaranteed by the Constitution of the United States to the same extent, and subject only to the same restrictions, that can be placed around a person engaged in any lawful business not within the range of the police power. Among the numerous cases that might be cited on this question, we call attention to the following: *Winston v. Beeson*, 135 N. C. 271, 65 L. R. A. 167, 47 S. E. 457; *State v. Dodge (Vt.)* 56 Atl. 983; *State v. Ramseyer (N. H.)* 58 Atl. 958; *State v. Shugart*, 138 Ala. 86, 100 Am. St. Rep. 17, 35 So. 28; *Long v. State*, 74 Md. 565, 12 L. R. A. 425, 28 Am. St. Rep. 268, 22 Atl. 4; *Com. v. Sisson*, 178 Mass. 578, 60 N. E. 385; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Young v. Com.* 101 Va. 853, 45 S. E. 327. See also 57 Cent. Law J. 421. But the le-

gality of the trading-stamp business is not involved in this case. The city of Atlanta has not proceeded under the police power. It has by its ordinance treated the furnishing of stamps by merchants as a business, and attempted to tax it as such; the ordinance attempting to place it as a business upon exactly the same footing with other classes of business not within the range of legislation under the police power delegated to the city. While the tax levied is referred to in the ordinance as a license, the ordinance, taken as a whole, shows that it is not to be treated as a license, in the strict sense of that term, but simply as a business tax imposed upon the merchants, just as similar taxes are imposed upon others engaged in pursuits and avocations which are not regulated by the city under its police power.

The city of Atlanta has authority under its charter to impose a tax upon any person carrying on "any trade, business, calling, or avocation, or profession" within the city, not to exceed \$200 in any case, and not exceeding \$50 where the person also pays an ad valorem tax on merchandise or materials. It has also power "to classify business, and arrange the various business, trades, and professions carried on in said city into such classes of subjects for taxation as may be just and proper," and also "to make a just and proper classification of business for taxation." See Anderson's Code of Atlanta (1899) §§ 64, 65, 250. The ordinance treats the furnishing of trading stamps by a seller of merchandise to his customers as a business, and taxes it as such. It is therefore unnecessary to determine whether one thus engaged in furnishing trading stamps is carrying on a "trade, calling, or avocation, or profession;" the authorities seeking to proceed against the merchants under their power to tax business, and not having sought to classify the furnishing of stamps under any of the other occupations referred to. The questions to be determined, as the case is now presented, are whether the retail merchant, who furnishes trading stamps to his customers under a contract with the trading-stamp company, as set forth in the statement of facts, is engaged in a business, within the meaning of the charter of the city authorizing a tax to be imposed upon persons engaged in business, and whether the business is of such a character that it can be disconnected and isolated from the other business of the retail merchant in such a way as to make the retail merchant a member of two classes for the purposes of taxation; that is, a merchant and a furnisher of trading stamps. It is conceded that the trading-stamp company is engaged in a business, and the record discloses that it has

been taxed, and has paid the tax imposed upon it. But is a merchant who simply furnishes the stamps purchased by him from the trading-stamp company, and delivers them according to the contract into which he has entered (that is, to cash customers), in so doing, engaged in a business at all; and, if so, is that business one actually separate and distinct, and legally severable from his business as a merchant, within the meaning of the charter of Atlanta, conferring power and authority to classify businesses for taxation? If the delivery of the trading stamps to a cash customer is purely voluntary as between the merchant and his customer, the transaction being without consideration,—a mere gift,—then we suppose no one would contend that, in delivering the stamps under such circumstances, the merchant was engaged in a business at all. While the word "business," as used colloquially, carries with it a very broad meaning, still, as used in its legal and commercial sense, it applies only to that in which one engages for the purpose of livelihood, profit, or the like. This idea of business runs through all of the definitions contained in the dictionaries. This interpretation of the word "business" was recognized in the case of *Brush Electric Light & P. Co. v. Wells*, 110 Ga. 198, 35 S. E. 365. If the furnishing of stamps by a retail merchant to his customers is therefore a mere gift, it cannot be a business, within the ordinary and usual meaning of that term as used in the commercial world. Laws and ordinances imposing taxes are strictly construed, and authority to tax a business will not, in such legislation, be construed to authorize the taxing of one engaged in transactions from which he cannot possibly derive any profit, which cannot be the means of a livelihood, and which cannot be carried on without inevitable loss; persons so engaged not being engaged in any business, within the ordinary meaning of that term, nor within the meaning in which it must have been used in laws authorizing or imposing taxes. But it is said that the furnishing of the trading stamps is not a gift; that, when the merchant holds out to the world that he will furnish trading stamps to cash customers, such purchasers are entitled to demand the delivery of the stamps, and therefore a cash transaction involves both a sale of the article of merchandise as well as of the stamp; that, while the stamp has no intrinsic value, it is a symbol of that which has value; that the title to the article finally delivered by the stamp company to the stamp collector is really sold by the merchant when the stamp is delivered; and that the merchant would then be practically engaged in selling every character of article which it is possible for

the stamp collector to obtain from the stamp company upon the presentation of the stamp book. If the stamp is sold with the article with which it is delivered, of course the title to the stamp passes immediately upon delivery, and this would also be true if the furnishing of the stamp were a mere gift. The cash purchaser owns the stamp from the time it is delivered into his possession. But can it be properly said that the title to that which is finally purchased with the stamps passes to the customer of the retail merchant at the time the stamp is delivered? Suppose 100 stamps represent 100 different transactions with 100 different merchants, none of whom are engaged in the furniture business, and upon presentation of the stamps to the stamp company a chair is delivered. Could it be contended that each of these 100 merchants is subject to classification as a dealer in furniture on account of the delivery of this chair; and, if not, would they all be taxable as joint sellers of some character? We do not think the contention is sound that the title to the article finally selected by the stamp collector passes at the time of the delivery of the stamp, though the title to the stamp does pass, and whatever that is worth—whatever its purchasing power—is the property of the stamp collector. The stamp simply represents the contract of the stamp company that, when a given number are presented, the holder of the stamps can select an article from the stock of the company in exchange for the stamps. The stamps, in certain quantities, have a purchasing power with the trading-stamp company, and their value is simply the result of this purchasing power; and, if the merchant is to be treated as the seller of the stamps at all, he simply sells the right to demand of the stamp company what it has agreed to furnish, and does not sell the article which the trading-stamp company actually furnishes to the collector when the book is delivered. The transaction does not differ in essential particulars from one where a merchant, in consideration of a \$100 purchase, returns to the purchaser \$5 in gold. The title to the \$5 vests in the purchaser upon delivery, with the right to use it to purchase any article that it will buy; but certainly the title to the article subsequently purchased was never in the merchant, and cannot pass with the delivery to the customer of the \$5. The result would be the same if, instead of giving \$5, the merchant gave the purchaser an order on another merchant for an article worth \$5. And this would be the same as if the purchaser were given 50 different orders at different times. We do not think that, even treating the furnishing of the trading stamps as a sale, it is a sale of the article

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finally procured from the stamp company, so as to make the merchant furnishing the stamp one engaged in the business of selling that particular article, whatever it may be. If the transaction partakes of the nature of a sale at all, it is simply a sale of the stamp.

Treating the furnishing of the trading stamps as a sale and a sale of the trading stamps, is it a business which can be carried on for a livelihood, profit, or the like, when disconnected from every other business? When coupled with another business, it may result in profit owing to the owner of that business. Standing alone, it cannot be made the subject of profit, even if it can be carried on at all. Under the contract between the stamp company and the merchant, and under the plan, scheme, or device—whatever it may be properly characterized—such a thing as a person engaged in the furnishing of trading stamps, and doing nothing else, does not come within the remotest range of the contract, or the scheme therein provided for. Attached to a business, the furnishing of stamps thrives, and profits result. Detached from the business, it instantly dies; and it dies, not by withering gradually away, but its death is instantaneous. The business of the merchant can live without the sale of trading stamps, but the furnishing of trading stamps cannot live unless there is a business to which it can fasten, and from which it can draw its life blood. What has been said is applicable, no matter what the business to which the furnishing of trading stamps is attached,—whether it be that of a merchant, or of one who follows a trade or profession.

If an occupation is so made up as to include two or more separate and distinct classes of business, each of which could be maintained as a separate business,—that is, a business in the sense in which that term is above used,—then, under the power to classify subjects of business for taxation, the municipal authorities might be empowered to impose a separate tax upon each class of business embraced within this occupation. The department store is a familiar illustration of different classes of business going to make up one occupation. So it is with the hotel keeper, who, in addition to furnishing lodging and meals, sells cigars, liquors, newspapers, operates a barber shop, etc. So where a merchant undertakes himself to deliver his goods to his customers, and operates in connection therewith the business of delivering goods by wagon. See *Johnson v. Macon*, 114 Ga. 426. 40 S. E. 322 (2). In *Macon Sash, Door & Lumber Co. v. Macon*, 96 Ga. 23. 23 S. E. 120, a tax was imposed upon a wagon which was used by

one engaged in the business of contracting and selling builders' supplies; and it was held that the owner of the wagon was liable to the tax, notwithstanding he also paid a tax imposed upon him as a contractor or builder. In *Savannah v. Dehoney*, 55 Ga. 33, it was held that where the city of Savannah had imposed a tax upon the owners or lessees of public stables, and in the same ordinance there was a provision imposing a tax upon every person engaged in the business of transporting passengers by omnibuses, it was a question of fact whether the use of omnibuses was an incident to the business of one who was the owner of a public stable, and, if so, such owner would not be liable to a second tax because he used an omnibus in connection with the business in which he had been taxed. See also *Savannah v. Feeley*, 66 Ga. 34. But where the business is made up of different elements, and there is only one business, a municipal corporation, under a power to classify businesses, cannot separate this business into its different elements, and call that a business for taxation which from its nature is dependent for its existence, not upon anything inherent in itself, but upon its connection with the business which is itself subject to taxation. In other words, the power of a municipal corporation to tax mere incidents of business is not conferred by a charter which authorizes it to tax a business. In *Rogers v. Sandersville*, 120 Ga. 192, 47 S. E. 557, it was held that, where one engaged in the sale of soda posted bills advertising the sale of his goods, he was not engaged in business as a billposter, but was simply engaged in performing what was an incident to his business as a seller of soda, and was not liable to a tax under an ordinance imposing a tax upon all persons engaged in the business of a billposter. In the opinion Mr. Justice Lamar used the following language, which is appropriate to the present case: "What he did was for the purpose of making or increasing sales, and the various steps leading to that end were part and parcel of the business of selling." It may be that the general assembly would have authority to divide an occupation into its various elements, and to tax each, and also tax every incident of every business; but certain it is that a municipal corporation which is simply given the right to tax a business and classify business has not had conferred upon it authority either to divide a business into its elements for the taxation of each, or to tax that which is merely an incident of a business, and which could not alone, from its very nature, constitute a separate and distinct business.

In the cases above cited the furnishing of trading stamps by a merchant to his customers is sometimes referred to as a business, but a careful reading of the opinions will show that this term is used by the writers in its broad and colloquial sense, and that no question similar to the one now before us was under consideration in any of the cases. There are a few cases where the question of taxing the use of trading stamps by merchants has been the subject of decision. In *Humes v. Ft. Smith*, 93 Fed. 857, an ordinance which had the effect to impose a tax upon the use of trading stamps by merchants was upheld; but this tax was levied under an act of the legislature of Arkansas authorizing cities of certain classes to license, tax, and regulate gift enterprises, and the act defined the term "gift enterprises" so as to include the use of trading stamps by merchants. This was also true of *Lansburgh v. District of Columbia*, 11 App. D. C. 512, where the tax was imposed upon gift enterprises under an act of Congress which defined this expression in such a way as to include the use of trading stamps by merchants. In *Fleetwood v. Read*, 21 Wash. 547, 47 L. R. A. 205, 58 Pac. 665, the supreme court of Washington held that, under an act which authorized a city to grant licenses for any "lawful purpose," a license tax for the purpose of revenue could be imposed upon merchants who used trading stamps. The question as to whether the furnishing of trading stamps by merchants was in itself a business, so as to be thus classified for the purposes of taxation, was not involved in that case. In *Ex parte McKenna*, 126 Cal. 429, 58 Pac. 916, the supreme court of California held that a tax on merchants using trading stamps could not be justified as a tax on a lottery, since a lottery was unlawful and could not be licensed, and that the mere use by one merchant of trading stamps, when other merchants did not engage in their use, was not a sufficient reason for passing an ordinance imposing a tax burdensome in amount, if not prohibitory, on all merchants issuing trading stamps; and that such an ordinance was discriminating in its nature, unreasonable, and void, as in restraint of trade. Mr. McQuillin, in his treatise on Municipal Ordinances (p. 659), in enumerating the cases in which a tax upon trades, occupations, vocations, etc., had been sustained, mentions gift enterprises, and in a note says the term "gift enterprise" includes trading stamps and similar schemes; the authorities cited by him to sustain this being *Humes's Case*, 93 Fed. 857, and *Fleetwood's Case*, 21 Wash. 547, 47 L. R. A. 205,

58 Pac. 665; and these cases, as has been shown, dealt with legislative acts defining gift enterprises. In its ultimate analysis, the use of trading stamps by a merchant is simply a unique and attractive form of advertising, resorted to for the purpose of increasing trade. In the strict commercial sense of the term "business," it is not a business at all. It is simply a mode or manner of business,—an instrumentality or incident of a business. When resorted to for the purpose of increasing the business to which it is annexed, it occupies the same relation to that business as newspaper advertising, circulars, dodgers, and the like; and, if the city of Atlanta can classify as a business advertising through the medium of the trading stamp, it can also classify as a business advertising through the journals of the city, or through the medium of a person employed to walk the streets with the sandwich upon which the goods, wares, and merchandise of a merchant are advertised, or the employment of a dwarf who carries upon his shoulder a barrel upon which the wares of a merchant are advertised, and who stops at every street corner and seats himself upon it. These and other methods equally unique have been resorted to, but no one has ever pretended that the merchant, in thus attempting to increase his profits from the sale of his goods, was engaging in a new business, and not simply carrying on the business of selling goods. In the case of *Keely v. Atlanta*, 69 Ga. 583, in which the provisions of the charter of Atlanta above referred to were under consideration, it was held that these provisions conferred power upon the municipal authorities to divide a general merchandise business into specific classes, such as dry goods, boots and shoes, and the like, and to levy a tax upon each of such classes. There is nothing in that decision which would authorize the taxing of the mere incidents of a business, which in themselves could not exist without the business to which they were annexed. We think that the classification in the ordinance under consideration was unreasonable and arbitrary, and could in no sense be declared just and proper, as the general assembly has determined must be the case with all classifications for taxation made by the city of Atlanta.

2. It is contended, though, that even if the judge erred in his conclusion as to the validity of the ordinance, the demurrer was properly sustained, for the reason that there was a misjoinder of parties; that the application for injunction could not properly be made jointly by the trading-stamp company and one or more merchants who were its

customers. The trading-stamp company was not a necessary party, but it seems to us that it was a proper party. While it had paid its tax, and was not affected by the ordinance so far as further taxation upon its business was concerned, the effect of the ordinance was to embarrass and hamper those who dealt with it, and diminish its business, even if it did not have the effect to entirely destroy it. If the city of Atlanta were to impose a business tax upon a merchant, and then impose a tax upon every customer who entered his door, it would be at once apparent that the merchant was vitally and pecuniarily interested in the question as to whether his customers should be burdened with this tax. In such a case it would seem that the court would entertain a joint application by the merchant and his customers to restrain the enforcement of the tax attempted to be collected without authority of law upon the customers, when the effect of the collection would be to interfere with the customer by imposing a burden upon his right to buy, and to interfere with the merchant by impairing or destroying his right to sell.

3. It is also contended that injunction was not the remedy; that the parties should have paid the tax under protest, and then have brought suit against the tax officer for damages. If a lawful tax had been levied, and the question was whether the individual came within the description of persons subject to the tax, a question of fact would have been raised, and equity would not interfere, but would remit the party to his action at law. But where there is no law authorizing the collection of the tax, it is no tax, and equity will enjoin the attempt to collect it by anyone at the instance of the person who is about to be made the subject of the illegal exaction. *Decker v. McGowan*, 59 Ga. 805; *Vanover v. Davis*, 27 Ga. 354. The ordinance was void. There was, hence, no law authorizing the imposition of the tax. It was no tax; it was nothing; and the one attempting to enforce its collection was a wrongdoer; and those against whom the exaction was sought to be made could properly unite in an application to a court of equity to enjoin the enforcement of the ordinance, and would not be driven to their separate actions of trespass against the wrongdoer, who, under the guise of a tax officer, was attempting to collect that for which there was no authority.

Judgment reversed.

All the Justices concur.

J. L. FITTS, *Plff. in Err.*,
v.
City of ATLANTA.

(.....Ga.....)

- *1. The ordinance of the city of Atlanta (Mun. Code, § 1841), declaring it unlawful to hold public meetings in the streets of that city without the consent of the municipal authorities, is not unconstitutional, either because it curtails or restricts the liberty of speech, or makes an arbitrary discrimination in favor of some persons against others, or because the city had no legal power to enact it; nor is such ordinance void upon the ground that it is an unreasonable and oppressive exercise of police power.
2. The act approved December 19, 1893 (Acts 1893, p. 173), entitled "An Act to Amend the Charter of the City of Atlanta, to Wit: The Act Incorporating the City of Atlanta, Approved February 28th, 1874," etc., and empowering the mayor and general council of such city to provide by ordinance for the regulation of public meetings and public speaking in its streets by preventing the obstruction of the same or the gathering of disorderly crowds thereon, is not violative of that provision of the Constitution which prohibits the passage of any statute containing matter different from that which is expressed in the title thereof.
3. Where it appeared that the accused violated a municipal ordinance for the previously announced purpose of testing its constitutionality, it was not error to refuse to continue the case made against him merely to give his counsel time to investigate the constitutional questions claimed to be involved therein.
4. The allegations in the petition for certiorari as to the circumstances which it was claimed disqualified the mayor, as acting recorder, to try the petitioner, were not only not verified by the answer, but were expressly denied therein. Neither did the answer verify the statements made in the petition in reference to the petitioner being required, under the sentence imposed, to work upon the public works. "Points made in a petition for certiorari, not verified by the answer of the trial judge, present nothing for determination either by the superior or the supreme court."
5. When the penalty is left by the statute to the discretion of the trial judge, within certain fixed limits, his judgment will not be disturbed upon the ground that the sentence was excessive, if the penalty imposed does not exceed the limit provided.

*Headnotes by FISH, P. J.

NOTE.—For another case in this series as to validity of ordinance prohibiting making of speech in streets of city without license from mayor, see *Love v. Phalen*, 55 L. R. A. 618.

As to ordinance prohibiting making of public address on city common, see *Com. v. Davis*, 26 L. R. A. 712.

As to constitutional freedom of speech and of the press generally, see *Cowan v. Fairbrother*, 32 L. R. A. 829.
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6 Where complaint was made in a petition for certiorari that the trial court overruled objections to the testimony of named witnesses upon designated subjects, without setting forth, either literally or in substance, the testimony to which the objections were made, an assignment of error that the court erred in overruling such objections was not well taken.

7. The certiorari was properly overruled.

(January 26, 1905.)

ERROR to the Superior Court for Fulton County to review a judgment affirming a judgment convicting defendant of violating a municipal ordinance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Alonzo Field and A. M. Brand for plaintiff in error.

Messrs. J. L. Mayson and W. P. Hill, for defendant in error:

It is not an unconstitutional delegation of power for the legislature to authorize the city council to empower the city board of police to make rules and regulations for the use of the streets.

Com. v. Plaisted, 148 Mass. 375, 2 L. R. A. 142, 12 Am. St. Rep. 566, 19 N. E. 224; *Centralia v. Smith*, 103 Mo. App. 438, 77 S. W. 488; *Kansas City v. Mastin*, 169 Mo. 80, 68 S. W. 1037; *Kennedy v. Pawtucket*, 24 R. I. 461, 53 Atl. 317; *Brodline v. Revere*, 182 Mass. 598, 66 N. E. 607.

An ordinance expressly authorized by statute cannot be declared void upon the ground that it is an unreasonable and oppressive exercise of the police power.

Chesapeake & O. R. Co. v. Mayesville, 24 Ky. L. Rep. 615, 69 S. W. 728; *McQuillin*, Mun. Ord. p. 181; *Danville v. Hatcher*, 101 Va. 523, 44 S. E. 723; *Anderson v. State* (Neb.) 96 N. W. 149; *Taylor v. Sandersville*, 118 Ga. 63, 44 S. E. 845.

FISH, P. J., delivered the opinion of the court:

J. L. Fitts was adjudged guilty, in the recorder's court of the city of Atlanta, of violating a certain municipal ordinance, and sentence imposed on him therefor. He took the case by certiorari to the superior court, where, upon the hearing, the certiorari was overruled. Thereupon he sued out a writ of error to this court. Our learned Brother Lumpkin, who presided in the superior court, rendered an opinion in the case, which comes up in the record, and which is as follows:

"This case presents a contest of strength between 'Prof.' Fitts and a municipal ordinance of the city of Atlanta. The two are diametrically opposed to each other, and one must yield. There is no halfway ground. If the ordinance was a legal and valid ordinance, Prof. Fitts's conduct was illegal. If

the professor is right, the ordinance is illegal. The ordinance is contained in the Municipal Code of 1899, and reads as follows: 'Sec. 1841. The president, chairman, or other officer, or committee of men, or any persons who desire or intend to call a public meeting of the citizens of Atlanta, for political purposes, shall notify the mayor, or chief of police, of such desire or intent, and of the time and place of meeting, before said meeting is called, and, upon failure to do so, upon conviction thereof, shall be fined not exceeding \$50 and cost, or be imprisoned in the calaboose of the city not exceeding thirty days, in the discretion of the recorder's court; and upon receiving such notice it shall be the duty of the mayor or chief of police to attend such meeting with a sufficient police force to preserve peace and order: Provided, it shall not be lawful to hold any such meeting in any of the public streets of the city of Atlanta without the consent of the mayor and council, or the mayor and chairman of the board of police commissioners of the city of Atlanta; and any person calling or holding any public meeting, in any of the streets of the city of Atlanta, without such consent, shall, upon conviction thereof in the recorder's court of said city, be fined in a sum not exceeding \$100, or imprisoned not exceeding thirty days, in the discretion of the court.' The plaintiff in certiorari appears to have made two or three speeches on the streets of Atlanta under permit or consent from the mayor and chairman of the board of police commissioners, but his permit was withdrawn. Afterwards he determined to speak on the streets either with or without a permit or consent, and, failing to obtain one, he proceeded in defiance of the ordinance and in spite of it. Handbills were issued and scattered, of which the following is a copy:

"Great Sensation!

"Testing a City Ordinance.

"Free Street Lecture on Socialism by Prof.

"J. L. Fitts of South Carolina.

Monday, August 17th, 8 p. m., corner of Broad and Marietta streets. Prof. Fitts has been refused a permit. He will speak under the right guaranteed by the 1st Amendment to the United States Constitution, which was proposed by Jefferson and approved by Washington. If interrupted, the case will be carried to the United States Supreme Court. Shall we, who built the streets, be deprived of their use for lawfully assembling to discuss our condition and needs? Come and see. Be early and get a good place. Don't Block Sidewalks or Streets.

The Committee.

"The petition states that this was admitted in evidence over objection, on the ground that there was no evidence that said Fitts had it printed or circulated, and it was irrelevant; but there is no assignment of error on any such grounds, nor does the mayor verify this statement in his answer to the writ of certiorari. The answer states that, 'as part of its evidence, the city introduced the poster which Fitts scattered over the city, as set forth in paragraph 10 of the writ of certiorari.' Having gathered his crowd in a public street in the very heart of the business portion of the city, he proceeded to make his test of the ordinance, and speak without any permit or consent. At the appointed time, among those who answered his invitation were members of the police force; and, as he had announced a desire to make a test of the law, they accommodated him by arresting him when he refused to desist from speaking on the street; and on his trial in the recorder's court, the mayor, presiding, adjudged him guilty. He brings the case to this court by writ of certiorari. The assignments of error are numerous, but the leading ground of his attack upon the ordinance is, in substance that the Constitution of the United States and of the state guarantee freedom of speech, and that under this guaranty he had a constitutional right to hold meetings and make speeches in the streets of Atlanta, and the ordinance which prevented his doing so without a permit or consent of the municipal officers was invalid. In several respects the answer of the mayor to the writ of certiorari does not agree with the petition, and, not being traversed, it must control. The petition is only taken as correct where verified by the answer. *Childs v. Moran*, 114 Ga. 320, 40 S. E. 271. For instance, the answer contains the following: 'On the night of the arrest of Fitts the permit had been withdrawn, but Fitts spoke in defiance of the authorities of the city, and went out into Marietta street, gathered a crowd around him, and began his speech. The sidewalk was not blocked, but the crowd gathered around Fitts in the street. The language used by Fitts was not obscene or vulgar, but on the night of his arrest he had no permit to speak, issued either from the mayor or anyone else. He took a box, and placed same out upon the roadway, and, standing thereon, undertook to gather a crowd around him, and undertook to make a speech.' In the evidence of the chief of police occurred the following: 'The sidewalk was not blocked, but people had gathered around Fitts out in the street. The people in the street, of course, obstructed the street where they stood.' Another witness states that 'the language of Fitts was not obscene, but was that calculated to

arouse strife and discord and cause revolution. He represented the socialists, and seemed to be trying to convert the people to his way of thinking by a text [attacks] upon the government, legislature, capital, etc.' Further on in the answer it is stated that 'the people gathered around him out in the street, and when they undertook to arrest Fitts a number of his sympathizers became very much excited, and it was necessary to arrest them in order to disperse the assembly.'

"The primary object of streets is for public passage. They should be kept open and unobstructed for that purpose. If damage accrues to passers by reason of improperly allowing them to be used for other purposes, the city may become liable. The streets of the city are peculiarly within the police control for the purpose of preserving and protecting their use by the public as thoroughfares. A man has many constitutional and legal rights which he cannot lawfully exercise in the streets of a city. Thus, every citizen has a right to lawfully acquire and hold personal property; but he has no right, constitutional or otherwise, to insist on storing his possessions in the street. Every man has the inalienable right to sleep and eat (if he has the edibles), but he has no constitutional right to make his bed or set his table in the street. Every man has not only the right to, but he should, bathe and cleanse himself, and change his raiment, if he has a change. This is a duty imposed by his individual constitution, if not by that of his country. But there is no constitutional right on his part to perform his ablutions or exercise the most necessary demands of his nature in the public streets. At proper times and in proper places one may make loud noises, or shoot a gun, or test his lung power vocally to a considerable extent, without offending against any law; but there is no right, inherent or constitutional, to make vociferous outcries or practice gunnery in the street. If Professor Fitts's idea of constitutional law were correct, I see no reason why every citizen should not claim a right to use the public streets for the exercise of his trade, calling, or profession, which may be much more essential to his welfare and that of the public than speech making by the plaintiff in *tortiori*, however eloquent, and regardless of the soundness or unsoundness of his argument.

"If the Constitution, state or Federal, guarantees to Professor Fitts the right to make public speeches on the streets of Atlanta, why does it not also guarantee the same right to every lecturer who may not desire to hire a hall, and to every showman who wishes to exhibit on the highway,

or to every mechanic, artisan, merchant, or other citizen, the right to ply his lawful vocation in the public thoroughfare? The constitutional right to exercise one's lawful vocation is quite as sacred, and often more important, than the right to make speeches; but the exercise of either right must yield to the municipal power properly exercised over the streets for the primary objects for which they were established. If everyone who has some constitutional right has also the constitutional right to exercise it in the streets of a city regardless of municipal regulations, these thoroughfares may soon become a gathering place of a numerous clan rivaling those adjuncts of modern exhibitions which, since the term was used during the Columbian Exposition at Chicago in 1893, have come to be distinguished by the name of 'Midway Plaisance.' The right of the public in regard to the streets is to use them for passage as public highways, provided they are used lawfully for that purpose. But even the right of passage is subject to reasonable legislative regulations for the general good. Thus, idling and loitering in the public streets has generally been prohibited, and no one has yet doubted the constitutionality of such legislation.

"In the handbill above referred to, the question is asked, 'Shall we, who built the streets, be deprived of their use for lawfully assembling to discuss our conditions and needs? Who comprise the 'committee' signing this handbill, or whether Professor Fitts was a part of it or all of it, does not appear. But, as it is shown that he was from another state, and, so far as disclosed, neither a citizen, taxpayer, property owner, nor resident of Atlanta, it is not quite clear how this question has any relevancy, or how he was one of the 'we' who built the streets of the city, or how he derived any peculiar right to use them as a forum or lecture hall because they have cost the municipality or the taxpayers or the abutting property owners money to pave or repair or keep in order for public travel. I fear that Professor Fitts has confused in his mind the constitutional right of freedom of speech with an imaginary, though nonexistent, right to hold public meetings and make speeches in the public streets regardless of municipal law or regulations. It is true that, under an ordinance prohibiting speaking on the streets without a permit, and a charge that he violated such ordinance, the defendant could not be convicted of the offense of obstructing the streets arising under another ordinance, although he might be guilty of both offenses; but, in considering the reasonableness or propriety of the ordinance on the subject of speaking on the public streets,

and the necessity of police regulation and control of that subject, the liability to cause obstructions in the streets interfering with public passage and causing disorder is a matter for consideration. Neither the prohibition placed on Congress by the 1st Amendment of the Constitution of the United States, whereby it was declared that 'Congress shall make no law abridging the freedom of speech,' nor the provision of the Constitution of this state which declares that no law shall be passed curtailing or restraining the liberty of speech, confers any constitutional right to gather crowds and make public orations in the streets of a city regardless of the municipal control over them.

'If, then, the plaintiff in certiorari (the defendant in the recorder's court) had no absolute or constitutional right to use the public streets of Atlanta as a place to gather an audience and speak, is the ordinance void on the ground that it makes an arbitrary discrimination in favor of some against others, because it requires a permit or consent to be obtained, and prohibits holding public meetings on the streets without one? Under the general powers usually conferred on cities, or what is sometimes spoken of as the 'general welfare clause' in municipal charters, the corporate authorities could pass reasonable regulations for the preservation and keeping of their streets open and unobstructed for travel and preventing disorder upon them. Not content with this general power, the city of Atlanta obtained an amendment to its charter in 1893, which contains the following language: 'The mayor and general council of said city of Atlanta is empowered to provide, by ordinance, for the regulation of public meetings and public speaking in the streets of said city of Atlanta by preventing the obstruction of the streets of said city or the gathering of disorderly crowds in said streets.' City Code of 1899, 48. The ordinance quoted above does not, on its face, make any discrimination, or say that certain persons, or persons of certain classes, might speak on the streets and certain others should not do so. It says that none shall do so without a permit or consent from certain officers. By its own terms it is not discriminative. Is it invalid because it requires a permit or consent before any person shall be allowed to speak on the streets, or because it provides for the granting of such permit by the mayor and chairman of the board of police commissioners? Counsel for plaintiff in certiorari have cited but one case on this subject,—that of *Yick Wo v. Hopkins*, 118 U. S. 356-374, 30 L. ed. 220-227, 6 Sup. Ct. Rep. 1064, 1065. In that case an ordinance was passed which contained

the following provision: 'Section 1. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.' Other sections of the ordinance prohibited the erection or maintaining of any scaffolding on any building without obtaining written permission of the board of supervisors, and provided punishment for the violation of the ordinance. Yick Wo and others were imprisoned for violating this ordinance. The case arose on the application for a writ of habeas corpus. On the return of the writ and the hearing then had the evidence plainly showed that the great majority of the laundries in the city were operated by Chinamen in wooden buildings; that the board of supervisors arbitrarily refused to consent for them to continue to do business in these wooden buildings, although a similar right was granted to Caucasians. Yick Wo showed that he had a city license which had not expired; that he had been engaged in the laundry business in the same premises and building for twenty-two years previously; that he had a license from the board of fire wardens, which showed that they had inspected the premises, and found all proper arrangements for carrying on the business; that the stove, washing and drying apparatus, etc., were in good condition, and their use not dangerous to the surrounding property from fire; and that all proper precautions had been taken to comply with the provisions of the ordinance in respect to the fire limits and making regulations concerning the erecting and use of buildings in the city; and also that he had a certificate from the health officer showing that the premises had been inspected by him, and found to be sufficiently and properly drained, and that all proper arrangements for carrying on the business of a laundry without injury to the sanitary conditions of the neighborhood had been complied with. Under the facts disclosed, the Supreme Court of the United States held that the ordinance and its administration were evidently intended to discriminate against the Chinese on account of their race, and that it was an arbitrary effort to drive them out of business in favor of their Caucasian rivals. The following extract from the opinion of Mr. Justice Matthews will serve to indicate the real basis of the decision: 'It appears that both petitioners have complied with every requisite deemed by the law or by the public officers charged with its administration necessary for the

protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others, who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law is not justified.' That imprisonment under an ordinance, the object of which was to drive out of business and prevent from exercising a legitimate and useful calling a number of persons, merely because they were Chinese, in the interest of competitors of another race, was illegal, presents a very different question from that involved in the present case; nor does the ruling that, although the ordinance involved may have been fair and impartial in appearance, yet, if it was administered by public authority with an evil eye and an unequal hand, so as practically to make illegal discriminations between persons in similar circumstances material to their rights, imprisonment so brought about was illegal, control the present case. Here no business or useful occupation, established or to be established, was involved. The right of a man to ply his trade or business occupying property owned or rented by him, by which he serves the public and earns an honest livelihood, is very different from the alleged right contended for in this case, to hold meetings and make public speeches in the public streets of the city. The municipal authorities did not prohibit Professor Fitts from speaking altogether, but prohibited him from holding public meetings and speaking in the streets without a permit or consent, and he was convicted when he did so with the express purpose of violating the municipal ordinance and asserting an alleged right which he did not have. One who gathers a crowd in a public street under the invitation expressed in a handbill, announces an intention to violate and test a police regulation, mounts a box, and insists on speaking, though requested to desist by the authorities, can hardly claim to be in the same category with those who pursue lawful and useful occupations, and who desire to use property owned or rented by them in the conduct of their legitimate business.

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"In *Com. v. Plaisted*, 148 Mass. 375, 2 L. R. A. 142, 12 Am. St. Rep. 566, 19 N. E. 224, a rule was passed by the board of police forbidding singing or playing or performing on instruments in the streets without the license of the board of police. A member of the Salvation Army, playing on a musical instrument, contested the rule, and the case was carried to the supreme court. In the decision it was held that it is not an unconstitutional delegation of power for the legislature to authorize a city council to empower the city board of police to make rules and regulations with reference to itinerant musicians; and that the constitutional right of freedom of worship did not prevent the adoption of reasonable rules for the use of the streets. In the case of *Centralia v. Smith*, 103 Mo. App. 438, 77 S. W. 488, it was held that a city ordinance prohibiting the explosion of firecrackers without the written consent of the mayor is within the police power of the city. 'A city ordinance prohibiting the explosion of firecrackers without the written consent of the mayor is not void as a delegation of legislative power to the mayor.' Without discussing this fully, it may be said that, of course, if the statute itself were unconstitutional, or the administration of the law were in excess of the authority, or in violation of the Constitution, the ruling might be otherwise. See also *Kansas City v. Mastin*, 169 Mo. 80, 68 S. W. 1037; *Kennedy v. Pawtucket*, 24 R. I. 461, 53 Atl. 317; *Brodline v. Revere*, 182 Mass. 598, 66 N. E. 607.

"There was nothing on the face of this ordinance to stamp it as unconstitutional. When a case of capricious, malicious, or arbitrary action arises, the courts will deal with it as the law requires; but I do not think that this is one of them. The answer of the mayor to the writ of certiorari shows that there was ample room for the legitimate exercise of discretion in refusing a permit to the plaintiff in certiorari; and the manner in which he proceeded to get up his crowd in the street, and the disorder which the answer of the mayor shows followed when the police sought to cause him to desist, indicate that there may have been good grounds for the way in which the discretion was exercised. While he may have been guilty of no actual acts of disorder himself, yet the gathering of the crowd in the street for the express purpose of violating the municipal ordinance, the practical dare to the municipal authorities to interfere with him, and the disorder occurring when they did so, as well as the other evidence in the case, indicate that the exercise of the discretion on the part of the mayor and chairman of the board in refusing the permit was not so arbitrary or capricious as to warrant a find-

ing that either the ordinance or the administration of it was unconstitutional. In *Montross v. State*, 72 Ga. 261 (5), 53 Am. Rep. 840, it is said: 'Every person is presumed to intend the natural and legal consequence of his conduct; and where the agent of a newspaper, knowing of the law of this state against circulating obscene literature, violated it for the express purpose of making a test case or of vindicating the character of his paper, and, to insure a prosecution, sought the chief of police, and gave him copies of the paper, he cannot complain that he succeeded in obtaining a prosecution, or that the court, in its charge, did him injustice as to the intent with which he committed the act, although the result of his experiment was different from that which he anticipated.' In the present case not only were the handbills referred to scattered, but the plaintiff in certiorari gave written notice to the mayor of his intention to speak on the streets of Atlanta, in spite of the fact that he had no permit or consent. I hold that no constitutional right of the plaintiff in certiorari has been violated.

"There was no error in refusing the motion for a continuance under the facts set out in the mayor's answer. Nor was there any error on the part of the mayor in holding that he was not disqualified to preside, under the statements in the answer. The ordinance was not void for any of the reasons

assigned, nor was the sentence so excessive as to be illegal under the facts of the case. *Whitten v. State*, 47 Ga. 297. Nor does the answer of the mayor verify the statements of the plaintiff as to the sentence. *Childs v. Moran*, 114 Ga. 320 (2), 40 S. E. 271.

"The assignment of error in regard to the admission of evidence concerning the former speeches and conduct of the plaintiff in certiorari might be disregarded on the ground that it is too vague and general, and lacking in specification. But if it be considered that he sought to attack the conduct of the mayor and the chairman of the board of police commissioners on the ground that in denying him a permit they acted arbitrarily and capriciously, it was legitimate to show his previous conduct and language, and the circumstances under which the municipal authorities exercised the authority vested in them.

"Upon the whole case I am of opinion that the certiorari should be overruled, and the judgment of the mayor allowed to stand; and an order will be entered accordingly."

In our opinion, the reasoning and authorities cited in the foregoing opinion clearly establish the conclusions therein stated, and the certiorari was properly overruled.

Judgment affirmed.

All the Justices concur.

IDAHO SUPREME COURT.

STATE of Idaho, *Respt.*,

v.

Frank NELSON, *Appt.*

(.....Idaho.....)

- *1. An ordinance that provides, "It shall be unlawful for any person maintaining any saloon, barroom, or drinking shop, or any apartment thereto attached, to permit females to enter their said places of business," is unconstitutional.
2. A city may by ordinance prohibit females from entering places where intoxicating liquors are sold, for immoral purposes.
3. An ordinance that provides a punishment by fine of not less than \$25, nor more than \$200, or by imprisonment in the city jail for not less than ten days, nor more than sixty days, for violation of an ordi-

nance that prohibits females from entering their places of business for immoral purposes, is not void or unconstitutional for the reason that it is unreasonable or oppressive.

(January 14, 1905.)

APPEAL by defendant from a judgment of the District Court for Ada County convicting him of violating a municipal ordinance. *Reversed.*

The facts are stated in the opinion.

Mr. C. C. Cavanah, for appellant:

The ordinance is invalid, unreasonable, unjust, unfair, void, and contravenes the principle of common right.

Gasteneau v. Com. 108 Ky. 473, 49 L. R. A. 111, 94 Am. St. Rep. 386, 56 S. W. 705; *Re Ah Jow*, 29 Fed. 181; *Re Maguire*, 57 Cal. 604, 40 Am. Rep. 125; *Hechinger v. Maysville*, 22 Ky. L. Rep. 486, 49 L. R. A. 114, 57 S. W. 619; 1 Dill. Mun. Corp. 4th ed. § 322; 21 Am. & Eng. Enc. Law, 2d ed. p. 990.

An ordinance which the city passes in the exercise of the power given it must be rea-

*Headnotes by STOCKSLAGER, Ch. J.

NOTE.—As to constitutionality of discrimination against women in police regulations, see also, in this series, *Gastineau v. Com.* 49 L. R. A. 111, and note, and *Adams v. Cronin*, 63 L. R. A. 61.
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sonable, and the courts have authority to inquire into that question to a greater extent than they have with reference to state statutes.

1 McClain, Crim. Law, § 65; 21 Am. & Eng. Enc. Law, 2d ed. p. 985.

Whether an ordinance is reasonable or not is a question solely for the court.

Com. v. Worcester, 3 Pick. 462; *State v. Overton*, 24 N. J. L. 435, 61 Am. Dec. 671; *Angell & A. Priv. Corp.* § 357; *Helena v. Dwyer*, 64 Ark. 424, 39 L. R. A. 266, 62 Am. St. Rep. 206, 42 S. W. 1071; *Haynes v. Cape May*, 50 N. J. L. 55, 13 Atl. 231.

An ordinance is to be tested by its own terms.

Re Wong Hane, 108 Cal. 680, 49 Am. St. Rep. 138, 41 Pac. 693; *Los Angeles County v. Hollywood Cemetery Asso.* 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153.

The penalty prescribed for the violation of this ordinance is unreasonable, and the ordinance is therefore void.

Re Ah You, 88 Cal. 99, 11 L. R. A. 408, 22 Am. St. Rep. 280, 25 Pac. 974.

Messrs. C. F. Neal and F. B. Kinyon, for respondent:

The occupation of appellant is one in which he had no inherent and indefeasible right to engage.

Black, Intoxicating Liquors, §§ 37, 39; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *License Cases*, 5 How. 504, 12 L. ed. 256; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Crouley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13.

The ordinance was valid.

Ex parte Hayes, 98 Cal. 555, 20 L. R. A. 701, 33 Pac. 337; *Foster v. Police Comrs.* 102 Cal. 483, 41 Am. St. Rep. 194, 37 Pac. 763; *Adams v. Cronin*, 29 Colo. 488, 63 L. R. A. 61, 69 Pac. 590, 192 U. S. 108, 48 L. ed. 365, and note, 24 Sup. Ct. Rep. 219.

Mr. John A. Bagley, Attorney General, also for respondent.

Stockslager, Ch. J., delivered the opinion of the court:

This action was commenced before the police magistrate of Boise, and charged defendant with permitting a female (one Rena Morrow) to enter and remain in a saloon maintained by defendant, in violation of an ordinance of the said city. A trial was had, and defendant was convicted in that court, and an appeal taken to the district court. A trial was had in that court at the February, 1904, term, and defendant was convicted, and sentenced to pay a fine of \$25 and costs. The appeal is from this judgment.

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This prosecution is based on the following section of the ordinance of the city of Boise: "Sec. 858. It shall be unlawful for any person maintaining any saloon, barroom, or drinking shop, or any apartment thereto attached, to permit females to enter their said place of business or maintain any sign, or offer any inducement or any invitation to females to enter any such saloon, barroom, or drinking shop kept within the city of Boise. Approved Sept. 24th, 1903." This section was introduced in evidence, and was the state's exhibit A. State's exhibit B follows: "Any person violating any of the provisions of §§ 855, 856, 857, or 858, shall, upon conviction before the police magistrate, be punished by a fine not less than \$25.00, nor more than \$200.00, or by imprisonment in the city jail for not less than ten days nor more than sixty days." Section 872 provides: "In all cases where a fine shall be imposed upon a person for a violation of any of the ordinances of said Boise city, such fine may be collected under the ordinances of said city and laws of Idaho, or by imprisonment at hard labor in the city prison, or by working any person sentenced to such imprisonment upon the streets, parks, public squares, workhouse, or house of correction, during the term thereof, until such fine and costs be paid, at the rate of one day for every \$2 of said fine and costs, provided the total time of imprisonment shall not exceed sixty days."

It is first urged by counsel for appellant that "this objection to the introduction in evidence of §§ 858 and 859 [plaintiff's exhibits A and B] should have been sustained, for the reason that such sections of the revised ordinances of Boise city are invalid, void, unreasonable, and an interference with individual liberty granted to the citizens of Idaho by the constitutional laws of Idaho, and, in its operation, imposes an unjust and illegal punishment upon the owners of places where liquors are sold, whenever a female enters said places, although she may enter there upon lawful business, and creates an unequal, unjust, and illegal discrimination against women who enter such places upon lawful business." This seems, from the record, to be the sole question presented for our consideration in this appeal. If the section of the ordinance state's exhibit A is valid, we do not think the penalty provided by state's exhibit B too severe. The evident intent of both sections, above referred to, is in the interest of morals, and for the general good of the people of the city. All good citizens should join in an effort to protect the people from immoral influences, and especially the young people of the community. With this object in view,

we will examine the provisions of the ordinance in controversy.

In support of his contention that the provision of the ordinance under discussion is invalid, void, unreasonable, and an interference with individual liberty, counsel for appellant cites *Gastenuau v. Com.* 108 Ky. 473, 49 L. R. A. 111, 94 Am. St. Rep. 386, 56 S. W. 705. The ordinance in that case is dissimilar in some particulars to the one under consideration, but the reasons for declaring the ordinance unconstitutional seem to be applicable to the case at bar. The language of the ordinance is as follows: "Be it ordained by the board of council of the city of Middlesboro, Bell county, Kentucky: (1) That it shall be unlawful for any woman to go in and out of any building where a saloon is kept offering for sale any spirituous, vinous, and malt liquors, or to frequent, loaf, or stand around said building within 50 feet thereof. (2) That it shall be unlawful for any saloon keeper, or his clerk, or employees, to allow or permit any woman or women to come in or out of his building where spirituous, vinous, and malt liquors are sold or offered for sale, and it shall be the duty of said saloon keeper, clerk, or employees to immediately notify the officers that the 1st section of this ordinance has been violated, giving the name and color of the offender." These two sections are followed by § 3, which provides for the punishment of the proprietor if he violates § 2, and for the offender if she violates § 1. The Kentucky court, speaking through Mr. Justice Guffy, disposes of the case in the following concise and forcible language: "It is contended for appellee that the sole object of the ordinance is to regulate and control the sale of liquors, by reason of the fact that very disreputable, low, and vile women congregate in and about saloons and places where liquor is sold, thereby causing affrays, fights, murder, and other crimes. . . . It seems to us that the ordinance in question is unreasonable and an unnecessary interference with individual liberty, and tends to subject the vendor of liquors, as well as citizens, to unreasonable prosecutions. If the ordinance only included the persons mentioned in appellee's brief, we are not prepared to say that it would be invalid. But it might be that very good women would, for proper and legal purposes, find it necessary to go into a building where liquors are sold; . . . and, besides, we know of no rule of law which prohibits a well-behaved woman, for a lawful purpose and in a lawful manner, from going into or near a saloon. It may be taken for granted that it is not often that such would be the case, but the ordinances in question make no exceptions. If the citizens of Middlesboro

choose to have saloons established where liquor is sold, it follows that all orderly and well-behaved persons have a right, in an orderly manner, and for a lawful purpose, to visit such saloons." The judgment was reversed and the lower court directed to adjudge the ordinance in question invalid and unconstitutional. For the reason that this case is particularly applicable to the case at bar, we have quoted almost the entire opinion. Counsel for respondent urges that the ordinance under consideration in the case above cited, after making it a misdemeanor for "a woman to go into a building where liquor was sold," went further, and provided that it was a misdemeanor, also, for a woman to "stand within 50 feet of such building." Counsel for respondent further says: "The last clause of this ordinance is an obviously unnecessary interference with personal liberty, which finds no parallel in the ordinance in question in the case at bar." It is true that the ordinance in the Kentucky case does add the last clause, as suggested by counsel, and that no such provision is contained in the ordinance under consideration; but it will be observed that the court in passing upon the provisions of the ordinance, devoted nearly the entire opinion to a discussion of the clause that prohibited women from entering a building where intoxicating liquors were sold.

In *Re Ah Jow*, 29 Fed. 181, it is shown that the city of Modesto passed an ordinance, one section of which provided that "every person who, in the city of Modesto, keeps or maintains any room or other place where opium, or any of its preparations, is sold or given away, and every person who resorts to, frequents, or visits such room or place is guilty of a misdemeanor: Provided, that this section shall not apply to the sale or gift of any of the preparations of opium by any druggist for any ailment not caused by the use of opium, or any of its preparations." The opinion, which is by Mr. Justice Sawyer, on this particular feature of the ordinance, says: "This language is extremely comprehensive, and embraces every possible case of visiting 'such room or place,' no matter whether for a proper and lawful, or improper and unlawful, purpose; whether the party has knowledge or is ignorant of the character of the 'room or place,' whether he visits it innocently, or otherwise. Neither knowledge nor purpose of the visit is made an element of the offense. The mere fact of going there, without any other element, is made an offense."

In *Hechinger v. Maysville*—another Kentucky case by Mr. Justice Guffy, 22 Ky. L. Rep. 486, 49 L. R. A. 114, 57 S. W. 619,—the ordinance provided "that it shall be unlawful for [any] person or persons other

than the husband, father, brother, or male relative, to associate, escort, converse, or loiter with any female known as a common prostitute, either by day or by night, upon any of the streets or alleys of the city of Maysville, and any person or persons other than the said husband, father, brother, or other male relative, so offending shall, upon conviction thereof, before the police court in said city be fined." It is said in the opinion: "Manifestly the ordinance was intended to accomplish a proper and laudable object, but it seems to us that it is not properly guarded. . . . Any person should be allowed to converse with such a female long enough to transact any necessary and legitimate business."

Mr. Dillon, in his work on *Municipal Corporations*, vol. 1, 4th ed. § 322, in discussing the powers of municipal corporations to enact laws or ordinances for the punishment of crime, says: "As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and, if done by another, not so, ordinances which have this effect cannot be sustained. Special and unwarranted discrimination or unjust or oppressive interference in particular cases is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation." See § 325, same author and volume.

In 21 Am. & Eng. Enc. Law, 2d ed. p. 990, under the head of *Contravention of common right*, this subject is discussed, and the authorities of a large number of the states bearing on this question cited. Mr. McClain on Criminal Law, vol. 1, § 65, in discussing the subject of reasonableness of ordinances, says: "An ordinance which the city passes in the exercise of the powers given it must be reasonable, and the courts have authority to inquire into that question to a greater extent than they have with reference to state statutes;" citing a number of authorities to support the text. On the same subject we find the following language in 21 Am. & Eng. Enc. Law, 2d ed. p. 985: "It is well established, as a general rule, that ordinances, in order to be valid and binding, must be reasonable, and not arbitrary or oppressive; and ordinances which do not conform to this requirement will be declared void." Numerous cases are cited from many of the American states in support of this rule. In *Com. v. Worcester*, 3 Pick. 462, it is said: "Whether a by-law be reasonable or not is for the court to determine."

For a very able and interesting discussion of the powers and duties of city authorities, as well as the courts in passing

upon questions similar to the one before us, see *Helena v. Dwyer*, 64 Ark. 424, 39 L. R. A. 266, 62 Am. St. Rep. 206, 42 S. W. 1071.

In support of the contention that this ordinance should be sustained, counsel for respondent rely upon *Adams v. Cronin*, 29 Colo. 488, 63 L. R. A. 61, 69 Pac. 590,—a Colorado case. We have read this case with most interest and care, and are in full accord with every principle of law enunciated. A careful examination of this case, however, discloses that a very different ordinance was before the Colorado court for determination from the one we are called upon to construe. Section 745 of the Denver ordinance provided: "Each and every liquor saloon, dramshop, or tippling-house keeper, . . . who shall have or keep in connection with or as part of such liquor saloon, dramshop, or tippling house, any winerom or other place either with or without door or doors, curtain or curtains, or screen of any kind, into which any female person shall be permitted to enter from the outside, or from such liquor saloon, dramshop, or tippling house, and there be supplied with any kind of liquor whatsoever, shall, upon conviction, be fined as hereinafter provided." Section 746 provides: "No person . . . having charge or control of any liquor saloon . . . shall suffer or permit any female person to be or remain in such liquor saloon, dramshop, tippling house, or other place where intoxicating or malt liquors are sold or given away, for the purpose of their being supplied with any kind of liquor whatsoever; . . . nor shall any female person be or remain in any dramshop, tippling house, liquor saloon, or place adjacent thereto or connected therewith, and wait or attend on any person, or solicit drinks in any such place." This ordinance was declared valid, and why not? No provision in the ordinance that an orderly, well-behaved woman might not enter any saloon in the city of Denver for the transaction of legitimate business, and as often as she felt so disposed, so long as she did not visit such place for the purpose of being supplied with liquors or other immoral purposes. This ordinance falls strictly within the rule laid down in *Gastanau v. Com.* 108 Ky. 473, 49 L. R. A. 111, 94 Am. St. Rep. 386, 56 S. W. 705, and, indeed, all the cases to which our attention has been called, and heretofore referred to in this opinion. It was aimed at the very class of women who are usually termed "the unfortunates of the human family," and was designed to discourage and prevent their presence in and around saloons, tippling houses, and wherever intoxicating liquors are sold. There is no attempt to prohibit a woman in the ordinary course

of business to enter such places in the discharge of her business, or for any legitimate reasons. The distinction between that ordinance and the one under consideration is easily drawn. The Denver ordinance prescribes a punishment for an offense that the proprietor must commit himself, whilst the Boise city ordinance provides a punishment for the proprietor if any woman enters his place, unbeknown to him, without his consent and against his will, no matter what her motive or intent may be. There is no exception. The mere matter of entrance is the essence of the crime. There is no question about the power, and we may say, the duty, of the city authorities to enact such ordinances as will promote morals and regulate the sale of intoxicating liquors in such a way as to prohibit immoral women from

frequenting such places for the purpose of drinking, engaging in games, soliciting trade, or any other immoral purpose; but to say by an ordinance that a wife or mother may not enter a saloon, without subjecting herself to a fine, as well as the proprietor, in search of a recreant husband or a wayward son, is beyond the legal power of the city. So long as the state and the city of Boise see fit to license the retail sale of liquors, so long must they protect parties lawfully engaged in that business in a reasonable way.

The judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

Ailshie and Sullivan, JJ., concur.

INDIAN TERRITORY COURT OF APPEALS.

CORNERSTONE BANK, *Appt.*,

v.

William RHODES *et al.*

(.....Ind. Terr.....)

Ratification of an unauthorized signing of their names to a renewal note by the maker will be effected in case sureties on a note, which is past due, upon receiving notice from the payee that a new note has been substituted for the old one with their names attached to sureties, neglect to repudiate the transaction, and fail to notify the payee of their nonliability until after the insolvency and death of the maker.

(October 19, 1904.)

A PPEAL by plaintiff from a judgment of the Northern District Court in favor of defendants in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

Statement by **Clayton, J.:**

This action was brought by the appellant against the appellees on a promissory note dated July 1, 1901, for \$900 and interest, due January 1, 1902. The note purported to have been signed by one John W. Ward and the three defendants, William Rhodes, J. C. Welch, and John Clark. Ward, having died before the commencement of the action, was not joined in the suit. The defendants, in their answer, deny the execution of the note by them, and allege that, if their names appeared to it, they were forged. Verdict for

NOTE.—As to estoppel of, or ratification by, person whose signature is forged on commercial paper, see note to *Traders' Nat. Bank v. Rogers*, 36 L. R. A. 539.
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the plaintiff as against William Rhodes, and for the defendants as to the others. Motion for new trial filed, overruled, exceptions saved, and cause regularly appealed to this court.

Mr. W. H. Kornegay, for appellant:

Defendants, by virtue of the acts of John M. Ward, got the benefit of the surrender of the old note in renewal of which the present note was given.

Mechem, Agency, ¶ 146.

The principal may, upon the discovery of the forgery, so conduct himself as, by permitting the paper to be taken upon the strength of his assertion of its genuineness; or by inducing the holder to change his position or intermit some remedial proceeding upon an assurance of its validity or a promise of protection; or, generally, remaining silent as to its invalidity when in equity and good conscience he ought to have spoken,—to estop himself from asserting that it is not binding upon him.

Mechem, Agency, ¶ 116; *Reinhard, Agency*, ¶ 121; *Bigelow, Estoppel*, pp. 583, 584; *Waterson v. Rogers*, 21 Kan. 530; *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 811, 29 L. ed. 811, 6 Sup. Ct. Rep. 657.

Mr. Preston S. Davis for appellees.

Clayton, J., delivered the opinion of the court:

That the note sued upon was not signed by the defendants Welch and Clark sufficiently appears from the proof. Their names had been signed to it by Ward, who was a son-in-law of Welch. The real consideration of the note was the retirement of another

note, for \$750, with interest, then four months past due, with the difference in money between the amount due on that note and the \$900 note sued on in this case. This first note was signed by Ward and Welch as makers, Clark's name being put upon it, with his consent and by his direction, by Ward, who was the real borrower; the others being sureties. In the execution of this new note, it seems that Ward, after signing his own name to it and procuring Rhodes to sign it, without the knowledge or consent of Welch and Clark, wrote their names to it, immediately under his own and Rhodes's and sent it by mail to the plaintiff bank. The old note was canceled and returned to Ward, with the additional money necessary to make up the \$900 embraced in the new note. Within a few days thereafter the bank, by its cashier, wrote to Welch a letter informing him of the transaction, and that his name and that of Clark were upon the paper. Upon the receipt of this letter, Welch saw Clark, and talked to him about it. The two then went to see Ward.

Welch's testimony on this point is as follows:

Q. When did you first get notice there was such a note as this in existence, claimed that,—in which they claimed that you had signed it?

A. I believe, sir, the first that I ever knew anything about it was some time in the last of June or the first of July, in the summer before John died, in the summer before John died the next spring,—I believe, in 1891; to the best of my recollection, would be in 1891—

Q. 1902?

A. 1902; and in the summer in July—last of June or the first of July—I got a notice from Mr. George Smith, notifying me that there was such a note in existence; and I went to see Uncle John Clark, and asked him about it, and he knew nothing of it, and I knew nothing of it; and he came to see John Ward about it, and asked him if there was any such note in existence, and what it was, and the reply was that he,—He replied to me. He said, "That's all right." He said, "I will fix that all right." He said, "I have got notes enough in the bank put up against this to pay it off."

Q. What, if anything, did you do towards replying to this notice,—you and Mr. Clark?

A. I didn't do anything except go and tell John, and John went himself, or at least he told me he went.

Q. What did he say after he went?

A. He came back and told me he had fixed it, or settled it, or fixed it off some way. He said, "I have got it fixed,"—is the words John told me.

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Q. What did you say to John, if anything, in this conversation, as to whether or not you had signed this note?

A. I told John I had never signed it.

Q. What did John say?

A. He didn't say anything, any more than he said, "That's all right." That's all the reply he made to me. . . .

Cross-examination:

Q. You say you got a notice in the summer before John died the next spring, letting you know that this note was in existence?

A. Yes, sir.

Q. You never replied to those people at all, did you?

A. No, sir.

The witness is evidently mistaken in putting the date of the reception from the bank of the notice on the last of June or first of July, 1902. This suit was filed April 18, 1902, and the witness himself says that it was in the summer before the spring that John Ward died, which was the spring of 1902. Clark, in his testimony, puts the date as being in the summer of 1901, which was unquestionably the time, and this was the date the note was executed. Neither of them replied to the letter, or otherwise gave the bank any information that they had not signed the note, or had not authorized it to be done, until after the paper became due, and a demand was made upon them for payment. In the meantime Ward had died, hopelessly insolvent.

We are of the opinion that, under the facts and circumstances of the case, the defendants Welch and Clark, upon being notified by the bank, so soon after the execution of the note, of the fact that their names were upon it, should have promptly and at once given notice of their repudiation of the act of Ward in putting their names to the paper. They were on the original note, which was four months past due and unpaid. It was their duty to see that it was paid. They were expecting Ward to look after it. They were interested in seeing that it was taken care of. There was such a mutuality of interest between them that one might well look after it for all. And this is what Ward did. He took up the old note by executing a new one, to which, without authority, it is true, he put the names of Welch and Clark. But their names were on the old note, and they were immediately notified of the transaction. In their previous dealings when the old note was executed, Clark's name was, by authority, signed by Ward, and Welch was Ward's father-in-law. Had it been a bald, naked forgery, without any relation to their mutual interest and to the past dealings with the bank, they might possibly be excused for

their remarkable silence when notified of the conditions; but, under the circumstances of this case, the law will hold their silence as conclusive proof of ratification. It is a maxim of the law that "he who remains silent when, in conscience, he ought to speak, will be debarred from speaking when, in conscience, he ought to remain silent." And as to forgery, Mr. Mechem, in his work on Agency (§ 116), says: "But whatever may be regarded as the true rule in the abstract, it is certain that the principal may, upon the discovery of the forgery, so conduct himself, as by permitting the paper to be taken upon the strength of his assertion of its genuineness, or by inducing the holder to change his position or intermit some remedial proceeding upon an assurance of its validity or a promise of protection, or, generally, by remaining silent as to its invalidity, when, in equity and good conscience, he ought to have spoken, as to estop himself from asserting that it is not binding upon him." The same authority (§§ 154, 155) says: "A principal, upon being informed of the unauthorized act of another in his behalf, has the right to elect whether he will ratify or repudiate the act. And this right of election belongs in the first instance to him alone, and, so long as the condition of all parties remains unchanged, he cannot be prevented from ratifying because the other party may for any reason prefer to treat the act as invalid. And even though at first he may disapprove, he may afterwards, if the condition of all parties remains unchanged, elect to give confirmation to the act. But where the rights and obligations of third persons may depend on his election, it is obvious that he is bound to act, or suffer the necessary consequences of his inaction, and that if, after knowledge, he remains entirely passive in regard to the transaction, it is but just, when the protection of third persons may require it, to presume that, what upon knowledge he has failed to repudiate, he has at least tacitly confirmed. If, therefore, he would escape responsibility for the act, he must give notice of his nonconurrence. The time within which this notice is to be given has not been settled with absolute harmony by the courts. Many cases hold that the principal is bound to act at once upon receiving knowledge, but the better rule, and the one supported by the majority of the authorities, is that, if the principal desires to repudiate the transaction, he must give notice thereof within a reasonable time after becoming fully informed, and that, if he does not so dissent, his silence will afford conclusive evidence of his approval. What shall be deemed to be a reasonable time depends . . . upon the situation of the parties and the facts and

circumstances of the case." Mr. Reinhard, in his work on Agency (§ 121), says: "Implied Ratification—Intention. But the most common instances of ratification are those arising by implication from the conduct of the supposed principal. The ratification of an act is but a retroactive grant of authority, and this, as we have seen, may be effected in the same manner as the granting of authority prior to the act. Hence, as the delegation of authority may be proved by circumstances from which an inference may be drawn that such authority had in fact been bestowed, an inference may likewise be gathered from circumstances from which the ratification is commonly implied, or the acts and conduct of the principal with reference to the transaction performed for him. One who conducts himself in such a manner as to lead an ordinarily prudent man to believe, to his prejudice, that an act, though done without authority, has received the approval of him for whom it was performed, cannot, in justice and good conscience, be permitted to say that he really never assented to the act, or that he did not intend his words and conduct to have the effect of such assent. It is not material, therefore, what the actual intention of the ratifying party may have been, as to whether he would affirm the act or reject it. The old and familiar rule that a person must be held to have intended the natural and ordinary consequences of his act is fully applicable; and if his language, his silence, or his acts were such as would naturally cause another to believe that he had assented, and to act upon such belief, it will be conclusively presumed that his intention was consistent with his conduct, and he will be held responsible, the same as if he had manifested his assent by express ratification."

If it shall be said that the principle of ratification or estoppel does not apply in this case, because the bank may still proceed to sue on the old note, and therefore the making of the new note was not to its prejudice, the answer is that the making of the new note has changed the conditions to the injury of the bank. The time of payment was continued six months, and Ward has since died, leaving an insolvent estate. And reading between the lines of Welch's and Clark's testimony, and observing the strenuous efforts of their counsel to keep from the jury all knowledge of the old note, and of the intentions of his clients as to the payment of it, it is evident that the plaintiff is to be driven to the expense and annoyance of another suit. And, besides there went into the new note \$100 or more that was not embraced in the old one, and which was an entirely new and independent consideration, for which the sureties on the old note are

not bound; and, Ward having died insolvent, the plaintiff must necessarily look alone to the sureties on the new one for payment. If that sum cannot be collected from the sureties, it cannot be collected at all, and the bank will sustain a loss of the whole of it; and therefore, as to that part of the consideration, the case is brought fairly within the rule that "the acts claimed to effect a ratification must be of such a nature that the rights of the other party, who has relied upon them, will be prejudiced if a ratification has not taken place." *Mechem, Agency*, § 131. And: "It is a fundamental rule that, if the principal elects to ratify any part of the unauthorized act, he must ratify the whole of it. He cannot avail himself of it so far as it is advantageous to him, and repudiate its obligations; and this rule applies, not only when his ratification is ex-

press, but also when it is implied." *Mechem, Agency*, § 130. In this case the facts which, in law, constitute a ratification of the act of Ward in signing the names of the defendants Welch and Clark to the note being admitted by them, they are undisputed, and, "where the facts are undisputed, the question whether or not they amount to a ratification is one of law for the court." *Mechem, Agency*, § 135. In our opinion, it was the duty of the court below to have peremptorily charged the jury to find their verdict for the plaintiff for the full amount of the note, with interest.

Reversed and remanded, with directions to the court below to grant a new trial.

Raymond, Ch. J., and Townsend, J., concur.

KENTUCKY COURT OF APPEALS.

S. W. HAGER, State Auditor, *Appt.*,

v.

KENTUCKY CHILDREN'S HOME SOCIETY.

(.....Ky.....)

1. The appropriation of money for the care of destitute children is for a public purpose.
2. The appropriation of public money for use by a private corporation organized to care for destitute children is not prevented by a constitutional provision forbidding the giving or loaning of the state's credit to any corporation.
3. That a public charity is to be administered by a private corporation will not prevent the state from appropriating the public funds to it.
4. That a state has no power to remove the officers of a corporation organized to administer a public charity to which the state has made an appropriation will not invalidate the appropriation, where the state takes a bond conditioned upon the proper use of the funds, and requires a report of such use to the proper state officials.
5. A charter giving a corporation organized to secure homes for destitute children power to adopt by-laws in harmony with those of a national association does not show that an appropriation of pub-

lic funds for its use may be diverted to objects in which the state has no interest, where the statute provides that the by-laws must not be in conflict with the laws of the state, and the appropriation act requires the money to be applied for the benefit of the children of the state.

6. An appropriation of public funds to be expended by a private corporation organized to provide homes for destitute children is not void as local or special legislation when it is for the benefit of all children of the class within the state generally.
7. An appropriation of public funds for a public charity to be administered by a private corporation does not create an indebtedness against the state if it may be discontinued, reduced, or changed at the pleasure of the legislature.

(December 7, 1904.)

A PPEAL by defendant from a judgment of the Circuit Court for Franklin County in favor of plaintiff in a proceeding brought to compel the defendant to approve an appropriation which had been made by the legislature in plaintiff's favor. *Affirmed.*

The facts are stated in the opinion.

Messrs. N. B. Hays, Attorney General, and *Loraine Mix* for appellant.

Messrs. Hazelrigg, Chenault, & Hazelrigg, with *Mr. W. S. Pryor*, for appellee:

The support of paupers, and the giving assistance to those who, by reason of age, infirmity, or disability, are likely to become such, are, by the practice and common consent of civilized countries, a public purpose.

1 Cooley, *Taxn.* 3d ed. 204.

NOTE.—As to what are public purposes generally, for which money may be appropriated or raised by taxation, see *note* to *Daggett v. Colgan*, 14 L. R. A. 474.

As to appropriation for benefit of sufferers from flood, see *Patty v. Colgan*, 18 L. R. A. 744.

As to appropriation to pay debt incurred by city for benefit of sufferers from cyclone, see *State ex rel. New Richmond v. Davidson*, 58 L. R. A. 739.

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If for a public purpose, and confined to that alone, the fund may be controlled as well by a private corporation as by those directly under the control of the lawmaking power.

Kentucky Female Orphan School v. Louisville, 100 Ky. 470, 40 L. R. A. 119, 36 S. W. 921; *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212; *Norman v. Kentucky Bd. of Managers*, 93 Ky. 537, 18 L. R. A. 556, 20 S. W. 901; *Shepherd's Fold of Protestant Church v. New York*, 96 N. Y. 138; *Wisconsin Industrial School v. Clark County*, 103 Wis. 661, 79 N. W. 422.

O'Rear, J., delivered the opinion of the court:

This appeal involves the constitutionality of the act of general assembly approved February 20, 1904 (Acts 1904, p. 33, chap. 7), appropriating \$15,000 annually to the Kentucky Children's Home Society, a private corporation organized under the laws of this state for purely charitable purposes. The articles of incorporation of the society show that it is conducted solely to seek out destitute children and provide for them homes where they will be under the supervision of the institution during their dependent minority. The constitutionality of the act is assailed on several grounds, which will be taken up in order.

That the care of the indigent poor is a purely public charity is not really questioned by the attorney general. Christ commended it as a public privilege, whilst every civilized people upon the earth now regard it as a public duty. That great evasive question propounded in the adjustment of the first social relation of men, "Am I my brother's keeper?" is answered emphatically in the affirmative upon the consciences of this era of civilization, when speaking of the destitute and helpless. In this state, from its earliest history, it has been treated, as it had been in Virginia and England before us, as a public charge imposed as a matter of rightful exercise of governmental power upon the state, or such subdivisions of it as legislation might provide. It was borne by taxation, in one form or another, applied to such subjects and under such conditions as addressed themselves to the lawmaking branch as being the most expedient. Whatever errors may have been committed so far in its exercise, it is doubted if any has occurred on the side of its having been more liberal than just. The care of the insane, the special education of the deaf and dumb, the blind, and of the feeble minded, are particular applications of this general doctrine. They are all well provided for by the statute laws of this

state, and have been for many years. Separate institutions, especially fitted and officered for the appropriate service in each are established and maintained at the public expense by taxation levied upon all the taxable property in the state. The care of the indigent poor generally is given over to the counties (Ky. Stat. 1903, § 3933) and cities of the commonwealth. Ky. Stat. 1903, §§ 3058, 3290, 3490. Instead of this being an exclusive delegation by the state of this governmental function, it is its exercise by the state in the limited manner indicated by the several statutes, by the use of local government subdivisions. But the state is not precluded by these several provisions from exercising some part of the same power in some other proper way. It would scarcely be argued that, because legislation had been adopted making it the duty of the counties of the state to provide for their pauper citizens, the state itself could not take on any part of that burden.

The Constitution provides that taxes shall be levied for public purposes only, and forbids the donation or loaning by the state of its credit to any individual or corporation. Const. §§ 171-177. That the purpose of the appropriation in this case is a public one is too clear, in our opinion, to require more extended argument. Obviously appropriations of money out of the treasury must be measured by the same test as that by which it is raised by taxation and put into the treasury. If taxes could not be imposed for a purpose, money already in the treasury could not be appropriated to that purpose.

The purpose being a public one, for which the state might have levied a tax and applied it, the question immediately recurs, Can the state apply it otherwise than through its own officers? At this point § 177 of the Constitution is invoked by the attorney general. That section reads: "The credit of the commonwealth shall not be given, pledged, or loaned to any individual, company, corporation, or association, municipality, or political subdivision of the state; nor shall the commonwealth become an owner or stockholder in, nor make donation to, any company, association, or corporation; nor shall the commonwealth construct a railroad or other highway." There was a time when the state was allowed to subscribe, and did subscribe, to the capital stock of various quasi-public improvement companies, and loaned or gave its credit to such. It was to prevent a repetition of that practice by the state that the section was enacted. It was to keep the state out of partnership enterprises, or even the doing solely on its own behalf of that class of

public works,—the building of highways and railroads. The state cannot now loan or give its credit to any person or corporation for any purpose, public or otherwise. But this does not mean at all that the state cannot buy and pay for what it needs to enable it to discharge its governmental duties. Nor does it mean that the state cannot employ the services of a person or corporation to do a lawful act which it has the right to have done, and to pay for it. For example, the state may provide for the mobilization of the militia at a given point. It may hire a railroad corporation to transport them, and some other person to provision them, and may pay for these services. This is in no sense donating or lending the state's credit to the railroad company or to the caterer. Yet the state is not bound to avail itself of their services, but it may do it. If it does the transaction in no wise involves § 177 of the Constitution, though it does § 171; i. e., the purpose for which the state's money is paid out must be a public purpose. That is the only inquiry, other than that, Has the legislature enacted the statute allowing the thing to be done? When the legislature is authorized to do a thing generally, and no particular method is prescribed, it may pursue its own course in the means adapted to the accomplishment of the purpose. For example, it is admittedly a public purpose for the state to support at the public expense its pauper lunatics and idiots. It might have kept them all in its own institutions. It might have compelled the counties to keep one class, as it did for a while, or to keep either class or both. But it employs its own institutions in the care of the former, and hires individuals at so much per year for each pauper idiot kept, to care for the latter. Cooley, in his work on Taxation (2d ed.), p. 125, lays it down that the state, in its care for such dependent objects, might not only do it by an establishment of its own institutions for the purpose, "but," he says, "private institutions might undoubtedly be aided with public funds, in consideration of services to be rendered to the public, and expenses to be incurred by them in assisting and relieving the same necessitous and dependent classes."

In 1899 a terrific cyclone struck the city of New Richmond, Wisconsin, devastating its homes and business houses, killing outright a great many people, seriously injuring a great many others, killing large numbers of animals, and causing widespread disaster, want, and distress. The conditions were such that, but for immediate relief beyond the reduced powers of the city and its inhabitants to meet, disease and pestilence, in addition to the other woes occa-

sioned by the storm, would in every probability have followed. The city incurred a heavy debt to meet the critical emergency,—one, in view of the severe visitation upon it, it could ill afford to bear alone. The state legislature voted an appropriation to defray and thus carry in part this burden. Its payment was resisted on the ground that the state had not the right to tax all its inhabitants for the benefit of those of New Richmond alone. The supreme court of Wisconsin upheld the appropriation (*State ex rel. New Richmond v. Davidson*, 114 Wis. 563, 58 L. R. A. 739, 88 N. W. 596, 90 N. W. 1067, on the ground that it was for a public purpose. The court said: "The state at large was concerned in the objects of the appropriation in question, and that, if the legislature had been in session June 12, 1899, it might legitimately have appropriated the amount mentioned for the object in question. This being so, it follows that the legislature had the power to pass the act in question to reimburse the city for such expenditures." The court admitted that, unless the purpose was a public one, there was no power under the Constitution to appropriate the state's money to do it, no matter how laudable it may have been.

The legislature of Missouri appropriated \$50,000 to the St. Louis Insane Asylum, an institution owned and conducted by the city of St. Louis alone; the appropriation being "for the support of the indigent insane in the insane asylum in the city of St. Louis, who belong to the state outside of the city of St. Louis." The payment of the appropriation was resisted on the grounds that it was not for a public purpose; that the state had otherwise provided for the care of its indigent insane; that the Constitution of Missouri expressly prohibited such appropriations in the following provision: "The general assembly shall have no power to make any grant, or to authorize the making of any grant, of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever." [Mo. Const. art. 4, § 46]. The supreme court of Missouri upheld the appropriation. *State ex rel. St. Louis v. Seibert*, 123 Mo. 424, 24 S. W. 750, 27 S. W. 624. The court reasoned thus, in part: "The insane of the state being proper objects of charity, some of the insane of the state outside the city of St. Louis being supported by the St. Louis Insane Asylum, the Constitution authorizing an appropriation for their support, unless prohibited expressly or by reasonable implication, the question is whether there is such prohibition. The words of the Constitution do not contain a prohibition." The language of the provision first quoted is then set out; the court con-

tinuing: "The appropriation is for the 'indigent insane of the state outside the city of St. Louis,' and not for the institution. There is no prohibition here unless the state has no power to dispense its public charity through the agency of a private institution. There is no constitutional inhibition against it doing so. . . . But a private corporation or individual may be the recipient of the funds of taxation, provided that the use be a public one." "We can see no reason why the insane of the state," concludes the court, "not belonging to the city of St. Louis, who are found in the city, may not be cared for and supported in its insane asylum at the public expense, if it can be as well and economically done."

In the case of the *Shepherd's Fold of Protestant Church v. New York*, 96 N. Y. 137, the object of the corporation was to receive, adopt, keep, support, and educate orphan or friendless children, and the commissioners of charities and corrections were authorized to transfer eligible orphans and friendless children to it. In consideration of the corporation taking care of these children, an appropriation of \$5,000 annually was made for the benefit of the corporation. A provision of the Constitution of the state prohibited the giving or loaning of the money of the state to or in aid of any association or private undertaking, and also prohibited the counties and cities "from giving their moneys in aid of any individual, association, or corporation for the support of their poor." The court held that caring for the poor of the city through the instrumentality of private corporations was not prohibited, and the legislature had power to authorize the city to provide for the burden assumed by plaintiff and cast upon it by the act of 1868, by payment of a gross sum. The fact that the corporation might also receive subjects for which the city would in no event be liable was held not to be material, as the city was only paying for what it got.

In *Norman v. Kentucky Bd. of Managers*, 93 Ky. 537, 18 L. R. A. 556, 20 S. W. 901, this court construed the two sections of the Constitutions now involved,— §§ 171 and 177. In that case an appropriation had been made by the legislature to the appellee board, a corporation, to enable it to make an exhibit of the resources of our state at the World's Columbian Exposition at Chicago. The court held the purpose to be a public one, and that the appropriation was not a loaning of the credit of the state. It was said: "The commissioners selected to expend the money are merely the state's agents to do so, and provide the exhibit for the benefit of its people. The legisla-

ture had the power to provide the means for such a purpose." A similar construction of almost identical constitutional provisions was had in *Daggett v. Colgan*, 92 Cal. 53, 14 L. R. A. 474, 27 Am. St. Rep. 95, 28 Pac. 51, and in *Minneapolis v. Janney*, 86 Minn. 111, 90 N. W. 313, both Citing and Following *Norman v. Kentucky Bd. of Managers*, 93 Ky. 537, 18 L. R. A. 556, 20 S. W. 901.

In *House of Reform v. Lexington*, 112 Ky. 171, 65 S. W. 350, there was involved the power of a city of the second class to appropriate \$5,000 to the houses of reform, state penal institutions for the correction of incorrigible youth. It was held that the legislature had conferred upon the municipality the power to provide itself with houses of reform for the keeping of its juvenile criminals, and that having the power to do that, it might do less by procuring the state to locate its reform houses so that the city could avail itself of the peculiar advantages afforded by their proximity for caring for the former's youthful criminals, the city paying what was deemed a proper equivalent for that service. Section 179 of the Constitution makes the same restrictions against a municipality's donating its money or loaning its credit that § 177 does concerning the state. In considering whether that was a loaning of its credit or donation of its property, the court said: "To hold that a branch of government, such as a county or city, could not exercise a governmental function required of it by the law by employing the service to be done,—such as the care of the smallpox patients in a hospital owned by a corporation other than the city,—or that it might not buy a supply of water for the public use from a corporation without the city having the means of furnishing it to the city, would be to place a narrow and restricted construction upon the section, not warranted by the evils existing at the time of its adoption, and which were manifestly sought to be cured by the convention, as well as to materially hamper municipal subdivisions of state in the exercise of necessary powers and discretion in government."

These authorities clearly settle that the vital point in all such appropriations is whether the purpose is public; and that, if it is, it does not matter whether the agency through which it is dispensed is public or is not; that the appropriation is not made for the agency, but for the object which it serves; the test is in the end, not in the means. The limitation put upon the state government by the people is as to what things it may collect taxes from them for, to which it may apply their property through taxation; not upon the means by

which or through which it will do it. It may well and wisely be left to the legislature to say how it will dispense the state's charities. Varying conditions, improved methods of treatment, changing circumstances affecting the ability of the people to provide for such charges, all bear upon the legislative discretion, and doubtless find a proper application in the measures finally adopted by that body. Yet back of all that must exist the power to do the thing in question,—the power to make the provision. It is this power alone that the courts can deal with, and then only to the extent of determining whether it exists. Whether it is exercised, and how exercised, are manifestly matters of exclusive legislative discretion. What is this Kentucky Children's Home Society? A number of people in this state have organized a corporation of that name. It has no capital. It can make no profit to its stockholders or officers, and can declare no dividends. It has been already stated that it seeks out helpless, homeless children, cares for them, and places them in homes selected by the institution, and where the little ones may be adopted into suitable families. The last feature is the dominant and peculiar one of the society. There are many foundling asylums where dependent orphans of a limited class are cared for and educated for lives of usefulness by those peculiarly interested in them. The poorhouses of the state afford some sort of refuge to the utterly destitute, where the indigent, improvident, and frequently worthless are kept. Children reared amid such conditions of inertness and squalor have a poor chance, indeed, in life. This society has conceived a plan for taking these children who have this or no other chance, who have no claims upon other institutions maintained by certain voluntary organizations, such as lodges and churches, and to put them into homes that have no children. The world has had recently a most striking example of the probable influence of a home life upon a child taken from a public almshouse in Stanley, who gave the better part of a continent to the world, and, what is more, brought the possibilities of the world to a continent. How much of it he owed to the influences of the adopted home where his attainments were gained, and where his character was certainly very largely influenced, if not formed, it may be impossible to say. Judge Brewer, when a member of the Kansas supreme court, in passing upon an application for a writ of habeas corpus (*Re Bullen*, 28 Kan. 781), where it was sought to take a young orphan girl from a charitable institution, and to give her to her grandparent, in an opinion replete with wisdom and

goodness had this to say: "Two principal reasons control in my mind: First, her life here would be a life in an institution; there, a life in a home. I need not stop to recount the numberless blessings which home gives to a child, especially a female child. The common judgment of all voices the truth that the best development of a young life is within the sacred precincts of a home. No institution, however cultured and refined its instructors, however pure its life, however faithful and devoted all its officers and teachers to the care, nurture, and education of the many children within its walls, will give that sweet, gentle, and attractive development to a young girl that comes from the personal and affectionate training of a home. There is something of the same difference as between hotel life and home life. There is more publicity to the one; more privacy to the other. There is something official, as it were, in one, and personal in the other." There can be no doubt that foundling institutions may be, and generally are, large blessings. But the belief voiced by the eminent judge quoted from in the advantages of home life as a beneficial influence in the formation of the most useful and independent characters may have had a place in the legislative mind. To accomplish such work, persons whose hearts are in it for simple charity's sake, not for the salary of a public office, are the best suited for it. May not the legislature avail itself of the offer and services of such persons in doing what it unquestionably has the right to do by state officers,—to care for the helpless and destitute children of the state?

But it is argued that, as the state does not appoint these officers, and cannot remove them for misfeasance or malfeasance, and cannot, therefore, control the application of the money appropriated, it amounts, after all, to the giving of that much money to the society. Without admitting the premise assumed, we turn to the investigation of the question whether the state has made such an unconditional appropriation. The proviso attached to the appropriation reads as follows: "Provided, no part of said appropriation shall be paid until there has been executed on the part of said society, a bond to the commonwealth of Kentucky, with good and sufficient security, stipulating and providing that all of said sums of money so appropriated shall be applied to the purposes of the charter of said society,—that is, to the care, support, and maintenance of homeless and destitute children in this commonwealth, and providing homes for same; and a failure to do so to be a forfeiture thereof. Said bond to be approved by the auditor of public accounts,

and kept as a record in his office. If any part of said appropriation be not so applied then all of such part thereof as may be unexpended shall be returned to and covered into the state treasury. Said society shall, by its proper officers, make an annual verified statement and settlement with the auditor of public accounts, showing when, where, and how said funds or appropriations have been applied and disbursed." From the foregoing it is seen that the state has taken the precaution to insure that every dollar of its appropriation is expended directly for the benefit of homeless and destitute children of this commonwealth. The requiring of the report under oath of the officials of the home to the auditor of public accounts reserves to the state the power of enforcing the proper application of its appropriation,—the power of visitation, a power which in this country is by the government itself, through the medium of courts of justice. 2 Kent, Com. 240. The language of the act also disposes of the argument that the money of the state will be applied to objects of charity having no direct claim upon the state, a fear born of a statement in appellee's charter to this effect: "This corporation may adopt by-laws not inconsistent with the laws of Kentucky and these articles of incorporation, and in harmony with the constitution and by-laws of the Children's Home Society (National)." We read this provision to mean that the general scope and plan of operation by appellee within its chosen field. Kentucky, is to be formulated after a plan for placing homeless children in childless homes in use in a National Children's Home Society, not that the children of the National Home Society can have any part of Kentucky's provision for her own destitute children. The very language of the act precludes the imagined danger, because it says the by-laws must not be in conflict with the laws of Kentucky. This act restricts the appropriation made by it to the use of

Kentucky children, and compels all money not so used to be covered into the state treasury. Besides, Ky. Stat. 1903, § 331c. makes it unlawful for any person to bring into this commonwealth destitute children, except they be his own, or nearly related to him, and with the intention of taking them into his own family. The act is not open to the objection that it is local or special legislation, prohibited by the Constitution. § 59. It is an act for the benefit of the homeless destitute children of this commonwealth generally. It selects one agency to apply the money so appropriated, which, from the nature of the case, calls for an act of appropriation applicable to it alone. This is allowed by subsec. 29 of § 59. Const. All appropriations must be made by the legislature. Const. §§ 230 and 58. Therefore an act of this character was the appropriate method of making this appropriation. Nor does this appropriation create an indebtedness against the commonwealth. It may be discontinued, reduced, or changed at the pleasure of the legislature, which could not be done if it were a debt. It is a gratuity, just as the present provision for the support of the insane and idiots is, which may be altered both as to the amount and manner of application at the pleasure of the lawmaking body.

We find nothing in the act violative of the Constitution. Its subject is one wholly within the sound discretion of the legislature. That its exercise may be abused is true of this act, as well as of many other matters committed by the Constitution to that branch of government. But even its abuse is not a matter for the courts to inquire into. The people alone can control that. They have reserved to themselves that power over their representatives in matters of legislation.

The judgment of the Circuit Court having been in conformity to these views, it is affirmed.

ILLINOIS SUPREME COURT.

George BEIDLER *et al.*, *Appts.*,
v.
SANITARY DISTRICT OF CHICAGO.

(211 Ill. 628.)

1. The opening of canals for dockage

NOTE.—*Right to improve navigability of stream.*

I. *Extent and limits of the right*, 820.

II. *Right as between state and Federal governments*, 824.

III. *Character of improvement*, 827.

IV. *Improvement companies*, 828.

V. *Booming and sorting logs*, 839.

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purposes, leading out of a navigable river, and maintaining them for a period of twenty years, selling lots abutting upon them, establish a prescriptive right to use the water of the river to fill them; so that the level of the water in the river cannot be drawn down for purposes of public drainage in such a manner as to impair the value of

VI. *Interference with private rights*, 841.

VII. *Exercise of power of eminent domain*, 847.

VIII. *Public rights in improvement*, 848.

IX. *Use of surplus water*, 848.

X. *Other matters*, 849.

I. *Extent and limits of the right.*

Streams or bodies of water which are capable

such canals for dockage purposes without making compensation, under a Constitution requiring compensation to be made in case private property is taken or damaged for public purposes.

2. **The right of the public to improve navigation without liability for consequential injuries to riparian rights does not include the right to take the water of a navigable stream to supply an artificial channel or canal.**
3. **A public corporation organized to provide a drainage system cannot contest its liability to make compensation for injuries done to riparian owners by taking water from a navigable stream to supply its ditch, upon the ground that incidentally it has created a navigable channel, and that the public is not liable for injuries to riparian owners in consequence of the improvement of navigation.**
4. **Lowering the water of a navigable**

of useful navigation are public highways which may be used by the public to the extent of their capacity. See *note to Willow River Club v. Wade* (Wis.) 42 L. R. A. 305. Being highways, their condition and navigability are as much within the jurisdiction of the public as highways on land. Within their original limits the public may do anything which will facilitate the use of the water. The channel may be dredged and obstructions removed, or the depth of water increased by dams. The limit to this right is reached when it conflicts with the rights of the riparian owner. From the character of the property and the nature of the operations necessary to improve the navigation, there is much more liability to infringe upon the rights of the abutting owner than there is in the improvement of highways on land. Like the abutter on a land highway, the owner of land adjoining a water highway has a valuable advantage in his adjacency to it, and this advantage has been held to be property. See *note to State ex rel. Denny v. Bridges* (Wash.) 40 L. R. A. 593. Under constitutions protecting the right of property, this right of adjacency cannot be wholly destroyed by the removal of the channel of the stream to another locality. See *note to Hutton v. Webb* (N. C.) 59 L. R. A. 33. But it has been a serious question how far this right may be interfered with by the construction of levees or the changing of the water in the channel without infringing the rights of the riparian owner. Where the Constitution requires the payment of damages for property taken or injured for public benefit, it would seem that no material interference with the riparian owner's right of access to the navigable portion of the stream could be effected without paying him for the injury. But where the Constitution merely provides for the payment of damages for property taken, there is much doubt as to whether or not the riparian owner is entitled to compensation. As a matter of strict justice, it cannot be questioned that if the public, for its advantage or benefit, deprive an individual of valuable rights, the public should pay for them. But, on the other hand, the public is never swift to render to the individual more than he is by strict law entitled to, and if he has not provided, through the Constitution or legislative enactments, for compensation for a particular injury, it may safely be assumed that he has agreed to donate his individual

loss for the public good. The cases decided under the Federal Constitution, and those from Pennsylvania, have, perhaps, gone farther in the direction of denying a recovery to the individual than those from other jurisdictions. See *note to State ex rel. Denny v. Bridges* (Wash.) 40 L. R. A. 593. In addition to the danger of interfering with the access of the riparian owner to the navigable part of the stream, is that of injuring his land by raising the height of the water so as to flood his land or render it wet and untillable by lack of drainage, or of changing the direction of the current so that it undermines or washes away portions of the embankment. The flooding of the land, if permanent, is, of course, an injury for which compensation must be made. See *note to Avery v. Vermont Electric Co.* (Vt.) 59 L. R. A. 817. Where, however, injury is merely the interference with drainage, or the changing of the current, there, again, arises the question whether this is a taking or destruction of property within the protection of the various constitutions. There is an obvious tendency to treat these injuries as merely consequential, and the courts are very much inclined to hold that no compensation need be made for merely consequential injuries.

5. **Where riparian property has been injured by lowering the level of the water so as to interfere with access between the water and land, the measure of damages is the difference in value of the property before and after the injury was done, and not the cost of charges made to avoid the result of the change in conditions.**
6. **A defect in a declaration in claiming damages by an incorrect measure cannot be tested by a general demurrer.**

(October 24, 1904.)

dividual loss for the public good. The cases decided under the Federal Constitution, and those from Pennsylvania, have, perhaps, gone farther in the direction of denying a recovery to the individual than those from other jurisdictions. See *note to State ex rel. Denny v. Bridges* (Wash.) 40 L. R. A. 593. In addition to the danger of interfering with the access of the riparian owner to the navigable part of the stream, is that of injuring his land by raising the height of the water so as to flood his land or render it wet and untillable by lack of drainage, or of changing the direction of the current so that it undermines or washes away portions of the embankment. The flooding of the land, if permanent, is, of course, an injury for which compensation must be made. See *note to Avery v. Vermont Electric Co.* (Vt.) 59 L. R. A. 817. Where, however, injury is merely the interference with drainage, or the changing of the current, there, again, arises the question whether this is a taking or destruction of property within the protection of the various constitutions. There is an obvious tendency to treat these injuries as merely consequential, and the courts are very much inclined to hold that no compensation need be made for merely consequential injuries.

Of course the state has a right to devote its own property to such improvements, so that a river improvement company which, by its charter, is given authority to build and maintain levees and embankments along the shores of a river, by implication has the right to use any lands owned by the state along the shores of the river; and a subsequent purchaser from the state would take the lands subject to the company's right. *Black River Improv. Co. v. La Crosse Boom & Transp. Co.* 54 Wis. 859, 41 Am. Rep. 66, 11 N. W. 443.

A statute providing for improving the channel of a stream, and making an appropriation of state swamp lands to aid the work, is not in conflict with that provision of the Michigan Constitution which forbids the state from engaging or being interested in a work of internal improvement. *Sparrow v. State Land Office*, 56 Mich. 567, 23 N. W. 315.

But an act authorizing the payment of the expense of improving a river over and above the value of swamp lands granted in aid of the work, and permitting the power of taxation to be exercised for that purpose, violates a consti-

APPEAL by plaintiffs from a judgment of the Circuit Court for Cook County sustaining a demurrer to the complaint in an action brought to recover damages for alleged interference with plaintiffs' riparian rights. *Reversed.*

Statement by **Scott, J.:**

This suit was brought in the circuit court of Cook county by George Beidler and others, who are owners as tenants in common of the lots hereinafter mentioned, against the Sanitary District of Chicago, to recover as damages the amount expended by plaintiffs in deepening or lowering the canals hereinafter referred to, and in repairing certain docks fronting on said canals and the south branch of the Chicago river, and for

tutional provision forbidding the state from participating in works of internal improvement except by grants of land or other property. *Wilcox v. Paddock*, 65 Mich. 23, 31 N. W. 609.

The state of Michigan is forbidden by its Constitution from making any public works at its own expense; but the legislature may authorize corporations to improve waters that need improvement, and charge tolls for the use of the facilities provided. *Manistee River Improv. Co. v. Sands*, 53 Mich. 593, 19 N. W. 199.

An act providing for the levying of tolls on the commerce of a specified river in sufficient amount to pay within five years for improvements to its navigability is in conflict with a provision forbidding the state from carrying on any work of internal improvement except by the expenditure of grants made to the state therefor, nor is it material that the original act authorizing the improvement directed payment to be made from the internal improvement fund. *Ryerson v. Utley*, 16 Mich. 269.

The state of Texas has appropriated and set apart a special fund for the improvement of its navigable streams. *Selman v. Wolfe*, 27 Tex. 68.

The trustees of the internal improvement fund will be enjoined, at the instance of a bondholder, from appropriating it to clearing out a river channel, although acting under a subsequent act of the legislature, where the improvement act specifically appropriated it to the payment of interest on the bonds, but not to clearing the channel. *Internal Improv. Fund v. Bailey*, 10 Fla. 112, 81 Am. Dec. 194.

An act of the legislature providing for the appropriation by certain townships along a river of a portion of the state tax therein collected for the aid of such townships in improving the navigation of such river, and authorizing the tax collector to pay the same to the treasurer of a company incorporated for the purpose of such improvement, is unconstitutional and void as being in conflict with those provisions of the state Constitution prohibiting the commutation of state taxes of any taxing district therein or the inhabitants thereof, and requiring all taxes levied for state purposes to be paid into the state treasury. *People v. Lippincott*, 65 Ill. 548.

An appropriation by the legislature for the improvement of the navigation of a particular river of no importance, the sole purpose of

permanent injury to said lots, the nature of which is not specified. The form of the action was trespass on the case. A declaration was filed, setting up the following facts as a cause of action:

More than twenty years prior to January 17, 1900, the South Branch Dock Company, a corporation, was the owner of a large tract of land, divided into lots, in Green's South Branch Addition to the city of Chicago. Some of these lots fronted on the south branch of the Chicago river, which is and was a natural navigable water course opening into Lake Michigan, but a large majority of them lay north of the lots which fronted on the river. The dock company had excavated and constructed a number of large canals through the property so owned by

which is to save people living along its banks the expense of making a carry around a fall in it, is for a local purpose, within the meaning of a constitutional provision requiring such acts to have a two-thirds majority of the legislature to pass them. *People ex rel. Adsit v. Allen*, 42 N. Y. 378, Reversing 1 Lans. 248.

The courts will not take judicial notice of the character of the Bouquet river in the state of New York, its name not being found upon the general maps of the state, nor a description of it found in the general history of the country, nor its character in any way defined by any public statute, and it not being of such notoriety as to be known generally to the people of the state. *People ex rel. Adsit v. Allen*, 42 N. Y. 378.

All rights of the public may be required to give way to the improvement, in the discretion of the legislature.

The legislature may, under its power over the highways, authorize the deepening of the channel of a navigable stream to such an extent as to destroy the fords over the stream. *Zimmerman v. Union Canal Co.* 1 Watts & S. 346.

The state has such a title to the waters of a floatable stream that it can, as against the public desiring to use the stream, authorize their control by an improvement company, which shall use all the water within the channel so as best to float all the logs offered for transportation on the stream. *Mullen v. Penobscot Log-Driving Co.* 90 Me. 567, 38 Atl. 557.

A person may, by the King's license, raise locks upon a navigable river flowing through his land for the purpose of improving its navigation, and impose a toll upon vessels using the same. *Juxon v. Thornhill*, Cro. Car. 132.

But commissioners of sewers have no power to improve the navigability of a river by erecting locks, or other artificial methods. *Queen v. Westham*, 10 Mod. 159.

A state has the right to make improvements in its navigable waters for the more safe, convenient, and useful enjoyment of the common right of navigation in them. *Moor v. Veazie*, 32 Me. 343, 52 Am. Dec. 655.

The commonwealth has absolute power over the navigable streams for their improvement as great highways for the people. *McKeen v. Delaware Div. Canal Co.* 49 Pa. 424.

If, in the opinion of a state, greater benefit would result to her commerce by the improvement of a river than by leaving it in its nat-

them, extending north from said river several hundred feet and connected therewith, and then so subdivided their property that each lot not fronting on the waters of the river would front on one of the canals. The canals opened into the river, which, in turn, emptied into Lake Michigan. The river supplied them with sufficient water to keep their depth at about 17 feet at all times. This was their only source of water supply. They varied in length, the longest extending back from the river 2,560 feet, and were wide enough to admit large barges, steamboats, ships, and other vessels, and such vessels passed to and from points within each of said canals into Lake Michigan by means of said canals and river, and conveyed lumber, goods, and merchandise to and from such

points by means thereof. Plaintiffs' premises, fronting on the canals and on the river, contained valuable docks which were used in connection therewith for loading and unloading said vessels.

After constructing this system of canals, the dock company sold 66 of the lots belonging to it to Jacob Beidler, and at the latter's death the lots passed to plaintiffs by descent. Seven of these lots front on said south branch of the Chicago river. Each of the remaining lots fronts on one or another of the canals. The lots are leased to tenants, who use them for lumber yards and for dock purposes, under leases which provide that the lessors shall at all times keep a sufficient amount of water in said canals to furnish means of access for vessels to said premises.

ural state, it may authorize it, although thereby increased inconvenience and expense may result to the business of individuals. *Huse v. Glover*, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313.

The improvement of the navigation of a public river is a public purpose in contemplation of the law pertaining to eminent domain. *Weaver v. Mississippi & R. River Boom Co.* 28 Minn. 534, 11 N. W. 114.

The legislature is the exclusive judge of the propriety of an expenditure for the improvement of the canals or navigable rivers of the state. *Waterloo Woolen Mfg. Co. v. Shanahan*, 128 N. Y. 345, 14 L. R. A. 481, 28 N. E. 358.

If the stream is in fact floatable, the state may, for the purpose of developing the use of it, authorize dams and booms where their use will do more good than harm. *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525.

The state may grant to a log-driving company the right to the use of the water of a stream so that individuals on it will not be permitted to use any water of the stream for the driving of their own logs which will be needed by the company for driving the logs under its charge. *Mullen v. Penobscot Log-Driving Co.* 90 Me. 555, 38 Atl. 557.

The legislature may improve, at its discretion, the navigable rivers of the state, and authorize the construction of any works on them which shall not materially obstruct their navigability, such as the erection of a dam equipped with a lock or otherwise for the passage of boats. *Spooner v. McConnell*, 1 McLean, 337, Fed. Cas. No. 13,245.

A constitutional provision making navigable waters leading into the Mississippi common highways, forever free, applies only to the use thereof in their natural state, and does not prevent the legislature from authorizing the improvement of the navigation of parts of a river partially navigable, and the charging of tolls for the use of such improvement. *Wisconsin River Improv. Co. v. Manson*, 43 Wis. 255, 28 Am. Rep. 542.

The state possesses the power to authorize the formation of corporations for the purpose of improving by artificial means the navigability of rivers and streams within its borders, rendering them more useful and beneficial to the public, and to allow such companies compensation therefor by way of tolls or otherwise. *East* 67 L. R. A.

Hogquam Boom & Logging Co. v. Neeson, 20 Wash. 142, 54 Pac. 1001.

The legislature may authorize a corporation to improve the navigation of a public stream, and to collect toll for use of the improvement; and such a grant is primarily for public, and not for private, benefit. *Bennett's Branch Improv. Co.'s Appeal*, 65 Pac. 242; *Tewksbury v. Schulenberg*, 41 Wis. 584.

The state board of harbor commissioners has power to authorize a private individual to dig a new channel for the benefit of navigation, where the present one is shallow, narrow, and very crooked. *Lane v. New Haven Harbor*, 70 Conn. 685, 40 Atl. 1058.

Agents of the state having in charge the improvement of a navigable river do not find their power exhausted when a mistake has been made in the engineering or construction of dams or other works. *McKeen v. Delaware Div. Canal Co.* 49 Pa. 424.

The state, in granting lands upon the border of a tidal river, did not divest itself of the right of improving the navigation of the river; and it will not be liable for injuries to the adjoining property thereby caused. *Hollister v. Union Co.* 9 Conn. 436, 25 Am. Dec. 36.

So long as the riparian owner is not thereby deprived of his access to and use of a public river as a highway, the right of the commonwealth to make any erections in the river for its improvement as a highway is undoubted and unlimited. *Tuncum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597.

As against the unexercised right to wharf out, the state has the right to improve navigation by straightening old channels or digging new ones. *Lane v. New Haven Harbor*, 70 Conn. 685, 40 Atl. 1085; *Lane v. Smith*, 71 Conn. 65, 41 Atl. 18.

Certificates for work done on an improvement of the navigation of certain rivers, acknowledging that the indorser is entitled to receive a specified sum with annual interest at a specified rate, that the same are payable at a certain time and place, and that for the redemption thereof moneys received from sales of land granted by the United States in aid of the improvement of such rivers and the revenues of such improvement are pledged and appropriated,—do not constitute or create a debt not authorized by a constitutional provision that the state shall contract no debt for works of internal improvement, but that whenever grants

The lots fronting on the river extend to the middle thereof, and the ones fronting on the canals extend to the middle of such canals.

The defendant drainage district, which is a public corporation, on January 17, 1900, connected its drainage channel, constructed for sanitary purposes, with said branch of the Chicago river, and large quantities of water have ever since flowed from said river into said channel, which diminished the supply of water in the river and in each of the canals, lowering the water 6 feet, which made the canals too shallow for the large vessels to enter the canals or reach the premises of the plaintiffs which fronted on the canals. Plaintiffs were therefore compelled to excavate and deepen the canals to the extent that the water had been lowered there-

in which they did at a cost of \$10,000. The docks along the canals and along the river were also rendered useless by reason of the water being lowered therein by the drainage channel, and plaintiffs repaired them at a cost of \$15,000.

The defendant filed a general demurrer to the declaration, the demurrer was sustained, and judgment entered in favor of the defendant. Plaintiffs appealed to this court, claiming that there has been a taking of property without compensation, within the meaning of § 13 of article 2 of the Constitution of this state; that §§ 8 and 19 of the drainage act of May 29, 1889 (Starr & C. Anno. Stat. 1896, chap. 42, §§ 8, 19), under which appellate was created, gives them a right of action; and that they are entitled to recover

of land or other property are made to a state, specially dedicated to works of internal improvement, the state may carry on such works and devote thereto the avails of such grants, and may pledge and appropriate the revenues derived from such works in aid of their completion; but merely evidence a debt already existing for work done on such an improvement to which the contractors are entitled, where there is no money to pay them, but there are lands yet unsold and revenues to be derived from the works. *State ex rel. Resley v. Farwell*, 4 Chand. (Wis.) 106.

II. Right as between state and Federal governments.

Under the provisions of the Federal Constitution giving Congress the admiralty and maritime jurisdiction, and the power to regulate commerce, the power to improve waters which are subject to interstate commerce rests with Congress if it chooses to act; but, until it acts, the states may make such improvements as will not interfere with such commerce.

There is nothing in the ordinance of 1787 for the government of the northwest territory which prohibits a state formed therefrom from improving the navigation of its rivers. *La Plaisance Bay Harbor Co. v. Monroe*, Walk. Ch. (Mich.) 155.

The act of Congress of 1817, prescribing the free navigation of the Mississippi river and the navigable waters flowing into it, did not inhibit the power, inseparable from every sovereign or efficient government, to devise and execute measures for the improvement of the state, although such measures might induce or render necessary changes in the channel or courses of rivers within the interior of the state, or might be productive of a change in the valuation of private property. *Withers v. Buckley*, 20 How. 84, 15 L. ed. 816.

The provisions of the ordinance of 1787, and of the Constitution of the state of Michigan, securing to the public the free use of natural streams without tax, duty, or impost, do not prohibit the levy of tolls for the use of an improved stream. Such tolls are not taxes, duties, or imposts, but are imposed for the enjoyment of the benefits arising from expenditures giving a new value and increased navigability to the stream. *Benjamin v. Manistee River Improv. Co.* 42 Mich. 628, 4 N. W. 483.

A toll charged for the improvement of the

navigation of a river is not prohibited by the provisions of the ordinance of 1787 declaring the navigable waters of the northwest territory to be common highways and forever free. *Palmer v. Cuyahoga County*, 3 McLean, 226, Fed. Cas. No. 10,688.

A provision in the law admitting a state into the Union, that its navigable streams be preserved for the use of the citizens of the different states free of toll, is not violated by a statute providing compensation to a boom company which receives, scales, and delivers logs cast into a river. The word "navigation," as used in treaties, constitutions, and statutes, does not mean the running of saw logs down a river. *Duluth Lumber Co. v. St. Louis Boom & Improv. Co.* 5 McCrary, 382, 17 Fed. 419.

The proviso in the act admitting Louisiana into the Union, that the navigable waters leading into the Mississippi shall be common highways and forever free from any tax, duty, impost, or toll forever, was not intended to prevent the state from improving and rendering navigable bayous and other streams only capable of imperfect navigation in times of floods. *Boyd v. Shaffer*, 13 La. Ann. 129.

The assent of Congress to a state statute incorporating a navigation company with the right to take toll on a navigable river in Alabama relieves the company from the disability to collect toll imposed by the provision of the ordinance adopted by the Alabama convention, that all navigable streams shall remain free for navigation without toll, tax, or duty, which is revocable only with the consent of the United States; and the assent of Congress to subsequent acts of the state legislature reviving and amending the company's charter, which do not affect the duration thereof or the amount of toll, is not necessary. *Columbus v. Rodgers*, 10 Ala. 37.

The state of Illinois has power, in its discretion, to construct locks and dams for the improvement of navigation upon the Illinois river, in the absence of congressional legislation forbidding it. *Huse v. Glover*, 11 Bls. 550, 15 Fed. 292.

Where Congress has not legislated as to the improvement of the water ways of a state, under its power conferred by the commerce clause of the Constitution of the United States, a state has power to improve such water ways by the removal of obstructions from their channels, and may authorize persons making the improvement to collect reasonable tolls for the in-

under their common-law rights, as riparian owners, for a diversion of the water, whereby they have been injured.

Mr. William J. Lacey, for appellants:

Under § 13 of article 2 of the Constitution of the state of Illinois appellants are entitled to recover.

Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388; *Juvinall v. Jamesburg Drainage District*, 204 Ill. 107, 68 N. E. 440; *Aldis v. Union Elev. R. Co.* 203 Ill. 567, 68 N. E. 95; *Calumet & C. Canal & Dock Co. v. Morawetz*, 195 Ill. 398, 63 N. E. 165; *Chicago v. Jackson*, 196 Ill. 496, 63 N. E. 1013, 1135; *Wabash R. Co. v. Coon Run Drainage & Levee District*, 194 Ill. 310, 62 N. E. 679; *Illinois C. R. Co. v. Turner*, 194 Ill. 575, 62

N. E. 798; *Ginn v. Moultrie, C. & D. Drainage District*, 188 Ill. 305, 58 N. E. 988; *Payson v. People*, 175 Ill. 277, 51 N. E. 588; *Doane v. Lake Street Elev. R. Co.* 165 Ill. 510, 36 L. R. A. 97, 56 Am. St. Rep. 265, 46 N. E. 520; *Rigney v. Chicago*, 102 Ill. 64; *Plumleigh v. Dawson*, 6 Ill. 544, 41 Am. Dec. 199; *Evans v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 106; *Angell, Watercourses*, § 8, p. 11; *Gould, Waters*, § 204; *Oary v. Daniels*, 5 Met. 238; *Crittenton v. Alger*, 11 Met. 284; *Stokoe v. Singers*, 8 El. & Bl. 36; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Wadsworth v. Tillotson*, 15 Conn. 366, 30 Am. Dec. 391; *McCord v. High*, 24 Iowa, 336; *Baltimore v. Appold*, 42 Md. 442; *Shamleffer v. Council Grove Peerless Mill Co.* 18 Kan. 24; *Bealey v. Shaw*, 6 East, 208;

creased facilities thus afforded to travel and transportation. *Morris v. State*, 62 Tex. 728.

A state has the power to improve the rivers exclusively within her territory so as to make the same navigable, and to charge tolls for their use; and, so long as no discrimination is made against citizens of other states in favor of her own, the exercise of this power is not in violation of the Federal Constitution, which gives Congress power to regulate interstate commerce and forbids any state, without the consent of Congress, to levy any duty of tonnage, where Congress has not enacted laws by virtue of these provisions, prohibiting the states from exercising such rights. *McReynolds v. Smallhouse*, 8 Bush, 477.

Where a river entirely within the limits of a state is for a portion of its course non-navigable, the state may grant the exclusive right to navigate it to one who, in consideration of such right, undertakes to improve it for the purpose of navigation. *Veazie v. Moor*, 14 How. 568, 14 L. ed. 545.

A state has the power to lease a navigable river within her territory to a corporation for the free navigation thereof by its boats, and with power to collect tolls at certain prescribed rates from all other boats navigating such river, upon condition that it keep extensive improvements previously made by the state in repair at its own expense, and allow the free navigation of such river by all other boats desiring that privilege upon payment of the prescribed tolls. *Sinking Fund Comrs. v. Green & B. River Nav. Co.* 79 Ky. 73.

A state may incorporate a company to convert an unnavigable into a navigable stream, and, with the express or implied consent of Congress, may authorize the corporation to assess and charge for the use of the stream all vessels which shall thereafter navigate it. Such a charge is not a charge of duty forbidden by the United States Constitution, but a compensation for labors performed by the corporation and availed of by the vessels. *Carondelet Canal Co. v. Parker*, 29 La. Ann. 430.

But a municipal corporation has no right to improve a navigable river over which the United States has assumed control, without first submitting the plan to, and obtaining the privilege of, the Secretary of War, as required by an act of Congress. *Chicago v. Law*, 144 Ill. 569, 33 N. E. 855.

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a river lying entirely within a state, and the removal of obstructions therefrom by a county under legislative authority, there being no interference with the operations, constructions, or improvements of the general government therein, are not in violation of any law of the United States. *Stockton v. Powell*, 29 Fla. 1, 15 L. R. A. 42, 10 So. 688.

A state can authorize any improvement of a river wholly within its limits which in its judgment will enhance its value as a means of transportation from one point of the state to another, if the free navigation of the river is not impaired, nor any system of improvement provided by the Federal government defeated. *Sands v. Manistee River Improv. Co.* 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113.

In the absence of congressional action, a state has the power, either itself or through a corporation which it has chartered, to improve the navigation of one of its rivers by means of locks and dams, and to authorize the exaction of tolls for the use of such improvements. *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622.

The grant by a state of a franchise to a corporation authorizing it to improve a navigable river between a port of entry and a port of delivery established by Congress, and to exact tolls of vessels drawing an amount of water that would have prevented their using the river except for the improvement, does not conflict with the power of Congress to regulate commerce. *Kellogg v. Union Co.* 12 Conn. 7.

The establishment by Congress of a port of delivery on a navigable river does not constitute a regulation of navigation on such river, so as to deprive the state of the power to authorize a corporation to exact toll as a compensation for improving the same. *Thames Bank v. Lovell*, 18 Conn. 501, 46 Am. Dec. 332.

An act of the legislature authorizing a corporation to improve the navigation of a river, and exact toll of vessels of a description that were unable to navigate the river before the improvement, does not conflict with the right of Congress to regulate commerce. *Ibid.*

A state does not lay a duty upon tonnage in violation of the United States Constitution by charging tolls based upon the tonnage measurement of boats and cargoes for the passage and use of locks constructed by it in navigable rivers within its limits, where such charge is but fair and reasonable compensation for the use of the

Tillotson v. Smith, 32 N. H. 90, 64 Am. Dec. 355; *Gardner v. Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526.

Appellants are entitled to recover under §§ 8 and 19 of the drainage act of May 29, 1889, under which the said Sanitary District of Chicago was created.

2 Starr & C. Anno. Stat. 2d ed. pp. 1493, 1496; *Juvinall v. Jamesburg Drainage District*, 204 Ill. 107, 68 N. E. 440; *Wabash R. Co. v. Coon Run Drainage & Levee District*, 194 Ill. 310, 62 N. E. 679; *Ginn v. Moultrie, C. & D. Drainage District*, 188 Ill. 305, 58 N. E. 988; *Payson v. People*, 175 Ill. 277, 51 N. E. 588; *Kewanee v. Otley*, 204 Ill. 402, 68 N. E. 388; *Grey ex rel. Simmons v. Paterson*, 60 N. J. Eq. 385, 48 L. R. A. 717, 83 Am. St. Rep. 642, 45 Atl. 995; *Kellogg v. New Brit-*

ain, 62 Conn. 239, 24 Atl. 996; *New York C. & H. R. R. Co. v. Rochester*, 127 N. Y. 591, 23 N. E. 416; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321; *Morse v. Worcester*, 139 Mass. 389, 2 N. E. 694; *Carmichael v. Tawarkana*, 94 Fed. 561.

Appellants are entitled to recover under their common-law rights as riparian owners for a diversion of the water, whereby they have been injured.

Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388; *Juvinall v. Jamesburg Drainage District*, 204 Ill. 107, 68 N. E. 440; *Wabash R. Co. v. Coon Run Drainage and Levee District*, 194 Ill. 310, 62 N. E. 679; *Revell v. People*, 177 Ill. 478, 43 L. R. A. 790, 69 Am. St. Rep. 257, 52 N. E. 1052; *Payson v. People*, 175 Ill. 277, 51 N. E. 588; *Chicago v.*

improved commercial facilities. *Huse v. Glover*, 11 Biss. 550, 15 Fed. 292.

Tolls exacted under authority of the state, by an improvement company as compensation for improving a navigable river, are not in the nature of tonnage duties. *Thames Bank v. Lovell*, 18 Conn. 501, 46 Am. Dec. 332.

A state may charge tolls based upon the tonnage measurement of boats and their cargoes, for the passage and use of locks constructed by it in navigable rivers, and such charge is not inconsistent with U. S. Const. art. 1, § 8, prohibiting states from laying any duty upon tonnage without the consent of Congress. *Huse v. Glover*, 11 Biss. 550, 15 Fed. 292.

A municipal corporation, having improved the navigation of a river at its own expense, can, without subjecting itself to the charge of improperly interfering with interstate or foreign commerce, exact of vessels using the river in its improved condition a reasonable compensation for the improved facilities thus afforded. *Harmon v. Chicago*, 140 Ill. 374, 29 N. E. 732.

It is within the constitutional jurisdiction of Congress, under its power to protect and improve navigable rivers in the interest of commerce, to authorize the construction of an apron of planked timber over the crest of a falls to prevent the wasting away of the underlying rock. *United States v. Mississippi & R. River Boom Co.* 1 McCrary, 601, 3 Fed. 548.

The United States, as owner of the works erected for the improvement of the navigation of a river, is entitled to control the surplus water power thereby created, and not the state within which the stream is located. *Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97.

The Secretary of War has power to authorize private individuals to dig a new channel for the benefit of navigation where the present one is shallow, narrow, and very crooked. *Lane v. New Haven Harbor*, 70 Conn. 685, 40 Atl. 1058.

The United States may bring in the proper circuit court a bill for an injunction to protect improvements being made in navigable waters under the authority of Congress from threatened injury by the construction of a canal and the diversion of water therein under state authority; and in such case, when the danger or injury threatened is of a character which cannot be easily remedied if the injunction is refused, and there is no denial that the act charged is contemplated, a temporary injunction 67 L. R. A.

should be granted, unless the case made by the bill is satisfactorily refuted by the defendant. *United States v. Duluth*, 1 Dill. 469, Fed. Cas. No. 15,001.

A state may permit the United States government to enter its courts as a suitor to acquire by eminent domain property necessary to enable it to improve navigation. *Re United States*, 96 N. Y. 227.

The government of the United States may exercise its right of eminent domain within a state for the purpose of constructing a canal and locks around the cascades of a navigable river. *United States v. Oregon R. & Nav. Co.* 9 Sawy. 61, 16 Fed. 524.

If the national government, for the purpose of improving the navigation of a river, condemns and takes possession of a lock erected under state authority in the stream, it must pay for the franchises to take tolls which the state had given to its owner in consideration of the construction and maintenance of the lock. *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622.

A state bordering on a navigable stream cannot prevent the closing of a channel on its side of an island in the stream for the improvement of the channel on the other side of the island under authority of Congress, and such closing is not an unlawful preference given to the ports of the state on the other side of the river. *Ibid.*

By appropriating Federal funds to the dredging of a public stream, the United States does not assume control over it, similar to an assumption of ownership, and to the diminution of a municipality's control under the statutes. *Savage v. Philadelphia*, 16 Phila. 174.

Improvement of a navigable river, when undertaken by the general government, is exclusively under its control; and where an appropriation is made by Congress for any such improvement, and the execution of the work is intrusted to the War Department, the engineering officer, subject to the approval of the Secretary of War, prosecutes the work in such manner as in his judgment he deems best. *United States v. Rum River & M. Boom Co.* 1 McCrary, 397, Fed. Cas. No. 16,206.

Federal improvements of navigable waters may be protected by injunction. *United States v. Duluth*, 1 Dill. 469, Fed. Cas. No. 15,001; *Chicago Harbor Improvement*, 17 Ops. Atty Gen. 279.

Van Ingen, 152 Ill. 624, 43 Am. St. Rep. 285, 38 N. E. 894; *Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218; *McCartney v. Chicago & E. R. Co.* 112 Ill. 611; *Chicago & P. R. Co. v. Stein*, 75 Ill. 44; *Brazon v. Bressler*, 64 Ill. 489; *Washington Ice Co. v. Shortall*, 101 Ill. 52, 40 Am. Rep. 196; *Ensminger v. People*, 47 Ill. 384, 95 Am. Dec. 495; *Chicago v. Laflin*, 49 Ill. 176; *Bliss v. Kennedy*, 43 Ill. 68; *Rudd v. Williams*, 43 Ill. 386; *Illinois & M. Canal v. Haven*, 11 Ill. 557; *People v. St. Louis*, 10 Ill. 370, 48 Am. Dec. 339; *Plumleigh v. Dawson*, 6 Ill. 544, 41 Am. Dec. 199; *Middleton v. Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *Evans v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 106; *Slattey v. Harley*, 58

Neb. 575, 79 N. W. 151; *Woodin v. Wentworth*, 57 Mich. 278, 23 N. W. 813; *Pettibone v. Smith*, 37 Mich. 579; *Welton v. Martin*, 7 Mo. 307; *Gardner v. Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526; *Platt v. Johnson*, 15 Johns. 213, 8 Am. Dec. 233; *Colrick v. Swinburne*, 105 N. Y. 503, 12 N. E. 427; *Colburn v. Richards*, 13 Mass. 420, 7 Am. Dec. 160; *Hilliker v. Coleman*, 73 Mich. 170, 41 N. W. 219; *Koch v. Delaware, L. & W. R. Co.* 54 N. J. L. 401, 24 Atl. 442; *Halsey v. Lehigh Valley R. Co.* 45 N. J. L. 26; *Tillotson v. Smith*, 32 N. H. 90, 64 Am. Dec. 355; *Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265; *Clement v. Gould*, 61 Vt. 573, 18 Atl. 453; *Kimberly & C. Co. v. Hewitt*, 79 Wis. 334, 48 N. W. 373; *Clark v. Pennsylv.*

III. Character of improvement.

Under a charter authorizing a city to deepen and cleanse a navigable stream within its limits, it may remove wrecked vessels which constitute obstructions therein. *Buffalo Union Iron Works v. Buffalo*, 1 Sheldon, 244.

By a public act passed in the reign of Henry VIII., the corporation of the city of Exeter was empowered to remove obstructions to navigation of the River Exe, upon paying compensation to the owners of the soil where the obstructions are situated. *Exeter v. Devon*, L. R. 10 Eq. 232, 18 Week. Rep. 879.

A statutory provision authorizing log owners to construct chutes in connection with any dam, and to construct booms upon payment of damages to landowners, does not authorize the condemnation of an easement to float logs and timber down the stream, and to make improvements by the removal of obstructions therein, and of a strip of land on the shore for a distance of 10 feet back from high-water mark. *Re Thomson*, 86 Hun, 405, 33 N. Y. Supp. 467.

It is a "deepening of the channel" of a river, within the meaning of a statute authorizing corporations to undertake such improvements and to collect tolls therefor, where obstructions in the bed are removed or cut through, and the water is thereby confined to the channel. *Benjamin v. Manistee River Improv. Co.* 42 Mich. 628, 4 N. W. 483.

In *Callis on Sewers*, p. 262, the case of *Hall v. Mason* is cited, in which it was held that the commissioners of sewers could not destroy any ancient weir, although it interfered with navigation.

No recovery can be had for damages to a dock and filled land, caused by digging for the purpose of clearing, restoring, and making passable a water highway dedicated to and accepted by the public, within the limits of which such land is filled in and dock constructed. *Yates v. Judd*, 18 Wis. 118.

Where a city maintains a sewer which empties into a navigable river, and which deposits sand and other substances in the river bottom, and the city digs in and excavates the bottom of the river around and near piles on which a building rests, whereby the piles are undermined, and the city makes the excavation for the purpose of providing a settling basin, and thereby saving the expense of the frequent removals of the matters emptied by the sewer, so that such matters will not obstruct navigation, the owner of the building may recover against the city for damages sustained. The excavating by the city in such a case is not the legitimate dredging which it might be entitled to do for the improvement of navigation, and the owner of the building is not precluded from recovery on the ground that the city had a right to improve navigation, and that he had no remedy if the land on which the piles were placed was deprived of its lateral support. *Pomeroy v. Granger*, 18 R. I. 624, 29 Atl. 690.

Riparian proprietors entitled by statute to have half an acre of submerged land on their water front set off to them for oyster culture, but who have each staked out territory 216 acres in extent, have not such a title to the locations claimed by them as entitles them to compensation on the ground that their property is taken for private use, where the oyster beds are destroyed by the lawful action of the government in dredging the channel of the river. *Richardson v. United States*, 100 Fed. 714.

Equity will not interfere at the instance of a riparian owner to restrain the dredging and removing of sand from the bed of a navigable lake opposite his property where such acts do not injure his property by causing increased erosions of the shore, and do not prevent accretions from forming upon his shore line. *Blatchford v. Chicago Dredging & Dock Co.* 22 Ill. App. 376.

When a river improvement company is authorized by charter to close up any chutes or side cuts for the purposes of such improvement, if the state has riparian rights as owner of the banks of any such chutes or side cuts the corporation has the right, without making compensation, to destroy such rights by closing them, and all subsequent purchasers from the state will take subject to the company's right. *Black River Improv. Co. v. La Crosse Boom & Transp. Co.* 54 Wis. 659, 41 Am. Rep. 66, 11 N. W. 443.

The Black Snake river in Wisconsin, through which a part of the waters of the Black river diverge from the main channel, flowing through the bottom lands of the latter river and reuniting with the waters thereof in a lake further down, may be considered a "slough" into which the waters flow through a "chute" or "side cut," within the meaning of a statute granting an improvement company the power, in aid of the navigation of Black river, to close up chutes leading from such river into the

vania R. Co. 145 Pa. 438, 27 Am. St. Rep. 710, 22 Atl. 989.

If the property of a riparian proprietor is taken or damaged for a public purpose, his right to compensation under the Constitution is not limited to cases of illegal trespass, but may extend to acts which are legal.

Calumet & C. Canal & Dock Co. v. Morawetz, 195 Ill. 398, 63 N. E. 165; *Illinois C. R. Co. v. Turner*, 194 Ill. 575, 62 N. E. 798; *Chicago v. Jackson*, 196 Ill. 496, 63 N. E. 1013; *Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218; *Aldis v. Union Elev. R. Co.* 203 Ill. 567, 68 N. E. 95; *Rigney v. Chicago*, 102 Ill. 64.

The diversion of the water by the sanitary district was a taking of property, so the loss was different in kind from that suffered by

bottom lands thereof and into sloughs, although such river is a navigable stream. *Ibid.* In that case it was held that a riparian owner cannot recover damages for the diversion of the waters of the stream by a corporation under authority of the legislature for the purpose of improving the public navigation. It is said the doctrine of the *Delaplaine* Case. 42 Wis. 230, cannot be extended to a case where the state places obstructions in the navigable waters of the state for the purpose of improving the navigability of the stream.

The legislature may authorize the construction of flooding dams without making compensation to the owners of mills who are injured by the interruption of the flow of the water. *Falls Mfg. Co. v. Oconto River Improv. Co.* 87 Wis. 134, 58 N. W. 257.

The legislature may authorize the construction of flooding dams to facilitate the floating of logs on a river, although the effect is to interfere with the flow of the water so as to diminish the value of the stream for steamboat navigation. *Heerman v. Beef Slough Mfg. Co.* 2 Biss. 334, Fed. Cas. No. 6,320. 1 Fed. 145.

But, under a power to erect a dam to improve the floatability of a stream, a splash dam cannot be erected the use of which will deprive a lower riparian proprietor of a reasonable use of the stream, by being withheld to create a sufficient head and then let down in a flood. *Finney v. Somerville*, 80 Pa. 59.

Under a statute authorizing the owner of timber to prepare a river for the running of logs by the removal of obstructions and the construction of chutes and such piers, booms, or other works as may be necessary, the log owner is not entitled to create storage dams and let the water out in large quantities for the purpose of floating timber. *Brewster v. J. & J. Rogers Co.* 42 App. Div. 343, 59 N. Y. Supp. 32.

The owner of a flooding dam authorized by the legislature for the improvement of a river between designated points only will be liable for injury caused by his raising the stream so as to overflow land farther down the stream. *Hackstack v. Keshena Improv. Co.* 66 Wis. 439, 29 N. W. 240.

The flooding of lands many miles below the lowest point of improvement of a river authorized by the legislature, by the wilful and unnecessary act of an improvement company in discharging waters from its flooding dam, cannot be considered *damnum absque injuria* as an 67 L. R. A.

the general public. The damages, though not a taking of property, differ in kind from those suffered by the general public.

Keewanee v. Otley, 204 Ill. 402, 68 N. E. 388; *Aldis v. Union Elev. R. Co.* 203 Ill. 567, 68 N. E. 95; *Chicago v. Jackson*, 196 Ill. 496, 63 N. E. 1013, 1135; *Calumet & C. Canal & Dock Co. v. Morawetz*, 195 Ill. 398, 63 N. E. 165; *Wabash R. Co. v. Coon Run Drainage & Levee District*, 194 Ill. 310, 62 N. E. 679; *Payson v. People*, 175 Ill. 267, 51 N. E. 588; *Elmore v. Drainage Comrs.* 135 Ill. 269, 25 Am. St. Rep. 363, 25 N. E. 1010; *Ginn v. Moultrie, C. & D. Drainage District*, 188 Ill. 305, 58 N. E. 988; *Illinois C. R. Co. v. Turner*, 194 Ill. 575, 62 N. E. 798; *McCoombs v. Akron*, 15 Ohio, 481.

Appellants are riparian proprietors.

Incidental or consequential result of the improvement. *Ibid.*

The digging of a new channel through tide-water flats under the authority of the state or the United States government is not a taking of property so as to entitle the adjoining proprietor to compensation. *Lane v. New Haven Harbor*, 70 Conn. 685, 40 Atl. 1058; *Lane v. Smith*, 71 Conn. 65, 41 Atl. 18.

Under Texas Rev. Stat. art. 722, which provides for the condemnation of land for the purpose of constructing deep-water channels from the Gulf of Mexico to the main land for the purposes of navigation and transportation and for the accommodation of ships and their cargoes, the consent of the Secretary of the Treasury is not necessary before lands can be condemned. The government might interfere in the construction of the channel, but, in the absence of any protest, the owner of the land is not in a position to insist that such consent must be obtained. *Crary v. Port Arthur Channel & Dock Co.* 92 Tex. 275, 47 S. W. 967.

The proprietors of the navigation of a river are not authorized to make a channel or passage in the river to a new wharf, the court saying that their authority is limited only to what the owners were formerly bound to do. *Partherliche v. Mason*, 2 Chitty, 658.

Although a court may not have the power to review an award of damages for flowage caused by a state dam, if there was no authority for the award the error may be corrected. *Delaware Div. Canal Co. v. McKeen*, 52 Pa. 117.

IV. Improvement companies.

The cost of the improvement of streams is at times so great, and the benefit from it is so likely, in many instances, to be purely local, that the consent of the legislature to make the improvement at public expense cannot be secured. In addition to this, many of the state Constitutions have forbidden the state from entering upon works of internal improvement. The consequence is that, in order to secure the improvement of particular streams, it must be done by private enterprise. For this purpose, charters are granted to improvement companies authorizing them to take possession of the stream, make the necessary improvements, and recover their compensation by the exaction of a toll upon transportation obtaining the benefit of the improvement.

Although there is a dictum in *Nelson v.*

St. Anthony Falls Water-Power Co. v. Minneapolis, 41 Minn. 270, 43 N. W. 56; *Reading v. Althouse*, 93 Pa. 400; *Weatherby v. Meiklejohn*, 56 Wis. 73, 13 N. W. 697; *Lawson v. Mowry*, 52 Wis. 235, 9 N. W. 280; *Townsend v. McDonald*, 12 N. Y. 381, 64 Am. Dec. 508; *Sutcliffe v. Booth*, 9 Jur. N. S. 1037; *Wood v. Waud*, 3 Exch. 748; *Coulson & F. Waters*, 247-261; *Adams v. Manning*, 43 Conn. 477; *Campbell v. Talbot*, 132 Mass. 174; *Cowell v. Thayer*, 5 Met. 253, 38 Am. Dec. 400; *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732; *Smith v. Musgrove*, 32 Mo. App. 241; *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412; *Ford v. Whitlock*, 27 Vt. 265; *Shepardson v. Perkins*, 58 N. H. 354.

Appellants have acquired riparian rights

Cheboygan Slack-Water Nav. Co. 44 Mich. 7, 38 Am. Rep. 222, 5 N. W. 998, that an act to transfer to voluntary organizations the control of navigable streams with power to levy burdens upon commerce at discretion is inoperative, yet such practice has now become too general to be declared unlawful.

The Crown may grant a franchise to construct locks and sluices on the land of the grantee for the purpose of making continuously navigable a river which before had been navigable only from milldam to milldam, and confer upon the grantee the exclusive right of navigation, under which it will be the grantee's duty to take reasonable tolls and keep the locks and sluices in proper working order. *Atty. Gen. v. Simpson* [1901] 2 Ch. 671. In rendering judgment in this case, *Stirling, L. J.*, in reply to the argument that the Crown could not grant the exclusive right of navigation in a river in which the public had previously enjoyed the partial navigation,—that is, the navigation from milldam to milldam,—said that he was unable to find any case in which a similar charter had been the subject of decision by the courts, but compared it with the King's prerogative to grant ferry franchises in non-tidal streams, and said that the right closely resembled that of a ferry, and that he could see no reason why it could not be in the power of the Crown to create it; that the exercise of the right would impose on the grantee similar obligations to those of the ferryman.

An act of legislature leasing to a company incorporated by such act for that purpose the right for a term of years to navigate a river with its boats, which had previously been made navigable by a large expenditure of money by the state, by means of locks and dams, the duty to keep which in repair is imposed upon such company with the right to collect certain prescribed tolls, not exorbitant so as to amount to a prohibition of navigation, from all other boats using such locks, is not in violation of any provision of the Constitution of Kentucky, and is valid. *McReynolds v. Smallhouse*, 8 Bush. 447.

An act of the territorial legislature granting the exclusive privilege of using for the floatage of logs and timber that portion of a river between designated points, on compliance with the provisions therein for the improvement thereof between such points by the grantees or their assigns, is valid. *Carson River Lumbering Co. v. Bassett*, 2 Nev. 249. 67 L. R. A.

in the canals and in said river by prescription.

Murchie v. Gates, 78 Me. 300, 4 Atl. 698; *Shepardson v. Perkins*, 58 N. H. 354; *Mathewson v. Hoffman*, 77 Mich. 420, 6 L. R. A. 349, 43 N. W. 879; *Townsend v. McDonald*, 12 N. Y. 381, 64 Am. Dec. 508; *Messinger's Appeal*, 109 Pa. 285, 4 Atl. 162; *Reading v. Althouse*, 93 Pa. 400; *Weatherby v. Meiklejohn*, 56 Wis. 73, 13 N. W. 697; *Lawson v. Mowry*, 52 Wis. 235, 9 N. W. 280; *Sutcliffe v. Booth*, 9 Jur. N. S. 1037; *Wood v. Waud*, 3 Exch. 748; *Coulson & F. Waters*, 244-261; *Adams v. Manning*, 48 Conn. 477; *Campbell v. Talbot*, 132 Mass. 174; *Cowell v. Thayer*, 5 Met. 253, 38 Am. Dec. 400; *Tootle v. Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732; *Smith v. Musgrove*, 32 Mo. App. 241; *Ninin-*

A statute providing for the construction of dams in a stream is not unconstitutional as giving the right to take tolls solely for the private gain of the grantees; but the construction thereof is clearly intended to be in aid of navigation, although there is no express declaration therein that such is the object, where it requires the building of suitable slides therein for running logs over the same, and requires them to be kept in repair and open during the driving stage, unless necessary to hold the water back for the purpose of flooding or driving logs; and further providing for compensation by tolls on logs "driven by aid of such dam or dams," and in view of the necessity of such dams on many streams in the lumber regions. *Tewksbury v. Schulenburg*, 41 Wis. 584.

A statute providing for the improvement of navigable rivers is fatally defective where it does not provide for the appointment of commissioners to condemn lands, except by reference to a statute providing for their appointment in the construction of plank roads, the requirements of which are not applicable. *Clay v. Pennoyer Creek Improv. Co.* 34 Mich. 204.

An act providing for the incorporation of slack-water navigation companies for the improvement of rivers in specified counties does not conflict with a constitutional requirement that corporations be formed under general laws. Such requirement does not prohibit the passage of a special act to enable operations to be carried on in specific localities, and which could not be carried on elsewhere. *Atty. Gen. ex rel. Nelson v. McArthur*, 38 Mich. 204.

A special act of incorporation conferring a right to improve the navigation of a public stream and charge toll for its future navigation is void if passed as "An Act to Incorporate the Manufacturers' Improvement Company." *Rogers v. Manufacturers' Improv. Co.* 109 Pa. 109, 1 Atl. 344.

A flooding dam association, organized under a statute authorizing a corporation formed thereunder to improve a stream when it "shall have taken prior possession of such stream for that purpose," has no right to improve a stream and charge toll for the use of such improvement where such stream had been previously taken possession of by a river improvement company, thus rendering it impossible for it to comply with the condition of the statute as to the taking of prior possession, which requires a taking possession of the entire stream. *Black River*

ger v. Norwood, 72 Ala. 277, 47 Am. Rep. 412; *Ford v. Whitlock*, 27 Vt. 265; *Angell Watercourses*, § 206, p. 353; *Gould, Waters*, p. 443, § 225; *Ballard v. Struckman*, 123 Ill. 636, 14 N. E. 682; *Vail v. Mix*, 74 Ill. 127; *Illinois C. R. Co. v. Bloomington*, 167 Ill. 9, 47 N. E. 318; *Totel v. Bonnefoy*, 123 Ill. 653, 5 Am. St. Rep. 570, 14 N. E. 687.

The sanitary district, when it purchased the land whereby it connected its drainage canal to the said south branch of the Chicago river, became a riparian owner, and entitled to a reasonable use of the water; but it could take no more water than one owner was entitled to, having due regard for the rights of others, and, when it lessened the supply of water to which every riparian owner was entitled, it thereby became liable in damages for all injuries resulting.

Flooding-Dam Asso. v. Ketchum, 54 Wis. 313, 11 N. W. 551.

The grant of a franchise by a statute providing that any person who, or corporation which, shall have improved a river at a certain cost and in a certain manner may charge tolls upon logs put into the stream, is void for uncertainty, and the franchise fails for want of a grantee. *Sellers v. Union Lumbering Co.* 39 Wis. 523.

Under a statute providing that upon the non-completion of works within two years by a company incorporated for the purpose of constructing them its corporate powers shall be forfeited, the noncompletion of dams, slides, booms, etc., within the required period, by a company incorporated for the purpose of constructing them, does not *ipso facto* forfeit the charter, but only affords grounds for proceedings to have a forfeiture declared. *Hardy Lumber Co. v. Pickereel River Improv. Co.* 29 Can. S. C. 211.

The provisions of a statute authorizing the formation of companies to improve river navigation do not authorize the formation of corporations to improve any but navigable streams; nor do they contemplate the creation of navigable rivers out of non-navigable creeks or streams. *East Branch Sturgeon River Improv. Co. v. White & F. Lumber Co.* 69 Mich. 207, 37 N. W. 192.

Duty of improvement company.

One constructing locks for the purpose of making a nontidal river navigable, under a grant from the Crown giving him an exclusive right of navigation, thereby entitling him to receive public tolls from the public using the navigation, is subject to the obligation of maintaining and working the locks. *Atty. Gen. v. Simpson* [1901] 2 Ch. 671.

Where an act of incorporation prescribed no definite time within which a new channel of a river should be constructed, it will be presumed that a reasonable time was intended. *Spring v. Russell*, 7 Me. 273.

When a navigation corporation is given control of the entire course of a river, and authorized to collect toll for its use, it is liable for damage from any obstruction remaining in the stream, even though it is not in one of its artificial channels. *Phelps v. Grand River Nav. Co.* 12 U. C. Q. B. 245.
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28 Am. & Eng. Enc. Law, pp. 978, 979; *Wright v. Howard*, 1 Sim. & Stu. 190; *Ewing v. Colquhoun*, L. R. 2 App. Cas. 839; *Colburn v. Richards*, 13 Mass. 420, 7 Am. Dec. 160; *Cook v. Hull*, 3 Pick. 269, 15 Am. Dec. 208; *Anthony v. Lapham*, 5 Pick. 175; *Hilliker v. Coleman*, 73 Mich. 170, 41 N. W. 219; *Pettibone v. Smith*, 37 Mich. 579; *Welton v. Martin*, 7 Mo. 307; *Gardner v. Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526; *Platt v. Johnson*, 15 Johns. 213, 8 Am. Dec. 233; *Van Hoesen v. Coventry*, 10 Barb. 518; *Colrick v. Swinburne*, 105 N. Y. 503, 12 N. E. 427; *Koch v. Delaware, L. & W. R. Co.* 54 N. J. L. 401, 24 Atl. 442; *Tillotson v. Smith*, 32 N. H. 90, 64 Am. Dec. 355; *Sham-leffer v. Council Grove Peerless Mill Co.* 18 Kan. 24; *Thayer v. Brooks*, 17 Ohio, 489, 49 Am. Dec. 474; *Canfield v. Andreu*, 54 Vt. 1,

But when a corporation has been chartered to make improvements in certain parts of a river and collect toll for the use thereof, it cannot be held responsible for the navigability of the stream at other places. *James River & K. Co. v. Early*, 13 Gratt. 541.

A corporation authorized to collect toll on the navigation of a stream which it is to improve as a condition precedent may exercise its discretion as to the expenditure of its funds and the improvements to be made. Its franchise to collect tolls will vest when the stream has been put in a reasonable state of improvement. *Carman v. Clarion River Nav. Co.* 81 Pa. 412.

Unpaid trustees created by statute as conservators of a river are not liable for injuries to a vessel striking on submerged piles, though authorized and empowered to remove all obstructions and impediments to the navigation, as they are acting for a public purpose without pecuniary benefit, and the duty imposed upon them is discretionary, and not compulsory. *Forbes v. Lee Conservancy Board*, L. R. 4 Exch. Div. 116, 48 L. J. Exch. N. S. 402, 27 Week. Rep. 688.

A dam company collecting a toll for the use of its improvements on a navigable stream in derogation of the public right must yield its whole resources to that end and purpose, and its liability to the public can be neither increased nor diminished at the will or desire of any stockholder, and it is immaterial who the stockholders are. *Lewiston Steam Mill Co. v. Richardson Lake Dam Co.* 77 Me. 337.

The right to exercise the privilege of digging and trenching in and channelling out the bed of a river at a certain place under a contract with the owners of the land at that point is not dependent upon the performance of other acts therein provided for, which are not burdens imposed upon the grantee of the easement, the performance of which is required by the contract, but merely other privileges which he is given the right to exercise, and which can be accepted or refused at his option; and interference by the grantors of such privilege with the exercise thereof will be enjoined. *Stuart v. Ft. Scott Water Co.* 32 Kan. 405, 4 Pac. 844.

Noncompliance by the owner of a franchise to improve the navigation of certain rivers, create water power, etc., with a condition im-

41 Am. Rep. 828; *Kimberly & C. Co. v. Hewitt*, 79 Wis. 334, 48 N. W. 373; *Clark v. Pennsylvania R. Co.* 145 Pa. 438, 27 Am. St. Rep. 710, 22 Atl. 989; *Woodin v. Wentworth*, 57 Mich. 278, 23 N. W. 813; *Rudd v. Wilkins*, 43 Ill. 386; *Batavia Mfg. Co. v. Newton Wagon Co.* 91 Ill. 230; *Doud v. Guthrie*, 11 Ill. App. 194; *Evans v. Merriweather*, 4 Ill. 494, 38 Am. Dec. 106.

The declaration is correct on the measure of damages.

Hartford Deposit Co. v. Calkins, 186 Ill. 104, 57 N. E. 863; *Abend v. Terre Haute & I. R. Co.* 111 Ill. 202, 53 Am. Rep. 616; *Toledo, P. & W. R. Co. v. Pindar*, 53 Ill. 447, 5 Am. Rep. 57; *Illinois C. R. Co. v. McClelland*, 42 Ill. 355; *State ex rel. Rice v. Powell*, 44 Mo. 436; *Lloyd v. Lloyd*, 60 Vt. 288, 13 Atl. 638; *Loker v. Damon*, 17 Pick. 284;

Chase v. New York C. R. Co. 24 Barb. 273; *Simpson v. Keokuk*, 34 Iowa, 568; *Mather v. Butler County*, 28 Iowa, 259; *Hoehl v. Muscatine*, 57 Iowa, 444, 10 N. W. 830; *Sutherland, Damages*, pp. 152, 154; 1 Sedgw. Damages, p. 166; *Beach, Contrib. Neg.* § 19; 2 *Shearm. & Redf. Neg.* 5th ed. § 741, p. 1271.

Diversion of water is a cause of action without proof of actual damage, so that the declaration is good so far as the damages are concerned.

Plumleigh v. Dawson, 6 Ill. 544, 41 Am. Dec. 199; *New York Rubber Co. v. Rothery*, 132 N. Y. 293, 28 Am. St. Rep. 575, 30 N. E. 841; *Webb v. Portland Mfg. Co.* 3 Sumn. 189, Fed. Cas. No. 17,322; *Gould, Waters*, § 401; *Parker v. Griswold*, 17 Conn. 288, 42 Am. Dec. 739; *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191; *Rochdale Canal Co. v.*

posed upon it to complete the improvement of a certain portion of one river within a specified time, by an amendment to its charter passed after other portions of the river had been improved by it, is cause for forfeiture of the entire franchise, where the same is entire in its character, embracing the whole improvement as contemplated in the original charter, and is not separable or capable of being divided into separate independent franchises, one as to the completed portion of the improvement below, and the other as to the incomplete portion, to which latter only was the condition annexed; but the additional requirement upon the acceptance by the company of the amendment imposing it became an express condition to the grant of the franchise conferred, which the company must perform to entitle it to a continuance of its franchise. *People ex rel. Atty. Gen. v. Kankakee River Improv. Co.* 103 Ill. 491.

The court will enter a judgment of ouster from its franchise to improve the navigation of certain rivers, etc., as being demanded for the public good, and will not assess a mere fine for omission of duty, where the company failed to construct the improvements on a certain portion of a river so as to make the same navigable within a specified time as required by its charter, the performance of which goes to the object for which the corporation was created, and is essential to the accomplishment of the enterprise contemplated by the charter. The court will exercise its discretion to assess a fine only when the omission of duty is of minor importance. *Ibid.*

A lease by a state to a company of the slack-water improvements of a navigable river will be rescinded and determined, and possession restored to the state, where, by the terms of such lease, said company covenanted to keep the locks and dams in good repair, which it failed to do to such an extent that one or more of such locks and dams was in great and imminent danger of being washed out and destroyed; and it not only was not making any attempt to repair and preserve the same, but was hopelessly insolvent, and altogether unable to repair and preserve them as provided in the lease. *Kentucky River Nav. Co. v. Com.* 13 Bush. 435.

Minnesota Gen. Stat. 1878, chap. 32, title 8, relating to sluice dams for logs, gives the county commissioners no authority to take a bond from the licensee of the sluice dam requiring

him to conduct or drive logs, timber, or lumber through the sluiceway; and if they should take a bond containing such a condition it would not be a statutory condition, and hence would be void, and would not inure to the benefit of third persons, or give them any right of action for its nonperformance. *Anderson v. Munch*, 29 Minn. 414, 13 N. W. 192.

The owner of a sluice dam across a stream erected, maintained, and operated under a license granted by the board of county commissioners pursuant to Gen. Stat. 1878, chap. 32, title 8, is not required by statute to perform the labor of conducting or driving logs, timber, or lumber through the sluiceway. This is no part of the "operation" of the dam within the meaning of the statute. *Ibid.*

A company authorized by its charter, upon payment of the damages suffered by owners of property, to improve a navigable river within specified limits in order to facilitate the running of logs, is not thereby excused from liability for injuries occasioned by such improvements to property outside the prescribed location. *Thompson v. Androscoggin River Improv. Co.* 58 N. H. 108.

A board incorporated by the state of West Virginia, which by its charter is required to keep the channel of a river free from obstructions, may be sued by the owner of a vessel which is injured by an obstruction in the channel, although all the property under the control of the board is owned by the state, as such suit is not against the state within the meaning of the Constitution, which declares that the state of West Virginia shall never be made defendant in any court of law or equity. It will not be presumed that the state created such a board without liability to be sued, since, says the court, without such liability the board would be a legalized despot, trespassing upon the rights of citizens, who would be powerless to protect themselves. *Tompkins v. Kanawha Board*, 19 W. Va. 257.

A navigation corporation erecting a dam as part of a navigable highway cannot convert it into a mere receptacle of the dirt washed down from the country above to the injury of riparian inhabitants. *Schuykill Nav. Co. v. McDonough*, 33 Pa. 73.

A contract by a river improvement company to build certain public roads and keep them in repair "so far as they may be damaged from

King, 14 Q. B. 122; *Wood v. Waud*, 3 Exch. 748; *Harrop v. Hirst*, L. R. 4 Exch. 43; *Branch v. Doane*, 18 Conn. 233; *Munroe v. Stickney*, 48 Me. 462; *Amoskeag Mfg. Co. v. Goodale*, 46 N. H. 53; *Tuthill v. Scott*, 43 Vt. 525, 5 Am. Rep. 301; *Graver v. Sholl*, 42 Pa. 58; *Casebeer v. Mourey*, 55 Pa. 419, 93 Am. Dec. 766; *Hendrick v. Cook*, 4 Ga. 241; *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Stein v. Ashby*, 24 Ala. 521; *Scriven v. Smith*, 100 N. Y. 471, 53 Am. Rep. 224, 3 N. E. 675; *Crooker v. Bragg*, 10 Wend. 264, 25 Am. Dec. 555; *Garwood v. New York C. & H. R. R. Co.* 116 N. Y. 649, 22 N. E. 396.

Mr. James Todd, with **Messrs. Seymour Jones and William Beebe**, for appellee:

Appellants are not entitled to recover under §§ 8 and 19 of the act under which the sanitary district of Chicago was created.

flooding" from a dam maintained by it, in consideration of the withdrawal of all pending suits and relinquishment of all prior claims for damages, is valid, and enforceable when it is shown that the town has sustained actual damage by failure to comply with the stipulation to repair. *Levis v. Black River Improv. Co.* 105 Wis. 391, 81 N. W. 405, 669.

Right of companies.

The legislature may properly grant exclusive privileges and emoluments to a company organized for the purpose of improving navigation. *Yadkin Nav. Co. v. Benton*, 9 N. C. (2 Hawks) 10.

The legislature may grant an exclusive franchise of navigation for twenty years on a stream which is to be improved by the grantee, and, so long as it does not determine that the grantee has not complied with the conditions, equity will restrain any person from violating that privilege. *Moor v. Veazie*, 31 Me. 360.

The legislature has no power to pass a repealing act annulling a contract or lease previously granted by it to a corporation whereby such corporation acquired the right for a term of years to navigate a system of rivers within that state, and to charge all others desiring that privilege tolls therefor at certain prescribed rates, in consideration of which such corporation bound itself by its bond to keep extensive locks and dams previously constructed by the state in order to make such rivers navigable in good repair, and to allow the free navigation thereof by all boats desiring that privilege upon payment by them of the prescribed tolls, all of which conditions have been fully complied with by such corporation. *Sinking Fund Comrs. v. Green & B. River Nav. Co.* 79 Ky. 73.

Under Minn. Special Laws 1881, chap. 222, the power of the board of county commissioners of Mille Lacs county to license persons to maintain sluice dams is special and limited, and to be strictly construed. No power is conferred by the act upon the commissioners to delegate to those licensed by them the authority to substitute other grantees in their place; that is to say, the license is a privilege to be exercised by the licensees, and is not authorized to run to their assigns. *Mille Lacs Improv. Co. v. Rasset*, 32 Minn. 375, 20 N. W. 363.

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Aldrich v. Metropolitan West Side Elev. R. Co. 195 Ill. 456, 57 L. R. A. 237, 63 N. E. 155; *New River Co. v. Johnson*, 2 El. & El. 435; *Corrigan Transp. Co. v. Sanitary District*, 125 Fed. 611.

The police power of the state may be delegated to the various municipalities throughout the state, and may be extended beyond the limits of the municipality.

Chicago Packing & Provision Co. v. Chicago, 88 Ill. 221, 30 Am. Rep. 545; *Gundling v. Chicago*, 176 Ill. 340, 48 L. R. A. 230, 52 N. E. 44; *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698.

The property of plaintiffs not adjacent to the Chicago river is not riparian property, and the owners thereof have no riparian rights.

Gould, Waters, pp. 300, 301; *Joliet &*

The fact that log drivers suffer their logs to be sluiced through a dam which the licensee has sold and assigned the license to maintain will not preclude him from questioning the assignee's authority to collect the tolls fixed by the act under which the license was issued, and cannot raise an assumption on his part to pay such tolls. *Ibid.*

A corporation authorized to construct booms and other works to be used by the public generally in a stream chiefly navigable for logs, to the use of which such structures are necessary, is a quasi-public corporation,—the agent of the state for the improvement of the river,—and its franchises are granted for a public use. *Cohn v. Wausau Boom Co.* 47 Wis. 314, 2 N. W. 546.

A charter to establish lock navigation on a public stream is a contract. A charter to execute a public work which can only be accomplished by the state or an agent acting by its authority is essentially a contract between the state and the agent. *Monongahela Nav. Co. v. Coon*, 6 Pa. 379, 47 Am. Dec. 474.

The grantee of a Pennsylvania navigation franchise on a public stream has the right to use for navigation and water-power purposes all the water of the stream,—at least the ordinary, usual, and natural flow and volume and quantity of water in the river. *Lehigh Coal & Nav. Co. v. Pocono Spring Water Ice Co.* 7 Northampton Co. Rep. 350.

A state having leased a navigable river to a corporation for a certain term in consideration of its keeping the river in condition for navigation, and given it authority to collect tolls, cannot resume control of such river before the expiration of the term, except by exercising its power of eminent domain and compensating the company. *Sinking Fund Comrs. v. Green & B. River Nav. Co.* 79 Ky. 73.

Where the grantee under a franchise to construct locks for the purpose of improving the navigation of a river has neglected to construct the same although more than twenty years have expired since the granting of the franchise, such grantee is not in the possession of, or enjoying, its franchise so as to be entitled to an injunction against a company about to construct a canal and locks under an infringing franchise. *Enfield Toll Bridge Co. v. Connecticut River Co.* 7 Conn. 28.

A navigation corporation may temporarily or

C. R. Co. v. Healy, 94 Ill. 416; *Fox River Flour & Paper Co. v. Kelley*, 70 Wis. 287, 35 N. W. 542; 2 Kinkead, Torts, § 682, p. 1312; *Penrhyn Slate Co. v. Granville Electric Light & P. Co.* 84 App. Div. 92, 82 N. Y. Supp. 547; *Hayden v. Long*, 8 Or. 244; *Lake Superior Land Co. v. Emerson*, 38 Minn. 406, 8 Am. St. Rep. 679, 38 N. W. 200; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 386.

Private individuals cannot acquire pre-scriptive rights against the public.

Chicago & N. W. R. Co. v. Hoag, 90 Ill. 339; *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Parker v. People*, 111 Ill. 581, 53 Am. Rep. 643.

The true measure of damages is the differ-

ence in the value of the property before and after the improvement is completed. There can be no recovery for the money expended in dredging the slip and in reconstructing the docks.

Springer v. Chicago, 135 Ill. 560, 12 L. R. A. 609, 26 N. E. 514; *Eberhart v. Chicago, M. & St. P. R. Co.* 70 Ill. 349; *Elgin v. Eaton*, 83 Ill. 535, 25 Am. Rep. 412; *Chicago, M. & St. P. R. Co. v. Hall*, 90 Ill. 45.

The rights of the plaintiffs in the waters of the south branch of the Chicago river are held subject to the paramount authority of the state to make any and all improvements to facilitate navigation.

People v. St. Louis, 10 Ill. 351, 48 Am. Dec. 339; *Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 508; *Cummings v. Chicago*, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep.

permanently increase the height of its dams if necessary for the improvement of navigation, when, without its negligence, the dam becomes filled with debris, and the expense of removing it is excessive and unreasonable. *Fehr v. Schuykill Nav. Co.* 69 Pa. 161.

The power to erect such a dam across a navigable stream as may be necessary to improve navigation is not exhausted when acted upon, but includes the right to raise the dam first erected if found insufficient, and to keep it in repair. *McKeen v. Delaware Div. Canal Co.* 49 Pa. 424.

It is not necessary for a navigation corporation to have taken possession of a whole stream in order that its franchise to take toll may vest, when the law requires that the corporation "shall have taken prior possession of such stream, or any considerable portion thereof, upon which portion no other person or corporation has erected any dams or other improvements, and which may have needed improvement for that purpose." *Northwestern Improv. & Boom Co. v. O'Brien*, 75 Minn. 335, 77 N. W. 989.

A navigation company has, by inference at least, the right to insist that no unlawful interference with the headwaters of its stream shall do harm to the rights it may exercise below. *Lehigh Coal & Nav. Co. v. Scranton Gas & Water Co.* 6 Pa. Dist. R. 291.

Under a statute incorporating a navigation company and vesting in it the river or stream to be made navigable, a new species of statutory property and interest in the water is created and vested in it, and it can maintain an action against persons diverting the water for the purpose of supplying certain county buildings, although no actual damage to the navigation is inflicted. *Medway Nav. Co. v. Romney*, 9 C. B. N. S. 575, 30 L. J. C. P. N. S. 236, 7 Jur. N. S. 846.

The sufficiency and suitability of improvements in a public stream prior to the vesting of an exclusive franchise of navigation are questions to be settled by the legislature, if it thinks proper, by directing proceedings to vacate the charter, and not by an individual, as numerous and conflicting verdicts would thereby be made possible. *Moor v. Veazie*, 31 Me. 360.

Where a city is granted a franchise for the construction of a channel for the purpose of navigation and it authorizes individuals to con-

struct and operate the channel, and it is provided by a city ordinance that, in case the channel is obstructed or allowed to shoal up, the right to collect tolls shall be suspended until the obstructions are removed or the channel made of the required dimensions, the state legislature, in declaring that ordinance valid, where no statutory causes of forfeiture are prescribed, waives the right of forfeiture of the franchise on account of a temporary failure to maintain the channel with the required dimensions. *State ex rel. Gussett v. Morris*, 73 Tex. 435, 11 S. W. 392.

Texas Rev. Stat. art. 722, providing for the condemnation of land for the construction of deep-water channels from the Gulf of Mexico to the main land for the benefit of transportation and navigation, and for the accommodation of ships and their cargoes, conferred a privilege, and did not place a restriction upon corporations building such channels; and it is not necessary that the corporation should show that a condemnation of property is necessary to enable it to reach a place of safety for its docks. *Crary v. Port Arthur Channel & Dock Co.* 92 Tex. 275, 47 S. W. 967.

A river improvement company, forever ousted on quo warranto from the further exercise of the franchises and privileges conferred by its charter, has no power afterwards to sell an easement acquired by it to overflow lands adjacent to its improvements. *Wilmington Water Power Co. v. Evans*, 166 Ill. 548, 46 N. E. 1083.

A lease by a state to a navigation company of the slack-water improvements of a river, which provides for a forfeiture thereof unless such company, within sixty days after the date thereof, commence in good faith the extension of slack-water improvements on such river, required by the terms of such lease to be made, is not forfeited where the company actually and in good faith began such improvements within the specified time, although it failed to prosecute the work with proper diligence after having commenced it, and never completed the improvements agreed by it to be made. *Kentucky River Nav. Co. v. Com.* 12 Bush, 8.

A corporation having authority by law to improve a public stream in a prescribed manner, for the consideration of taking toll on the lumber and logs floated thereon, will not lose its franchise because the improvement is in

472; *Brooks v. Cedar Brook & S. C. River Improv. Co.* 82 Me. 17, 7 L. R. A. 460, 17 Am. St. Rep. 459, 19 Atl. 87; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; *Eldridge v. Trezevant*, 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345; *Ruch v. New Orleans*, 43 La. Ann. 275, 9 So. 473; *Scranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; *Slingerland v. International Contracting Co.* 169 N. Y. 60, 56 L. R. A. 494, 61 N. E. 995; *Homochitto River v. Withers*, 29 Miss. 21, 64 Am. Dec. 126; *Morgan v. Reading*, 3 Smedes & M. 366.

There can be no recovery for damages resulting from the proper exercise of the po-

lice power for preserving and safeguarding the public health; and § 13 of article 2 of the Constitution has no application.

Wilson v. Genseal, 113 Ill. 403, 1 N. E. 905; 22 Am. & Eng. Enc. Law, 2d ed. 922. 938; *Tiedeman*, Pol. Power, 444, 445; *Chicago v. Netcher*, 183 Ill. 104, 48 L. R. A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Rc Cheesebrough*, 78 N. Y. 232; *Brown v. Keener*, 74 N. C. 714; *State v. Wheeler*, 44 N. J. L. 88; *Frazer v. Chicago*, 186 Ill. 480, 51 L. R. A. 306, 78 Am. St. Rep. 296, 57 N. E. 1055; *Bancroft v. Cambridge*, 126 Mass. 438; *Elgin v. Elgin Hydraulic Co.* 85 Ill. App. 182; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Frost v. People*,

fact not beneficial, there being no such condition prescribed, and the legislature having determined that question in granting the charter. *Bennett's Branch Improv. Co.'s Appeal*, 65 Pa. 242.

Conservators with the duty of keeping a river navigable may, under a statute providing for a certain toll for the reimbursement of expenditures made by them, and a subsequent act providing for an additional toll to meet a special expenditure, at their option receive a toll not exceeding the full amount authorized to be taken by the two acts. *Rex v. Tone Conservators*, 1 Barn. & Ad. 561.

No contract is impaired when the state draws water for improvements from a navigable stream, although to the injury of the previously vested franchise of a navigation corporation. *McKeen v. Delaware Div. Canal Co.* 49 Pa. 424.

The state having granted a franchise to one corporation to erect dams and locks on a tributary to rivers, and to collect tolls, does not, by afterward granting a franchise to another corporation to collect higher tolls on the river itself than had been collected before, and thus injuring the former corporation's business, become liable in damages to such corporation, an enabling act having been passed to allow it to sue; nor does it by such act elect to purchase the dams and locks of the first corporation and pay their value, such election being allowed by the term of the franchise to the first corporation. *Com. v. Stevens*, 3 Ky. L. Rep. 165.

A corporation authorized to build locks and take tolls may leave some of its works, or even cause some of them to be built with the understanding with the contractor that he shall be permitted to reimburse himself from the receipt of the tolls arising from the same. *Boykin v. Shaffer*, 13 La. Ann. 129.

Persons authorized by act of Parliament to make certain rivers navigable, and to do all things necessary for making and maintaining a navigable passage, and to charge toll for the use of the river, have a mere easement in the land over which the river flows, and are not occupiers of it within the meaning of a statute making occupiers of land ratable to the poor. *Rex v. Mersey & I. Nav. Co.* 9 Barn. & C. 95, 4 Mann. & R. 84, 7 L. J. M. C. 70; *Rex v. Thomas*, 9 Barn. & C. 114, 4 Mann. & R. 23.

Where, under an act of Parliament authorizing persons to make a certain river navigable, they had but an easement in the land over which 67 I. R. A.

the river flowed, a subsequent statute vesting the legal estate and interest in the navigation of the river in trustees, and authorizing them to mortgage the navigation, vested in them only an incorporeal right in the bed of the river, and no title to the soil passed so as to make them ratable to the poor as occupiers of land. *King v. Aire & C. Nav. Co.* 9 Barn. & C. 820.

Limited improvement of the navigation of a river under a provision of a charter for the improvement thereof that the corporation shall not be entitled to any benefit, privilege, or advantage under the act, and that all its interest shall be forfeited and cease, unless the improvement is completed within a designated time for vessels drawing 1 foot of water, does not prevent the subsequent, further, and more extended improvement thereof under a provision of the charter giving the company the power to cut canals and construct such other work as it shall judge necessary for improving and extending the navigation from place to place and from time to time in such manner as it shall think fit, where such improvement was recognized and considered as a work of great public utility intended to connect the Atlantic states with the country west of the Alleghany mountains, so that there could have been no intention to limit the broad power necessary fully to secure such object by the provision as to such limited improvement; but such requirement must be deemed to have been intended only to secure a partial use of the river within a reasonable time. *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.* 4 Gill & J. 1.

A boom company is entitled to an injunction restraining the placing of obstructions in the river lower down for the purpose of aiding in the running of logs, interfering with the beneficial use of its works constructed on a slough formerly constituting the main channel of the river, where it is lawfully in possession of such slough and works, under a statute authorizing corporations organized for booming and improving purposes and owning both shores to improve rivers by clearing and straightening channels and closing sloughs, because such statute authorizes it so to improve its slough across a bend in the river as materially to straighten the river, and make such slough the main channel, so dedicating it to public use, and to treat

193 Ill. 635, 86 Am. St. Rep. 352, 61 N. E. 1054; *Meadowcroft v. People*, 163 Ill. 56, 35 L. R. A. 176, 54 Am. St. Rep. 447, 45 N. E. 303; *Charleston v. Werner*, 38 S. C. 488, 37 Am. St. Rep. 776, 17 S. E. 33; *Munn v. People*, 69 Ill. 80; *State v. Schlemmer*, 42 La. Ann. 1116, 10 L. R. A. 135, 8 So. 307.

Scott, J., delivered the opinion of the court:

Appellants are the owners of sixty-six lots, all of which they claim were damaged by the act of the Sanitary District of Chicago in lowering the general level of the water in the south branch of the Chicago river. Seven of these lots front or abut on this branch of the river. The others front on canals leading from the south branch at right angles to

the general course of the stream. It is contended by appellee that appellants have no riparian rights appurtenant to those lots which do not abut on the river, and this presents the first question for our determination.

At the time the canals were excavated, the real estate through which they extend was all property of one owner. More than twenty years intervened the construction of the canals and the opening of the principal channel of the sanitary district, the opening of which reduced the level of the water. After the canals were opened the owner of the land subdivided the same into lots facing or abutting upon the canals, except a few immediately contiguous to and fronting upon: the

the disused bend of the former channel as a slough. *Stevens Point Boom Co. v. Rellly*, 44 Wis. 295.

An improvement company sustaining loss of tolls by reason of the obstruction of a navigable stream by a dam may maintain a suit in equity to restrain and prevent the completion and maintenance thereof. *Wisconsin River Improv. Co. v. Lyons*, 30 Wis. 61.

The lessee from the state of the "Green & Barren river line of navigation" acquired thereby no peculiar right in the navigation of those streams not common to the public, but merely the exclusive proprietorship, during the lease, of the locks, dams, and other improvements made by the state previous to the leasing; and the grant to a railroad company of the right to erect a bridge across the streams "so as not unreasonably to obstruct navigation" is not void as impairing the obligation of contract existing between the state and such lessee by virtue of such lease. *Green & B. River Nav. Co. v. Chesapeake, O. & S. W. R. Co.* 88 Ky. 1, 2 L. R. A. 540, 2 Inters. Com. Rep. 515, 10 S. W. 6.

Where a corporation was directed to purchase the stock of a channel company for \$2,000, and to expend \$3,000 in improving the channel of a river during a stated period, and to expend after that time the sum of \$500 annually, a further provision that, if the tolls received be more than sufficient to defray the annual expenses, said excess shall be first applied to refund the sums which shall have been expended beyond the amount of tolls received, allowing interest on all expenditures for the purpose aforesaid, it being provided that said principal sum of \$3,000 and the amount that shall be paid for the channel stock shall not at any time be refunded,—was construed as entitling the company to interest on the annual expenditures only, and not on the original expenditure of \$5,000. *Thames Bank v. River Thames*, 22 Conn. 198.

Tolls.

The exaction of tolls under a statute for the improvement of a water way is not an unconstitutional deprivation of property. *Sands v. Manistee River Improv. Co.* 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 118.

An alleged power to collect toll on a public stream will be construed strictly in favor of the public, and will not vest until all the statutory conditions are met. *Northwestern Improv. & 67 L. R. A.*

Boom Co. v. O'Brien, 75 Minn. 335, 77 N. W. 989; *St. Louis River Dalles Improv. Co. v. C. N. Nelson Lumber Co.* 51 Minn. 10, 52 N. W. 976.

One who has erected locks in a bayou, thereby rendering it navigable, will not be required to destroy or remove them; but he cannot charge toll unless such a franchise has been conferred upon him by the sovereign power. *Boykin v. Shaffer*, 13 La. Ann. 129.

The mere fact that a company has improved a stream does not give it the right to collect tolls upon logs of persons driving on the stream, who use their own forces and appliances. *Washougal River Improv. & Log Driving Co. v. Skamania Logging Co.* 23 Wash. 89, 62 Pac. 450.

The right to impose tolls as a consideration for the improvement of navigation on a public river is a right of government, to which individual inconveniences must yield. *Bennett's Branch Improv. Co.'s Appeal*, 65 Pa. 242.

Under the Ontario act, tolls can be charged for use of improvements in a floatable stream when they are made for the express purpose of facilitating the floating of logs, lumber, and timber, and a milldam is not such an improvement. *Re Dam & Slide on Little Bob River*, 23 Ont. App. 177.

Subject to a paramount authority of the nation under the power granted to Congress to regulate commerce between the states, a state may impose tolls upon boats and cargoes passing through locks constructed by it to improve the navigation of rivers. *Huse v. Glover*, 11 Bliss. 550, 15 Fed. 292.

That a navigable stream was capable of use in its natural condition does not deprive a navigation company of the right to collect tolls from one who uses the improved water way, and whose commerce is facilitated by it. *Nelson v. Cheboygan Slack-Water Nav. Co.* 44 Mich. 7, 38 Am. Rep. 222, 5 N. W. 998.

A navigation improvement company is entitled to charge tolls pursuant to its charter, when it has expended money in putting the stream into a reasonable state of improvement. *Carman v. Clarion River Nav. Co.* 81* Pa. 412.

The state has a right to provide for improving waters that need improvement, and may levy tolls on property for use of the improvements. Such tolls are not taxes or invasions of property rights, but a fixed compensation for the advantageous use of that which has

river. These lots the owner sold from time to time without any reservation.

Under the law of this state, the owner of lots on each side of a river, such as the Chicago river, is also the owner of the bed of the stream to the center of the stream (*McCartney v. Chicago & E. R. Co.* 112 Ill. 611), subject only to the right of the public to the free and undisturbed navigation of the river (*Chicago & P. R. Co. v. Stein*, 75 Ill. 41). A riparian owner has the right to use the water in the stream. This includes the right to take a reasonable quantity of the water for his own purposes. The limitation and extent of the use of the water is that it shall not interfere with the public right of navigation, nor in a substantial degree diminish and impair the right of use of the

water by other riparian owners. *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196.

These canals had been continuously supplied with water for more than twenty years prior to the opening of the sanitary channel. This court has on several occasions held that the right to have water flow in an artificial channel, and to flood land which it would not overflow naturally, may be acquired by prescription. *Vail v. Mix*, 74 Ill. 127; *Bailard v. Struckman*, 123 Ill. 636, 14 N. E. 682; *Total v. Bonnefoy*, 123 Ill. 653, 5 Am. St. Rep. 570, 14 N. E. 687. In other states it has been frequently held that one who, by an artificial channel or waterway, has taken water from the original channel, and who has continued to divert and enjoy it for a pe-

value. They are collected on the same principle as turnpike tolls or railway or wharfage charges. *Manistee River Improv. Co. v. Sands*, 53 Mich. 593, 19 N. W. 199.

A statute authorizing a navigation corporation to collect toll from persons using the stream for floating lumber "across" its waters, when the whole purpose of the law relates to descending navigation, cannot be held to relate merely to crossing from one bank to the other. *Bennett's Branch Improv. Co.'s Appeal*, 65 Pa. 242.

Where a city, which has a franchise to construct a channel for the purposes of navigation and to collect tolls, grants the same to individuals upon the condition that they shall maintain the channel at a specified depth and width, reserving the right to suspend tolls in case the channel shall not be so maintained and until it shall be made of the said dimensions, a boat owner, when sued for tolls, may defend on the ground that the tolls had been so suspended under the contract between the city and the grantee at the time the boats of the defendant passed through the channel. *Morris v. The Leona*, 67 Tex. 303, 3 S. W. 281.

Where a city is granted a franchise by the state to erect an artificial channel for the purpose of navigation, and to take tolls, and the city grants the franchise to individuals, reserving the right to suspend the tolls during any time when the channel is not maintained with specified dimensions, the city may suspend the tolls by giving notice to the grantee and by passing an ordinance, in case the channel is maintained in a shoaled condition, and not of the dimensions specified in the grant. The grantee cannot successfully contend that the right to collect tolls can only be suspended by a direct proceeding on the part of the state to forfeit the franchise. *Ibid.*

Where the charter of a corporation organized for the purpose of improving a river authorized it to exact toll at a specified rate, and fixed the duration of the company at sixty years, its right to charge toll after the expiration of fifteen years is not forfeited, in the absence of a direct proceeding to forfeit its charter, by its failure to comply with a provision of its charter that it shall have the right to charge such tolls for and during the term of fifteen years, and at the expiration of said fifteen years it shall submit to the legislature a statement of its accounts, to the end that the legislature 67 L. R. A.

may reduce the rate of toll if the profits have exceeded a specified amount. *Kellogg v. Union Co.* 12 Conn. 7.

Payment of the tolls fixed by the board of control for river-improvement companies cannot be resisted on the ground that the rates fixed are too high, or that the board has been imposed upon by fraudulent representations, since their action is not subject to review by the courts. *Manistee River Improv. Co. v. Lamport*, 49 Mich. 442, 13 N. W. 810.

The franchise of a navigation corporation to collect toll on a public stream after its establishment of an artificial navigation does not include the right to recover that toll after the artificial navigation has been destroyed and the corporation has neither reconstructed nor elected to reconstruct it. *Lehigh Coal & Nav. Co. v. Brown*, 100 Pa. 338.

A company which has improved a navigable river is not entitled, in the absence of express contract, to recover tolls from log owners for the use of the improvements, where the rate of tolls has not been fixed by the state board of control as required by How. Anno. Stat. § 3859. *Osqueoc Improv. Co. v. Mosher*, 101 Mich. 473, 59 N. W. 664.

A navigation company authorized to improve the navigation of a river and construct canals and cuts, and to charge tolls for the use of the same, may exact tolls from those using a portion of the river which has been improved by them, although the canals and cuts have not been constructed, where the statute under which they are operating provides that it shall be lawful for them from time to time, and at all times thereafter, to receive toll. *Tamar Nav. Co. v. Wagstaff*, 4 Best & S. 288, 32 L. J. Q. B. N. S. 295, 9 Jur. N. S. 132.

A navigation company cannot collect toll upon logs carried out of a stream by the owners upon a freshet, and without the use of its improvements, or which are rolled from the banks contrary to the direction of their owner, under authority to collect tolls for driving logs upon a stream when improved, when the driving is done either at the request of the log owners, or, without such request, when such logs lie in such a position as to impede or obstruct its own drive. *Washougal River Improv. & Log Driving Co. v. Skamanla Logging Co.* 23 Wash. 89, 62 Pac. 450.

A lumber owner can maintain assumpsit to recover back the excess tolls collected by a har-

riod beyond the statute of limitations as to real actions, acquires by prescription the right to use the water in that particular manner and to continue the diversion of it in the same way. *Murchie v. Gates*, 78 Me. 300, 4 Atl. 698; *Mathewson v. Hoffman*, 77 Mich. 420, 6 L. R. A. 349, 43 N. W. 879; *Townsend v. McDonald*, 12 N. Y. 381, 64 Am. Dec. 508; *Weatherby v. Meiklejohn*, 56 Wis. 73, 13 N. W. 697; *Cowell v. Thayer*, 5 Met. 253, 38 Am. Dec. 400; *Campbell v. Talbot*, 132 Mass. 174; *Belknap v. Trimble*, 3 Paige, 605; *Shepardson v. Perkins*, 58 N. H. 354; *Meessinger's Appeal*, 109 Pa. 285, 4 Atl. 162; *Reading v. Althouse*, 93 Pa. 400; *Adams v. Manning*, 48 Conn. 477. It is suggested by appellee that these cases all involve the relative rights of private parties, and that no

such right can be acquired by prescription against the public. The right of the public in this stream is the right to navigate it. No right can be acquired by prescription which will interfere with this right of navigation. It does not appear from the declaration in this case that filling these canals with water from the river interfered in any wise with navigation. In view of the length of the canals and the amount of water necessarily required to fill them to the level of the river, the diversion of the waters to the canals was an appropriation of the water adverse to the rights of other owners of abutting property, and, as the appropriation did not violate the public right of navigation, the owner of each lot fronting upon either of these canals acquired by prescription the

bor company, being the difference between the tolls specified in a special contract and the regular tolls. *Marsh v. Port Hope Harbour Co.* 6 U. C. Q. B. O. S. 100.

A statute authorizing improvement of the navigation of a river by three flooding dams, and providing that when such dams shall have been erected or acquired the owner shall be authorized to collect tolls, does not authorize the collection of tolls when but two dams have been acquired or constructed. *Sauntry v. Laird*, Norton Co. 100 Wis. 146, 75 N. W. 985.

A statute authorizing the construction of three dams across a stream within the space of a few miles for the purpose of improving the navigation of the stream will entitle the grantee to toll on all logs entering the stream at any point above the next lower improvement dam, although no water from his dams facilitates their drive, and the statute gives him a right to collect tolls on logs sluiced or driven through or by the aid of one of the dams or by the aid of waters collected therein. *Ibid.*

The right of a boom company to charge tolls on logs passing through its limits does not depend upon its improvement or service having been actually beneficial to the log owner in the particular instance. *St. Louis Dalles Improv. Co. v. C. N. Nelson Lumber Co.* 43 Minn. 130, 44 N. W. 1080.

The right of a river improvement company which has improved a river for the driving of logs to collect tolls upon logs passing through its limits depends, not only upon the construction, but on the maintenance, of the improvements. *St. Louis River Dalles Improv. Co. v. C. N. Nelson Lumber Co.* 51 Minn. 10, 52 N. W. 976.

The right of a state or its lessees to charge toll for the navigation of a river exists by reason of the facilities afforded those who by passing through locks are able to navigate a river not otherwise navigable; but where navigation is unobstructed, and the use of locks and dams is unnecessary, such river is free for all purposes of navigation. *Green & B. River Nav. Co. v. Palmer*, 83 Ky. 646.

A corporation to whom the state leased a river with the right to charge tolls for the use of the locks and dams thereof by all boats, rafts, etc., navigating such river, in consideration of the construction by it of such locks and dams so as to make such river navigable in low water, is not entitled to toll from the owner 67 L. R. A.

of boats who navigates such river during high water when such locks and dams are not necessary and are not used by him. *Ibid.*

The right of a navigation company to take toll cannot be defeated by proof of the bad condition of the river at the time it was demanded, in the absence of any report of the commissioner appointed by the governor to supervise the same declaring it not to be in such repair as to permit of the easy and safe descent of boats, and until the repairing of which the statute declares no toll shall be taken by the company, as such report is the only matter which can defeat the right to take toll. *Duke v. Cahawba Nav. Co.* 10 Ala. 82, 44 Am. Dec. 472.

The improvements for facilitating the transportation of logs and lumber in a public stream are the consideration for granting a boom company a franchise under which it collects toll on all such transportation. *Swift River & B. B. Improv. Co. v. Brown*, 77 Me. 40.

A boom company which has expended a large sum of money in improving a stream which before was not capable of floating logs is entitled to collect a reasonable toll for driving and floating the logs of a riparian owner down the stream to tide water, and to a lien on the logs for that purpose, where such owner permitted his logs to float down the stream into the company's boom, where they mingled with other logs, and, failing to remove them upon request, the company was obliged to drive them with the others, under a statute authorizing such charges by boom companies without the owner's request in case of their logs lying in such position as to obstruct or impede the drive. *East Hoquiam Boom & Logging Co. v. Neeson*, 20 Wash. 142, 54 Pac. 1001.

An attempt to collect tolls under a franchise granted for the improvement of a public stream may be defeated if the improvements which are a condition precedent have not been made. *Carman v. Clarion River Nav. Co.* 81* Pa. 412.

A franchise to collect an increased toll because of the expense of the erection of a dam will be effective from the time of its acceptance, if a postponement is not more plainly expressed; but, having accepted it, the grantee cannot omit to perform the correlative duty. *Susquehanna Boom Co. v. Dubois*, 58 Pa. 182.

When an act makes an appropriation for riparian improvements, but provides that "no charges or tolls shall be collected on any other

same riparian rights in the waters therein that he would have had if the canals had been natural water ways, and, under the authorities above cited, his title extended to the middle of the canal.

Section 13 of article 2 of the Constitution of the state provides, "Private property shall not be taken or damaged for public use without just compensation," and the question is here presented whether the damages sustained by appellants are within this language of the Constitution.

Section 19 of the act for the creation of sanitary districts (2 Starr & C. Anno. Stat. 1896, chap. 42) provides: "Every sanitary district shall be liable for all damages to real estate within or without such district which shall be overflowed or otherwise damaged by

part of the river on any commerce on said river which originates above" said works, the appropriation is not contingent upon the abandonment of franchises to collect such tolls. *Monongahela River Improvement*, 18 Ops. Atty. Gen. 481.

A cut constructed by drainage commissioners along the channel of a navigable river which is thereby straightened and reconstructed assumes the character of the river as a navigable stream, and goods transported over it are not exempt from toll, under a statute providing that turnpike trustees shall make use of any public or parish drain leading to or near its roads without payment of toll. *Coulton v. Ambler*, 18 Mees. & W. 403, 14 L. J. Exch. N. S. 11, 3 Railway Cas. 724, note.

The right of a navigation improvement company to exact tolls under its charter granted by the state is not terminated by a subsequent appropriation of money by Congress, which is expended for additional improvements in the same river. *Thames Bank v. Lovell*, 18 Conn. 501, 46 Am. Dec. 332.

Equity will not restrain the exercise of a franchise to collect tolls on a navigable river until its forfeiture has been declared by proper proceedings in law. *Pixley v. Roanoke Nav. Co.* 75 Va. 320.

Where a corporation is authorized to collect tolls from those navigating a river, and is bound to keep the river in navigable condition, it is not an insurer of the goods shipped on the river, and is only liable for losses which may occur by reason of its negligence in failing to maintain the river in a navigable condition. *Tompkins v. Kanawha Board*, 21 W. Va. 224.

A river company which has a franchise to collect tolls after prescribed improvements in navigation have been made will not be liable for injury sustained by one navigating the stream before the works are completed or the company charges toll, and thus vouches for the navigability of the stream as contemplated by its charter. *James River & K. Co. v. Early*, 13 Gratt. 541.

Where a corporation authorized to collect tolls of those navigating a river has imposed upon it by law the duty of keeping the chutes free from obstruction, proof that a log was in a chute in the river shows negligence in the corporation; and, in an action against it by one whose boat was injured by running against the log, such proof casts the burden on the corporation. *L. R. A.*

reason of the construction, enlargement, or use of any channel, ditch, drain, outlet, or other improvement under the provisions of this act."

In the case of *Kewanee v. Otley*, 204 Ill. 402, 68 N. E. 388, we held (p. 417, 204 Ill. p. 393, 68 N. E.), referring to *Gardner v. Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526, and *Grey ex rel. Simmons v. Paterson*, 60 N. J. Eq. 385, 48 L. R. A. 717, 83 Am. St. Rep. 642, 45 Atl. 995: "It is the right of every owner of land over which a stream of water flows to have it flow in its natural state and with its quality unaffected. The right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold, of which the owner cannot be dispossessed except by due process of law, and

poration to show that it used due diligence to discover and remove the obstruction. *Tompkins v. Kanawha Board*, 21 W. Va. 224.

Liability for injuries.

If it appears in evidence in a suit to recover because land is flooded by reason of the log jams caused by piers and booms of a boom company, that a certain boom is so constructed as to need protection by a cushion of 10,000,000 feet of logs, notwithstanding which it breaks, letting its contents down upon the sorting works below, whereby they are put in danger, the jury is warranted in finding that the works of the boom company are not properly built, or managed with due care. *Doucette v. Little Falls Improv. & Nav. Co.* 71 Minn. 206, 73 N. W. 847.

The mere fact that, after the raising of a dam to aid in floating logs injury was done to lower land which did not occur before, is not sufficient to render the owner of the dam liable for the injury caused thereby, where it is not shown that the land injured was above high-water mark, or the dam owner was guilty of negligence. *Ramgren v. McDermott*, 73 Minn. 368, 76 N. W. 47.

A riparian owner may maintain case for damages caused by a river-improvement corporation without authority of law, and therefore not subject to the special statutory remedy provided for it. *White Deer Creek Improv. Co. v. Sassaman*, 67 Pa. 415.

The Pennsylvania court applied the erroneous doctrine originating in a *dictum* of Lord Holt (see note to *Mayer v. Thompson-Hutchinson Bldg. Co.* [Ala.] 28 L. R. A. 433), to the effect that a servant was not liable to strangers for his negligent acts, in holding that the servants of a navigation corporation are not liable for the damage done by the works they construct for their employers, for *respondent superior*. *Woodward v. Webb*, 65 Pa. 254.

But the officers and agents of a navigation company are not protected from prosecution for wilful injury to a milldam by the floatage of logs because done while in the prosecution of the corporation's business, where the corporation had not complied with the terms of the act upon compliance with which its right to the control of the navigation of the river thereunder depended. *Olive v. State*, 86 Ala. 88, 4 L. R. A. 33, 5 So. 653.

One engaged in improving the navigation of

the pollution of a stream constitutes the taking of property, which may not be done without compensation."

Now, if the owners of the various lots abutting on the canals in question have acquired by prescription the same right to the enjoyment of the use of the water in these canals at the ordinary level that they would have, had these canals been natural and not artificial water ways, it is apparent that it is their right to have the water flow into these canals to the same height that it did prior to the opening of the drainage district channel.

It is urged in opposition to this view that the title of the riparian owner is subordinate to such use of the water as may be consistent with or demanded by the public right of

navigation, and that the rights of the plaintiffs are subject to the paramount authority of the state to make any and all improvements to facilitate navigation; and it is argued that, as § 24 of the sanitary district act declares that the drainage channel is a navigable stream, consequently, reducing the level of the water in the Chicago river for the purpose of filling the sanitary channel was in the interest and for the purpose of navigation, and that, as the rights of plaintiffs were subject to the rights of the public to make any and all improvements to facilitate navigation, the damages inflicted are not of a character for which recovery may be had. To this there are two answers: While it is true that the rights of the plaintiffs are subject to the public right of navigation,

a tidal river under contract with the United States government is not liable for injury to property on the shore 3,000 feet away, caused by vibration of the earth or air because of blasts fired in the prosecution of the work. *Benner v. Atlantic Dredging Co.* 134 N. Y. 156, 17 L. R. A. 220, 31 N. E. 328, *Reversing* 58 Hun, 359, 12 N. Y. Supp. 181.

It is difficult to see on what theory that decision can be upheld. Surely a mere government contract does not absolve the contractor from liability for his negligent acts, and it would seem that injury to property at such a distance from the work as shown in that case would *per se* be evidence of negligence. As to liability for acts within scope of authority, see *infra*, VI.

Validity of acts.

A navigation company cannot alter the flow of the stream farther than is necessary for the purposes of its charter. *Schuykill Nav. Co. v. McDonough*, 33 Pa. 73.

A lock and sluice company, having been chartered to make improvements in a public stream, will be presumed to have acted lawfully. A riparian owner who has leased lands to the company for fowage and the erection of works will not, through failure to sue for the statutory damages, acquire title to the said works upon the expiration of the lease; and a grant of the fee to such lands so leased will be subject to the easement. *Ginn v. Hancock*, 31 Me. 42.

It is presumed that state agents improving the navigation of a river do their duty, and that a dam erected by them across its mouth is necessary to its successful operation. *McKeen v. Delaware Div. Canal Co.* 49 Pa. 424.

The board of commissioners of a county will render the county liable to a mill owner whose mill power is destroyed by the erection of a dam in the stream above his mill under authority of a void law which authorized the improvement of the stream and lake of which it is the outlet for navigation purposes, if the county insists on maintaining the dam. *Schussler v. Henepin County*, 67 Minn. 412, 39 L. R. A. 75, 70 N. W. 6.

Rules for use.

A navigation company is not authorized to make a by-law closing the navigation on Sunday and imposing a penalty upon any person navigating the same on such day, under a statute empowering it to make by-laws for the good government of the company and for the good and orderly using of the navigation. *Calder & H. Nav. Co. v. Pilling*, 14 Mees. & W. 75, 3 Railway Cas. 735, 14 L. J. Exch. N. S. 228, 9 Jur. 377.

V. Booming and sorting logs.

Acts which are not strictly improvements of the navigability of the stream, but which are convenient aids to the floating of logs therein, are found in provisions for the booming and sorting of timber. As to the right to place booms in streams, see *note* to *Miller v. Hare* (W. Va.) 39 L. R. A. 491.

The Mississippi river is, among other things, a public highway for the running of logs, and a boom may properly be regarded as an improvement of the highway, the purpose and effect of which are to render the highway more valuable for the running of logs, for which the taking of private property may be regarded as a taking for public use. *Cotton v. Mississippi & R. River Boom Co.* 22 Minn. 372; *Weaver v. Mississippi & R. River Boom Co.* 28 Minn. 534, 11 N. W. 114.

The right of a person to run logs in a stream is not interfered with by a legislative permission to a boom company to erect a boom which will detain all logs running in the stream, and hold them while logs of other persons are being sorted out. *Osborne v. Knife Falls Boom Corp.* 32 Minn. 412, 50 Am. Rep. 590, 21 N. W. 704.

So far as the charter of a boom company authorizes it to enter upon or occupy lands before making compensation, it is unconstitutional and void. *Weaver v. Mississippi & R. River Boom Co.* 30 Minn. 477, 16 N. W. 269.

When a boom company is authorized to erect booms in a river for the sorting of logs floating in the stream at that point, and to exact tolls for its services; and where the sorting is necessary because, from the nature of the stream, the logs must be floated loose, and those of the various owners are unavoidably mixed, the company may exact tolls from those owners whose logs pass below the boom, whose logs would reach their destination more quickly without the boom, and who are not aided by the boom. *Osborne v. Knife Falls Boom Corp.* 32 Minn. 412, 50 Am. Rep. 590, 21 N. W. 704.

A boom company is not entitled to collect

gation, and that damages resulting in consequence of any work by the public for the purpose of improving navigation are damages for which no recovery can be had, still it must be manifest that the right of navigation and the right of improvement for purposes of navigation, which are superior to the rights of plaintiffs, must be the right to navigate the south branch of the Chicago river and to improve navigation in that branch, or some stream or lake whose waters naturally flow into that branch, or into which that branch naturally flows. Here the waters were taken and their general levels reduced for the purpose of making navigable an artificial channel, and not for the purpose of facilitating the navigation of the south branch of the Chicago river, or any

stream or body of water naturally emptying into it, or any stream or lake into which it naturally empties.

Again, it is evident, from an examination of the act for the creation of sanitary districts, that the primary and principal purpose of their creation under the statute is to provide for the preservation of the public health by improving the facilities for the final disposition of sewage, and by supplying pure water. The fact that a navigable water way may be created is a mere incident, and not one of the purposes for which a sanitary district is created.

Appellee cites a large number of cases in which it has been held that there can be no recovery for damages resulting from a proper exercise of the police power for preserving

boomage charges upon all logs that pass down the river through its boom merely because it has constructed it across the same, when it performs no service in connection with such logs, by virtue of a statute authorizing such companies improving streams to charge tolls to sluice, sack, and drive all logs placed in such streams upon the owners' request, and without such request in case of logs lying in such position as to obstruct and impede the drive; since that act authorizes charges to be made only in cases where requested by the owners, and without such request only when they permit their logs to lie in such position as to impede the company's drive. *Gray Harbor Boom Co. v. McAmant*, 21 Wash. 465, 58 Pac. 573.

A boom company given statutory authority to retain logs for sorting may be made liable for unreasonable detention of them. *Mississippi & R. River Boom Co. v. Prince*, 34 Minn. 71, 24 N. W. 861.

The right conferred by public authority to maintain a boom in a stream which is declared a highway, and to collect tolls for its use, is a privilege and franchise. *Chehalis Boom Co. v. Chehalis County*, 24 Wash. 185, 63 Pac. 1123.

The right to exercise a booming franchise cannot be defeated by objections which deny the necessity of the franchise or call in question the degree of perfection or the improvements made by the company preliminary to the vesting of the franchise. *Genesee-Fork Improv. Co. v. Ives*, 144 Pa. 114, 13 L. R. A. 427, 22 Atl. 887.

It is competent for the state to authorize boom companies to charge compensation at rates, or within limitations, fixed by the legislature for the use of their improvements of streams and for their services. *Underwood Lumber Co. v. Pelican Boom Co.* 76 Wis. 76, 45 N. W. 18.

A statute authorizing a boom company to erect booms at a certain point on a river, and receive, scale, and deliver to the owners all logs floating on the stream at that place, charging a toll for its services, is not in violation of a constitutional provision and enabling act providing that the river shall be "forever free . . . without any tax, duty, impost, or toll therefor," as the boomage is not charged for the use of the river, but as compensation to the boom company for services in facilitating the separation of the logs floating on the stream. 67 L. R. A.

Osborne v. Knife Falls Boom Corp. 32 Minn. 412, 50 Am. Rep. 590, 21 N. W. 704.

The fact that it becomes necessary that logs destined for points in a river below a fall, because of United States government works for the preservation of the fall, shall pass over it through a sluice provided for that purpose, does not impose any additional duty upon a boom company maintaining a boom above the fall, whose charter prescribes its duties with reference to such logs. *Mississippi & R. River Boom Co. v. Prince*, 34 Minn. 79, 24 N. W. 861.

When logs which were boomed in the river above the limits fixed by the statute for an improvement company which had improved the river to facilitate the passage of logs were broken from the boom by a great freshet and floated through the limits of the improvement company, and when, before their passage, the works of the improvement company were destroyed by the flood, it is not authorized to collect tolls on the logs. *St. Louis River Dalles Improv. Co. v. C. N. Nelson Lumber Co.* 51 Minn. 10, 52 N. W. 976.

The obligation of a boom company to assume control of and drive through the limits "all logs that may be driven" down the river, and allowing tolls to be charged therefor, under Minn. Special Laws, chap. 48, prevails concerning logs which were retained in booms above the part of the river where it had made improvements for driving logs, and not intended to be floated further down the stream, but which were carried out of the boom and down the river by a great freshet. *St. Louis Dalles Improv. Co. v. C. N. Nelson Lumber Co.* 43 Minn. 130, 44 N. W. 1080.

The fact that a boom company consents to receive the rate of boomage for its services fixed by a statute passed subsequent to its charter, fixing a rate less than the charter rate, raises an estoppel to preclude its denying the obligation of the later enactment. *Mississippi & R. River Boom Co. v. Prince*, 34 Minn. 79, 24 N. W. 361.

A law authorizing boom companies making improvements in rivers to make a reasonable charge for sluicing, sacking, and driving down the stream, without the owner's consent, all logs placed therein, in case such logs are permitted to lie in such a position as to obstruct or impede the driving, is constitutional. *East Hoquiam Boom & Logging Co. v. Neeson*, 20 Wash. 142, 54 Pac. 1001.

and safeguarding the public health, and argues that the declaration herein does not state a cause of action, as the channels of the sanitary district were constructed for the purpose last mentioned under and by virtue of the police power of the state. This doctrine is applicable where compensation is claimed for taking property, or for damaging property not taken, where the damages result from some direct physical injury to the corpus of the property itself, or from the fact that the law prescribes some particular manner in which the property shall be used, or some particular manner in which it shall not be used, and where the character or condition of the property, whether taken, or damaged without being taken, is such that it is necessary that it should be taken or

damaged for the purpose of preserving the public health, or for some other purpose which sets in motion the police power; as where a slaughterhouse or a soap factory, located in a city, is abated under regulations in reference to nuisances; where the erection of buildings of combustible material is prohibited within certain limits; the seizure and destruction of intoxicating liquors under prohibitory statutes; the seizure and destruction of gambling implements and apparatus under laws authorizing that course; or where the law requires the property owners to fill open cesspools in use by them upon their property.

In the case at bar, however, there was nothing in the condition or character of the property of the plaintiffs which rendered it

The effect of Minn. Special Laws 1872, chap. 106, authorizing a boom company to erect booms at a certain point in a river and receive, scale, and deliver all logs floating on the stream at that point, is to constitute the boom company a public agent,—a representative of the state,—charged with directing the use of the river within certain limits to the common advantage of those who may float logs upon it. *Osborne v. Knife Falls Boom Corp.* 32 Minn. 412, 50 Am. Rep. 590, 21 N. W. 704.

One who, in pursuance of statute, has cleared a stream from obstructions caused by the logs of another, and seeks to recover from such owner the cost and expenses of the work, may maintain an action in assumpsit against him therefor, and is not limited to the enforcement of the lien conferred by subsequent sections of the act. *Chapman v. Keystone Lumber & Salt Mfg. Co.* 20 Mich. 358.

The legislature may authorize an individual to take charge of a section of a river valuable for floating logs, but which, on account of the obstructions, is difficult of navigation, and keep the channel free from jams, and collect and sort the logs, and recover a toll from every log owner, even against the latter's consent. *Duluth Lumber Co. v. St. Louis Boom & Improv. Co.* 5 McCrary, 382, 17 Fed. 419.

A state statute empowering a corporation to receive, control, scale, and deliver all loose logs coming down the river from above, and which are found within the specified townships, and authorizing it to retain some of the logs as compensation for its service, is not unconstitutional. *Ibid.*

The charge for boomage on logs which are destined for points below the sorting boom is not alone for turning them loose, but to compensate the boom company for its outlay in maintaining booms, and for its quasi-public services in receiving, handling, driving, and assorting logs coming within its jurisdiction. *Mississippi & R. River Boom Co. v. Prince*, 34 Minn. 79, 24 N. W. 361.

An action to collect charges for the use of booms in a river will not lie where it appears that defendant supposed that, in consideration of repairs to be made by him, he was to be allowed to pass his logs free, and that the plaintiff by his course of conduct for a number of years had led the defendant to believe that the party who made the repairs had the use of the 67 L. R. A.

booms free. *Ball v. McCaffrey*, 20 Can. S. C. 319.

VI. Interference with private rights.

The question how far private rights may be interfered with in the improvement of navigation is one which has caused the courts much trouble. Theoretically it is of easy solution, but practically the decisions upon it are in hopeless conflict. On the one hand, under the Constitutions the property of the riparian owner cannot be taken for public use without compensation. On the other, the Federal government, under the commerce clause of the United States Constitution, has the right to improve the navigation of streams which come under its jurisdiction, and the states have the same power by right of their sovereignty. There is no necessary conflict in these respective rights. The riparian owner cannot object to, or interfere with, any improvement which the government may undertake. He only can complain when there has been a taking of his property. Mere inconvenience, or, as it is generally termed, consequential injury, gives him no cause of action. As to these general principles there is no controversy.

Riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government in regard to such improvement. *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578.

In the hands of the state or of the state's grantees, the bed of a navigable river remains subject to an easement of navigation which the general government can lawfully enforce, improve, and protect. *Hawkins Point Light-House Case*, 39 Fed. 77.

The whole bed of a public stream is a highway, and may be improved or be made to contribute to an improvement of the rest. The rights of a riparian owner below his high-water line are contingent, and recede before the development of the rights of navigation. *Improvement of Navigable Waters*, 18 Ops. Atty. Gen. 64.

The United States, in the improvement of riparian navigation, may place its jetties even to ordinary high-water mark without interfering with the riparian proprietor's qualified rights to soil between high and low water marks. *Improvement of Navigable Waters*, 17 Ops. Atty. Gen. 109.

either necessary or desirable that it should be taken or damaged in the exercise of the police power. It is evident that lowering the level of the water obstructed ingress to and egress from the lots in question, and, following the reasoning of this court in *Chicago v. Jackson*, 196 Ill. 496, 63 N. E. 1013, 1135, we hold that such obstruction is a damage to private property for public use, within the meaning of § 13 of article 2 of the Constitution of this state, for which compensation may be recovered from the sanitary district under and by virtue of § 19 of the act authorizing the creation of the district.

It appears from the declaration herein that, when the level of the water was reduced, plaintiffs deepened the various canals passing their property, so that there would

be the same depth of water at their docks that there was before the opening of the sanitary district channel, and made such changes in the construction of their docks as were necessitated by deepening the canals; and they seek to measure their damages by the expense of making these excavations and changes, and contend that they cannot recover for damages to their property from acts which they permit to continue without making reasonable efforts to prevent them, and that it was their duty to make the excavations and changes, and thereby lessen any damage that would be occasioned by interference with their business consequent upon the inability of vessels to land at their docks.

Where the plaintiff, by the exercise of rea-

In the improvement of navigation, the United States may place wing dams in the river without the consent of the adjoining riparian proprietor. *Ibid.*

The rule that a state is not liable for consequential injuries inflicted upon private property by the improvement of the navigation of a river is based upon the principle that the improvement of the navigation is part of the state's governmental duties; that the work which is done towards such improvement is done in the discharge of the governmental powers of the state; that the land of the riparian proprietor within the state is subject to the just exercise of this power; and that, when the state undertakes to exercise its governmental power, the public good is paramount to the consequential injury to land which is incidentally and naturally affected by the improvement. *Holyoke Water Power Co. v. Connecticut River Co.* 52 Conn. 570.

The rights of the public are limited to waters which are navigable by nature. These it may improve.

But any attempt to create navigable capacity at the expense of private interests can be justified only on the payment of compensation. *Thunder Bay River Boom Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184.

The state has not the right, without making compensation, to take or destroy the property of riparian owners in making a water course navigable when it is not so by nature, or in appropriating such water course to the public use by artificial erections or improvements. *Weaver v. Mississippi & R. River Boom Co.* 28 Minn. 534, 11 N. W. 114.

And BEIDLER v. SANITARY DISTRICT has made a distinct contribution to the law of the subject by holding that the right of the public to improve navigation without liability for consequential injuries to riparian rights does not include the right to take water to supply an artificial canal. This decision would seem to be based on sound principles, although, as will be seen by reference to the note to *Smith v. Deniff* (Mont.) 50 L. R. A. 737, it reaches a different conclusion from that reached in some cases which hold that the state is the owner of the waters of navigable streams, and may make such use of them as it chooses. There is no difference of opinion upon the proposition that compensation must be made for property taken, but that there is no liability for conse-

quential injuries. The difficulty arises in determining what is private property, and what constitutes a taking of it. First, it may be stated that since *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557, it is not necessary that the government should actually take possession of the property and appropriate it to its own use to constitute a taking. It is sufficient if the public improvement necessitates the destruction of the private use of the property.

A municipal corporation cannot, by dredging, so change the channel of a navigable river within its limits as to render private wharves constructed and maintained for more than twenty years by the riparian owners on the banks of such river an obstruction to navigation, and require their removal without compensation, where they were no obstruction before such change, even if the state has delegated its rights in that respect to such municipality; since the state cannot exercise that right without first making compensation to the individuals injured thereby. *Chicago v. Ladfin*, 49 Ill. 172.

The situations which have led to the most conflict and uncertainty are those where improvements have cut off those rights which may be included in the generic term "access;" those where the water level has been raised so as to submerge the land or render it cold and wet; and those where the improvement has resulted in washing away the banks or shores. The right to have the subsurface water retain its natural level so far as it is affected by adjacent streams is a property right, as is also the riparian right of access to the stream. See notes to *Avery v. Vermont Electric Co.* (Vt.) 59 L. R. A. 817, and *State ex rel. Denny v. Bridges* (Wash.) 40 L. R. A. 593, where the cases are fully collected; so that they will be noticed here only so far as is necessary to show the conflicting views and the reasons therefor.

Interference with access.

In *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984, it was said that the riparian owner has a right of access to the navigable part of the stream, which is valuable and property, and can be taken for the public good only when due compensation is made.

In *Sage v. New York*, 154 N. Y. 61, 38 L. R. A. 606, 61 Am. St. Rep. 592, 47 N. E. 1096, however, the court of appeals of New York, by

sonable diligence, prevents or lessens damage which his property would otherwise sustain through the negligence of another, no doubt the expenditures that he has made in so doing may be considered in ascertaining the amount of his damages; but where property has been damaged, though not taken, by a public improvement, and the damages are of such a character that recovery may be had, the measure of damages is the difference in the value of the property before the improvement was constructed and the value of the property after the improvement was completed.

"Where an action is brought to recover damages, where no part of the plaintiff's property has been taken, but merely damaged by a public improvement, the law is

a *dictum*, announced the doctrine that this right was not property as against the governmental right to improve navigation. The case involved a right under the grant of the inhabitants and freeholders of New Harlem of land bounded by the Harlem river. The court, in the course of the opinion, demonstrated that the rights under this grant had been made subordinate to the subsequent grant to the city of New York of a strip of land under the water around the island; so that no riparian rights existed in the case. But the court, in treating the claimed right exclusive of that fact, says that, although, as against individuals or the unorganized public, riparian owners have special rights to the tide way that are recognized and protected by law as against the general public as organized and represented by government, they have no rights that do not yield to commercial necessities. The judge says: "I think that the rule rests upon the principle of implied reservation, and that in every grant of lands bounded by navigable waters where the tide ebbs and flows, made by the Crown or the state as trustee for the public, there is reserved by implication the right to so improve the water front as to aid navigation for the benefit of the general public, without compensation to the riparian owner." *Sage v. New York*, 154 N. Y. 61, 38 L. R. A. 613, 61 Am. St. Rep. 592, 47 N. E. 1096. When it is considered that in that case the improvement consisted of solid wharves and docks which completely cut the riparian owner off from access to the water, the scope of the *dictum* will be apparent. It is as though the court had held that in a public grant of land bordering on a highway the right to erect a solid fence along its edge, which would completely destroy the right of the abutting owner to use it, was reserved. The principle of that *dictum* was adopted in a Federal case in which a wall was constructed along the water front of the riparian owner so as to cut off his access to navigable water, the court saying: Under the principles of the Federal Constitution, the states held the soil beneath their navigable rivers under a high public trust to preserve them forever free as public highways, subject only to the power of Congress to regulate commerce among the states. The title which they bestow upon riparian owners is subject to the same public trusts, and therefore subject to the rights of navigation, and subordinate to the power of Congress to control and use the soil 67 L. R. A.

well settled that a recovery cannot be had unless the property claimed to be damaged has been depreciated in value by the construction of the public improvement. In other words, if the fair market value of the property is as much immediately after the construction of the improvement as it was before the improvement was made, no damage has been sustained, and no recovery can be had." *Springer v. Chicago*, 135 Ill. 552, 12 L. R. A. 609, 26 N. E. 514, Citing *Elgin v. Eaton*, 83 Ill. 535, 25 Am. Rep. 412; *Chicago & P. R. Co. v. Francis*, 70 Ill. 238; *Chicago, M. & St. P. R. Co. v. Hall*, 90 Ill. 42; *St. Louis, V. & T. H. R. Co. v. Haller*, 82 Ill. 208; *St. Louis, V. & T. H. R. Co. v. Capps*, 67 Ill. 607; *Eberhart v. Chicago, M. & St. P. R. Co.* 70 Ill. 347; *Chicago & A. R. Co. v. Maher*,

whenever the interests of commerce and navigation demand it. *Scranton v. Wheeler*, 6 C. C. A. 585, 116 U. S. App. 152, 57 Fed. 808.

By a similar process of reasoning it might be held that every public grant contained the implied reservation that it was subject to the public needs. Of course, neither court would take such a position if the land of the riparian owner had actually been invaded. Neither court would hold that the constitutional provision requiring compensation for property taken for public use was subordinate to the right of the state or general government to regulate commerce. The court, in *United States v. Lynah*, 188 U. S. 471, 47 L. ed. 549, 23 Sup. Ct. Rep. 349, says, if any one proposition can be considered as settled by the decisions of this court, it is that, although the government may appropriate property, it cannot do so without being liable to the obligation placed upon it by the 5th Amendment, of paying just compensation.

And the Kansas court, in *State v. Smiley*, 65 Kan. 240, 69 Pac. 206, says that the idea that one clause of the Constitution is subordinate to another is the very madness of unreason.

It being conceded that the right of access is a property right for all purposes except when it conflicts with the governmental right to improve navigation, it is difficult to see how the court can hold that it is not a property right for the purpose of relieving the government from the duty of making compensation when it destroys it. The public right of improvement without making compensation extends only so far as property rights are not infringed, and to say that a right which is universally recognized as a property right for all other purposes ceases to be such when the government is asked to make compensation for destroying it must result from failing to see that the constitutional provision applies equally to incorporeal as to corporeal property. That the court did not have in mind, when these decisions were made, the fact that incorporeal property was within the protection of the Constitution, and that its failure of memory is in part responsible for these decisions, appears from the opinion rendered in the *Scranton* Case in the Supreme Court of the United States (179 U. S. 164, 45 L. ed. 137, 21 Sup. Ct. Rep. 48). The contention was there directly made that the right of access was a property right; but the court does not seem to be able to treat it as an incorporeal right incident to the land, but beyond

91 Ill. 312; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 59 Am. Rep. 341, 8 N. E. 460; *Chicago & P. R. Co. v. Stein*, 75 Ill. 41; *Page v. Chicago, M. & St. P. R. Co.* 70 Ill. 324.

The defect in the declaration arising from the fact that damages were claimed by an incorrect measure is one which cannot be reached by a general demurrer, which is the only method by which this pleading was test-

ed. This declaration states a good cause of action, notwithstanding it does not adopt a correct measure for determining the amount of compensation to which the plaintiffs are entitled. The judgment of the circuit court will be reversed, and the cause remanded with directions to overrule the demurrer.

Reversed and remanded.

and superior to the soil itself, and which is in and of itself a property right within the protection of the Constitution, regardless of physical interference with the land. It states that, if the riparian owner cannot enjoy access to navigability because of the improvement of navigation by the construction of public works, away from the shore line, there is not, within the meaning of the Constitution, a taking of private property for public use, but only a "consequential injury to a right which must be enjoyed in due subjection to the rights of the public." There certainly is not a consequential injury to the right of access, because it is destroyed, so the court must have had in mind the effect on the land itself; and this supposition is strengthened by the conclusion that "plaintiff had no such right of property in the submerged lands" as entitled him "to be compensated for any loss of access between upland and navigability." But the question then arises: Is there no right to compensation for the property which the riparian owner had in the right of access itself?

If, as shown by the note to *State ex rel. Denny v. Bridges* (Wash.) 40 L. R. A. 593, the right of access is in and of itself property, it is protected by the Constitution, and the duty to make compensation cannot be avoided by holding that it is subject to public use, or that its destruction is a mere consequential injury to the upland.

In *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 990, 17 Sup. Ct. Rep. 578, the right of access was merely impaired, and therefore that case cannot be regarded as authority upon the question of the right to compensation for its destruction.

Injury to embankment.

The failure of the court to remember that incorporeal property is within the protection of the Constitution is well illustrated by the recent case of *Salliotte v. King Bridge Co.* 65 L. R. A. 620, 58 C. C. A. 460, 122 Fed. 378. In that case the dredging of a channel for navigation turned the current directly against the bank so that a considerable quantity of land was torn away. The court said that there could be no recovery unless the injury constituted an appropriation of the land, or a taking thereof; that, as a riparian proprietor, plaintiff was subject to all the injury, not amounting to a taking of his land, which might result from the lawful improvement of the navigation of the stream. It then asks: Has there been any appropriation of plaintiff's land by anyone?—and answers this question by saying that the injury has not been by flooding, or any sort of possession, but simply by the natural effect of the flow of the current upon the bank against which it has always flowed. The incidental injury was one which might have been guarded against by a protecting line of piles, or by a sea wall, 67 L. R. A.

and the question at last is, whose duty it was properly to protect a river bank exposed to waste by the increased volume and force of the current to which it is exposed. The court concludes: "That such a consequential injury is a taking or appropriation, we cannot agree." In that case the right of the riparian owner to have the current of the stream follow its ancient course, and not to flow upon his property, was a property right, and its destruction was just as much a taking of property as would be the appropriation of the land itself.

The Massachusetts court had made a similar ruling. It held that the legislature may authorize the erection of embankments in tidal rivers so as best to secure public convenience, and if, in doing so, some damage is done to riparian proprietors by the changing of the current so as to require the construction of protecting walls to preserve the land, it is *damnum absque injuria*. *Fitchburg R. Co. v. Boston & M. R. Co.* 3 Cush. 58.

The Massachusetts Constitution, however, gives the legislature unusual powers, and does not protect private property rights to the same extent as do those of other states.

The Connecticut court also hold that injuries inflicted upon an adjoining proprietor in improving the navigation of a river by erecting piers in such a way that his land is washed away do not amount to a taking of property within the meaning of the constitutional provision inhibiting the taking of private property for public use without compensation. *Hollister v. Union Co.* 9 Conn. 436, 25 Am. Dec. 36.

In *Hooker v. New Haven & N. Co.* 14 Conn. 146, 36 Am. Dec. 477, where the plaintiff claimed that the flowage of his land by the discharge from a wastewell of the defendant's canal amounted to a taking of property, the defendant cited the case of *Hollister v. Union Co.* 9 Conn. 439, 25 Am. Dec. 36, as conclusive against the plaintiff's contention. In the latter case the court held that the gradual wearing away of plaintiff's land as the result of straightening the river by an improvement company did not amount to a taking of property. In deciding the canal case in favor of the plaintiff's contention, the court made the distinction that, the river being a natural stream, the sovereign power had a right to improve its navigation, and that, where the lands on the bank were granted, they were subject to that condition, and the owners, and not the public, were bound to protect them; while the canal was an artificial highway similar to a turnpike. To this view of the case, *Sherman and Waite, JJ.*, dissented, holding that the cases were analogous.

If a dam erected under authority of the legislature for the raising of a head of water to float logs causes the carrying away of the banks and widening and deepening of the channel, the riparian owner has no cause of action, it being

damnum absque injuria. Brooks v. Cedar Brook & S. C. River Improv. Co. 82 Me. 17, 7 L. R. A. 460, 19 Atl. 87.

The above decision would seem to conflict with the rule that one attempting to use a navigable stream is liable for injuries caused by exceeding its capacity.

Injury from flooding.

As will be seen by a reference to the cases collected in the *note* to Avery v. Vermont Electric Co. (Vt.) 59 L. R. A. 817, the government has no right to raise the level of a navigable body of water for the purpose of improving it, so as to flood adjoining property, without making compensation. That rule was settled by the Supreme Court of the United States in *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557.

Uncertainty was thrown upon the doctrine by the case of *Mills v. United States*, 12 L. R. A. 673, 46 Fed. 738. The general claim in that case was for damages because of a change in the canals used to convey water onto and off from the property for rice cultivation, made necessary by the improvement. So far as that change was concerned, it was doubtless a consequential injury for which no recovery could be had, and, but for other holdings in the case, the decision would not be remarkable. But it further appeared that, although the property was below high tide, it was above low tide, so that it could readily be reclaimed and made valuable. The plaintiff alleged that the government improvement had raised both the high and low water levels so as to make it necessary to raise the levees around the property to prevent flooding at high water. The habit of water is peculiar in this,—that to maintain its level at a particular point there must be a retaining wall to keep it there. Unless an artificial wall is provided, it will provide one for itself by saturating or spreading over the adjoining land far enough back from the reservoir to find an impervious barrier. The saturation of abutting property by this water, and using it as a part of the retaining wall of the reservoir, are a taking of just so much of the property as is saturated as completely as though the water stood on the surface. The abutting owner is entitled to have the property in its natural condition, and is not bound to construct barriers to keep the water out of or off from it, and, if the government raises the water so as to saturate the soil and render it unfit for cultivation, it thereby takes the property. This the court in the *Mills* case denied, holding that all the right plaintiff had in the ebb and flow of the tide was subordinate to the control of the government over the stream for its free navigation by the public and it held that reclaimed land, which would be covered by the ordinary flow of the tide, is held subservient to the right of the government to change such flow for the purposes of navigation; and the owner cannot recover damages for a resulting overflow of the land during high water. *Mills v. United States*, 12 L. R. A. 673, 46 Fed. 738.

This part of the decision must be regarded as overruled by *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 530, 23 Sup. Ct. Rep. 349. The circumstances were similar in the two cases, and the Supreme Court attempts to distinguish the *Mills* case without overruling it. But the 67 L. R. A.

distinction went merely to the feature involving drainage canals. The Supreme Court held that the fact that the land was reclaimed land lying below high tide was immaterial, and that since, because of the improvement, the water percolated through the levees and flowed over the top so that it stood upon the surface of the ground, there was a taking; the court saying that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog, and holding that this was a taking.

Riparian owners who, with their ancestors, have for nearly one hundred years used the waters of a stream for flowing their rice plantations, have acquired an easement therein which constitutes property within the protection of the 5th Amendment to the Constitution of the United States, and are entitled to compensation, where the government, in the improvement of navigation, diverts such waters so that they are no longer available, thereby destroying the plantations. *Lowndes v. United States*, 105 Fed. 838.

From these decisions it is apparent that the Supreme Court of the United States does not seem disposed to take any such radical ground as that suggested in *Sage v. New York*, 154 N. Y. 61, 38 L. R. A. 606, 61 Am. St. Rep. 592, 47 N. E. 1096, to the effect that private property rights are held subject to the governmental right to improve navigation, but that it will give effect to the constitutional provision which requires compensation to be made when property is taken. Its apparent departure from the rule in the *Scranton* and *Gibson* Cases seems to have resulted from its momentary failure to perceive that the right of access is in and of itself property, although incorporeal, and that it is, therefore, within the protection of the Constitution.

Other rulings.

The right of the Federal government to make improvement in aid of commerce is paramount to the right of the individual whose property may be taken or injured upon payment of just compensation. *Avery v. Fox*, 1 Abb. (U. S.) 246, Fed. Cas. No. 674.

But the rights of a riparian proprietor upon a navigable stream should not be taken or destroyed in the construction of a public improvement in aid of commerce until compensation is actually made, so that the burden of seeking or pursuing expensive remedies may not be imposed upon the property owner. *Ibid.*

A statute providing for the rendering navigable of a non-navigable stream, and which requires mill owners, who have, prior thereto, constructed their mills on such streams under legislative authority, to build and maintain locks through their dams, which will interfere with their water power and be practically prohibitive of the continuance of the dams by reason of the great expense thereby entailed; and declaring that, on failure to construct such locks through any dam, such dam shall be a nuisance and shall be abated, thrown down, and destroyed, without provision for compensation to the owner,—is unconstitutional and void. *Crenshaw v. Slate River Co.* 6 Rand. (Va.) 245.

But a riparian owner cannot recover damages to his mill privilege on which he has legally erected a dam and mill because of the exercise of a subsequently granted franchise to insti-

tute lock and slack-water navigation on the river, the title to which is in the state, as the state is never presumed to have parted with one of its franchises in the absence of conclusive proof of such an intention. *Susquehanna Canal Co. v. Wright*, 9 Watts & S. 9, 42 Am. Dec. 312.

So, a dam having been authorized in a public stream, although to the damage of the occupant of an adjoining mill privilege, he can give no notice which would avail to affect the corporation in building the dam. *Woodward v. Webb*, 65 Pa. 254.

But a navigation corporation whose charter requires it to make compensation for injuries inflicted must pay for damages caused by its works to a mill and privilege, although erected under a mere license from the state. *Ibid.*

A state grant to a navigation corporation of the use and control of waters in a public stream rescinds all former licenses inconsistent therewith. *Philadelphia v. Gilmartin*, 71 Pa. 140.

While the owner of land taken for the purpose of improving the navigation of the river is entitled to compensation for the land actually taken, he is not entitled to compensation for any damage that may result from his loss of the water power caused by the improvement. *Reg. ex rel. Atty. Gen. v. Fowlds*, 4 Can. Exch. 1.

A navigation corporation is not liable for damages purely consequential upon the erection of the authorized works, unless made so by law, since it is not liable in tort for its lawful deeds. *Young v. Grand River Nav. Co.* 12 U. C. Q. B. 75.

The rights of the riparian owner in Canada are not protected by constitutional guaranties.

A corporation is liable for consequential damages when its charter makes it liable for any damages done to lands or property. *Monongahela Nav. Co. v. Coon*, 6 Pa. 379, 47 Am. Dec. 474.

Everyone who buys property upon a navigable river purchases subject to the superior rights of the commonwealth to regulate and improve it for the benefit of her citizens. *McKeen v. Delaware Div. Canal Co.* 49 Pa. 424.

It is one of the incidents to holding property on one or both sides of a navigable stream that the party is subject to any inconvenience that may arise from deepening the channel, or otherwise improving the navigation of such stream, which is to be submitted to without any right to damages therefor, except as such improvement may flood or drown his lands. *Zimmerman v. Union Canal Co.* 1 Watts & S. 346.

A corporation having a franchise to institute lock and slack-water navigation on a public stream is not responsible for consequential damages further than is provided in its charter, as it is exercising powers of sovereignty. *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 101.

A navigation franchise may confer far greater rights than those of a mere riparian proprietor; they may be paramount to the private riparian rights, and cannot be obstructed by such proprietor. *Lehigh Coal & Nav. Co. v. Pocono Spring Water Ice Co.* 7 Northampton Co. Rep. 350.

Consequential damages are never recoverable from a navigation corporation, except when expressly given, and on the terms on which they are allowed. *Woodward v. Webb*, 65 Pa. 254.

If a river navigation corporation is not liable for damages done under its original charter, when that charter is amended it is no injustice 67 L. R. A.

to the corporation to make it liable for damages both done and to be done. *Monongahela Nav. Co. v. Coon*, 6 Pa. 379, 47 Am. Dec. 474.

A company which has been authorized by statute to improve the floatage of a stream in its natural flow will be liable to a riparian owner in case it injures his property by floods, or by the jamming of logs. *White Deer Creek Improv. Co. v. Sassaman*, 67 Pa. 415.

The statute of 21 & 22 Vict. chap. 149, authorizing the Clyde navigation trustees to dredge and improve the bed of that river, does not require the consent of the owner of the foreshore over which the tide ebbs and flows to be procured before the soil of such foreshore is disturbed. *Blantyre v. Clyde Navigation*, L. R. 6 App. Cas. 273.

Where the right of eminent domain is available, benefits to the riparian proprietor cannot be urged and set off against damages sustained in clearing out a river at heavy expense, resulting in choking the river with booms of logs causing such damages. *Watkinson v. McCoy*, 23 Wash. 372, 63 Pac. 245.

A navigation company empowered to take tolls of those navigating the river is not bound to clear away weeds which, though injurious to the adjoining lands, are not detrimental to the navigation. *Parrett Nav. Co. v. Robins*, 10 Mees. & W. 593, 12 L. J. Exch. N. S. 81, 3 Railway Cas. 383.

The rule that a state has a right to improve the navigation of a river without liability for the remote and consequential injuries, not amounting to a taking of property, occasioned to the land of riparian proprietors, does not apply where the land or water rights injured are situated beyond the jurisdiction of the state. *Holyoke Water Power Co. v. Connecticut River Co.* 52 Conn. 570.

A statute authorizing any person desiring to float logs down a river to construct chutes in any dam and make other necessary changes in the river, doing no injury to the rights of riparian owners, and paying them such damages as they may sustain thereby, the amount of which, if the parties cannot agree, is to be determined by appraisers appointed by the court, is unconstitutional if treated as an act for the exercise of eminent domain, since the rights authorized to be acquired are not shown to be for the public use. *Brewster v. J. & J. Rogers Co.* 169 N. Y. 73, 58 L. R. A. 495, 62 N. E. 164.

It also provides arbitrary compensation, and fails to afford a landowner an opportunity to show its inadequacy. *Ibid.*

A riparian navigator is liable to the owner of a wreck for tearing it out when not necessary to enable him to pass without seriously endangering his own property, as he cannot act in the general interests of navigation. *Gumbert v. Wood*, 146 Pa. 370, 23 Atl. 404.

When the bed of a floatable stream is the property of the riparian proprietor as an incident of ownership of the upland, the soil therein cannot be interfered with without his consent; so that, if there be a boulder therein that interferes somewhat with the floating of logs, it cannot be removed without the riparian proprietor's consent. *Watkins v. Dorris*, 24 Wash. 636, 54 L. R. A. 199, 64 Pac. 840.

Fisheries.

Riparian owners who stake out for oyster culture an area of submerged land, the title of which is in the state, cannot claim a license

for such territory acquired by possession under color of title, where the lands are occupied unlawfully; and are not entitled to compensation for the destruction of their oyster beds by the government while carrying out a public improvement. *Richardson v. United States*, 100 Fed. 714.

The digging of a new channel through flats designated for the cultivation of oysters does not constitute a taking of property, as such rights are held subservient to the right of public navigation. *Lane v. Smith*, 71 Conn. 65, 41 Atl. 18.

The destruction of an oyster bed due to the stirring up of the mud caused by the lawful action of the government in dredging the channel of a navigable river without invading the bed itself is a consequential injury for which compensation cannot be made. *Richardson v. United States*, 100 Fed. 714.

One who holds under the state submerged lands in a navigable river, and devotes them to the cultivation of oysters, takes the premises subject to the control of Congress over navigation and commerce, and cannot recover from the United States for damages suffered in consequence of the improvement of the river under an act of Congress. *Ibid.*

But one in possession, under a right derived from the state, of submerged land, which he uses for the cultivation of oysters, is entitled to compensation where the government takes possession of the property for the purpose of improving the navigation of a river, in the bed of which the lands are located. *Brown v. United States*, 81 Fed. 55.

VII. Exercise of power of eminent domain.

Under an act of Congress providing for river and harbor improvements on condition that lands acquired for the purpose shall be vested in the United States without charge, the United States has no power to obtain possession of the property by condemnation proceedings. *Re Montgomery*, 48 Fed. 896.

Act of Congress 1875, chap. 166, giving a right of action in the state courts against the United States to ascertain the amount of compensation for injuries to property by the improvement of a river, whereby the government pledges its faith to pay damages so ascertained, furnishes an adequate mode of obtaining compensation. *Kimberly & C. Co. v. Hewitt*, 79 Wis. 334, 48 N. W. 373.

The improvement of the navigation of a river is a public purpose, and the appropriation of land for such purpose is a proper exercise of the power of eminent domain. *Kaukauna Water P. Co. v. Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173.

If the provision made by a statute for compensation for property taken for river improvement is retained for a reasonable time and then repealed, the riparian owners who have failed to take their compensation under the statute will be deemed to have waived it. *Ibid.*

In a proceeding instituted by the United States to condemn land for the erection of a lock and dam upon a navigable river in a state which has no statute respecting the condemnation of lands for such purpose, the compensation to be awarded must be determined upon the principles of the common law, and no allowance of consequential damages can be made. 67 L. R. A.

High Bridge Lumber Co. v. United States, 16 C. C. A. 400, 37 U. S. App. 234, 69 Fed. 320.

A statute providing for the acquirement of the right to use a non-navigable stream as a public highway for the floatage of logs where a landowner thereon does not consent thereto, and the acquirement of the right to the use of the banks necessary in the improvement and management thereof, where it cannot be purchased at a satisfactory price, is unconstitutional as a taking of private property without due process of law, where it makes no provision for notice to the landowner of the proceedings by viewers appointed thereunder to assess damages, and gives him no right to be heard except by an appeal from the order of the court approving the report of the viewers as to damages, which must be taken within twenty days after the order is made, and on which the right to be heard is confined to the question of damages alone. *Hood River Lumbering Co. v. Wasco County*, 35 Or. 498, 57 Pac. 1017.

When a statute provides for indemnity, not for acquiring the title, but for the loss of land cut away in the course of widening a river, the indemnity may be paid without transfer of the title to the land. *Savannah River Improvement*, 17 Ops. Atty. Gen. 455.

That an act of Congress, under which property is sought to be condemned for river and harbor improvements, fails to provide for the compensation of the owners of the property taken, does not necessarily invalidate it, since the good faith of the public is pledged for its payment, and the owner may call into action the resources of the taxing power of the government for raising the amount. *Re Montgomery*, 48 Fed. 896.

Navigation undertakers authorized to alter their dams and enter upon lands for that purpose, first making satisfaction to the owners as commissioners under the act shall direct, may enlarge such dams to the injury of adjoining land, though by the death of the commissioners, they not having appointed successors, the landowners are deprived of any means of obtaining compensation. *Kennet & A. Canal Nav. Co. v. Witherington*, 18 Q. B. 531, 21 L. J. Q. B. N. S. 419. From this Lord Campbell, Ch. J., dissented, holding that, the compensation clause having become incapable of execution by extinction of the commissioners, the powers which the act conferred upon the company to cause injury to other persons could no longer be exercised.

In proceedings to condemn lands for improving the navigation of rivers, the petition is jurisdictional, and must set forth all the facts necessary to show that the corporation is authorized to make the proposed improvement, before it can ask for the appointment of commissioners to condemn lands for such purpose. *Clay v. Pennoyer Creek Improv. Co.* 34 Mich. 204.

One entitled to tithes out of land taken for the purpose of improving navigation is not entitled to compensation under an act of Parliament providing for the payment or compensation of all persons who shall be seized, possessed, or interested in any lands, tenements, or hereditaments taken in the improvement of navigation, as his interests are in the crops, and not the lands. *King v. Nene Cutfall*, 9 Barn. & C. 875, 4 Mann. & R. 647, 8 L. J. K. B. 1.

In a suit to enjoin a riparian owner from removing water gates erected at the outlet of a lake and head of a river on his land, statutes

authorizing the complainants, who were private parties at first, to remove obstructions, drift wood, etc., from the river to improve its navigability for running logs, and to make booms, and for these purposes to enter on the beds of the stream and its tributaries, and bank logs on the marginal lands of adjoining owners on paying or tendering damages, which, if not agreed upon, were to be fixed by local officials finally and subject to no appeal, and for the payment of which neither fund nor security was provided; and, by an amendatory act, to make, maintain, and control the gates in controversy, to save water in the lake not raising its level above the usual high-water mark, with no provision as to damages whatever in such case, none, in fact, being paid or tendered,—were declared unconstitutional because the provisions for compensation were inadequate, and the award of damages insufficient, to authorize the taking of private property, and because the acts done constituted a taking of private property for which compensation must be made at the time of the taking; and, besides, it is open to question whether such taking is for a public use; hence, the injunction prayed for was refused. *Foster v. Stafford Nat. Bank*, 57 Vt. 128.

VIII. Public rights in improvement.

One receiving a charter from the Crown to make a private river navigable and take toll from those navigating it does not thereby dedicate it to the public, unless he puts the charter into operation. *Atty. Gen. v. Simpson* [1901] 2 Ch. 671.

But a private river is dedicated as a common highway by acquiescence of the riparian proprietors in the construction of sluices for through navigation, accompanied by the user of the navigation by the public. *Ibid.*

One, upon applying for and putting in operation a charter from the Crown authorizing him to construct sluices and locks around a milldam in a private stream for the purpose of making continuously navigable a stream which had been previously navigable only from milldam to milldam, thereby dedicates the locks and sluices to the public use upon payment of a reasonable toll. *Ibid.*

A log owner has a right, independent of any contract or agency, to the use of the improved condition of the stream, to effect which the dam company was chartered; and the right cannot be interfered with except under unusual circumstances and necessities, by those having the right to exercise sound, legal discretion relative thereto. *Toothaker v. Winslow*, 61 Me. 123.

One wishing to use improvements made by an improvement company for the running of logs in a river has a right to the use of the stream in its improved condition equal to those of other persons similarly situated, for the interference with which by a third person he can maintain an action. *Ibid.*

While it is doubtless true that, in the exercise of any and all chartered privileges and powers which are in derogation or restriction of common rights, all due and reasonable care must be used to avoid any unnecessary or unreasonable abridgment of the public right, or injury to those who have occasion to exercise it, it must not be expected that such a construction of the act will be adopted as will make the legislative grant of a booming franchise nugatory, or deprive the privilege conferred thereby of its substantial value. *Ibid.*

tory, or deprive the privilege conferred thereby of its substantial value. *Ibid.*

The use of the improvement of a river for the floatage of logs without the permission or the consent of the owners thereof, who have the exclusive right to use such improved portion, is a trespass which cannot be waived, and therefore an action of assumpsit cannot be maintained for the use thereof. *Carson River Lumbering Co. v. Bassett*, 2 Nev. 249. The court further says that no promise can possibly be implied where the act constituting the cause of action is done in defiance of the plaintiff's rights.

An injunction will be granted to restrain log owners from taking possession, without the owner's permission, of a dam and other improvements designed to furnish artificial floods with which to drive logs. *Hall v. Nester*, 122 Mich. 141, 80 N. W. 982.

One who has suffered no special damage cannot maintain a bill against a navigation corporation to require it to repair its works after they have been damaged by a flood. *Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co.* 50 Pa. 91, 88 Am. Dec. 534.

The Crown cannot be held liable as a common carrier for injury to the property of an individual passing his logs through a government slide, caused by the negligent and improper manner in which the passage of logs was performed by the person in charge of the slide, since no contract, express or implied, is created in such a case by the payment of the required tolls, as such slides are vested in the Crown only for the benefit of and in trust for the public. *Queen v. McFarlane*, 7 Can. S. C. 216.

If a person at his own charge makes his own private stream passable for boats by locks or cuts, so that the river, which was his own in point of propriety, becomes now capable of carriage of vessels, he may pull down his work and apply the stream to his own private use. For it shall not become a public stream unless it was done at a common charge or by a public authority, or the right to use which has been acquired by prescription. *Hale, De Jure Maris*, chap. 3.

The rights of the public in the waters of a private non-navigable stream are not increased because a riparian owner, by the expenditure of money, makes the stream navigable for his own personal convenience and accommodation. *De Camp v. Thomson*, 18 App. Div. 528, 44 N. Y. Supp. 1014.

IX. Use of surplus water.

If, in the erection of a dam for a public purpose, there is necessarily produced a surplus of water which may be used for manufacturing purposes, the state may retain to itself the power of controlling or dispensing such water as an incident of its rightfully making such improvement. *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 178.

A riparian owner on a stream on which works of public improvement have been constructed by state and Federal authority to improve navigation thereon, and incidental water power is created, is not entitled to have all the water flow past his land so as to prevent the diversion of the surplus power by grantees of the government, where he was given reasonable opportunity to obtain compensation for injuries sustained by the construction of the improve-

ment. *Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 58, 43 L. ed. 864, 19 Sup. Ct. Rep. 97, Reversing 90 Wis. 370, 28 L. R. A. 443, 61 N. W. 1121, 63 N. W. 1019, and 93 Wis. 283, 66 N. W. 601, 67 N. W. 432, which held that the state, or its grantees, has no right to divert the surplus water from a dam built to supply water to a canal past rapids in aid of navigation, from its natural channel to the injury of lower riparian owners, through the canal and sluiceways therefrom, although the statute authorizing such improvement declares that the title to any water power created by dams so constructed shall belong to the state.

A statute reserving to the state the surplus water power created by a river improvement over and above that necessary for navigation is not invalid as a taking of private property for private use, as such surplus water power is merely incidental to the improvement, the absolute control by the state or its grantees being necessary to the preservation and maintenance thereof. *Green Bay & M. Canal Co. v. Kaukauna Water Power Co.* 70 Wis. 685, 36 N. W. 828.

The state takes absolute ownership of the water power created, and not merely so much thereof as exists upon lands owned by it, under a statute providing that whenever any lands, water, or materials appropriated to the use of the improvement of navigation of designated rivers shall belong to the state, such lands, water, and materials, and so much of the adjoining land as may be valuable for hydraulic or commercial purposes, shall be reserved to the state; "and whenever a water power shall be created by reason of any dam erected or other improvements made on any of said rivers, such water power shall belong to the state." *Ibid.*

The state's control of the waters of a public stream is not impaired by the granting of rights to water power therefrom by a navigation corporation authorized thereto, if it be so done that it shall not at any time interrupt or impede navigation. *McKeen v. Delaware Div. Canal Co.* 49 Pa. 424.

One who takes water from the works of a navigation corporation in violation of public law is liable for resulting damages, although the corporation might also have been answerable. *Philadelphia v. Collins*, 68 Pa. 106.

One who tears down a dam built by the state to aid navigation, to the injury of a riparian owner who was using the surplus water therefrom, cannot question the right of such owner to take the water, to defeat his liability for the act, since the state alone can raise that question. *Harris v. Thompson*, 9 Barb. 350.

Grants of power to build dams and improve the water power of a river in such manner, or to such an extent, as shall be authorized by the directors of a corporation, are subject to the paramount rights of the state as trustee of the public to divert a portion of the waters for public use, and also to the rights of the general government in regard to navigation and commerce. *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.* 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157.

X. Other matters.

Power and duty of municipality.

A provision in the charter of a city, that it may remove and prevent all obstructions in the waters which are public highways within the 67 L. R. A.

city, does not impose any obligation or duty upon the city, or render it liable to a boat injured by a collision with a sunken rock which was not removed because too firmly imbedded in the sand to be loosened. *Goodrich v. Chicago*, 4 Biss. 18, Fed. Cas. No. 5,542.

A state may delegate to a municipal corporation authority to deepen or otherwise improve a harbor and navigable river within its corporate limits, with power to pass ordinances for the preserving of such harbor and river and the regulation of vessels navigating the same. *Harmon v. Chicago*, 140 Ill. 374, 29 N. E. 732.

A city bound to remove obstructions from navigable channels within its limits is not liable for injury to a ship caused by a sunken wreck, where the owner contracted with a wrecking company to remove her, and the company prosecuted the work with diligence, but did not succeed because of the difficulty of the enterprise. *McCauley v. Philadelphia*, 108 Fed. 661.

Failure of the city to enforce its ordinance providing for the removal of obstructions in a navigable water within its limits will not render it liable to private individuals injured thereby. *Coonley v. Albany*, 57 Hun, 327, 10 N. Y. Supp. 512, Affirmed in 132 N. Y. 145, 30 N. E. 882.

Imposing upon a city the duty to dredge all tide-water creeks or estuaries which would be navigable for vessels of 20 or more tons' burden, and were formerly fed or supplied from fresh-water streams which the city had diverted to its own use, is a valid exercise of power for the protection of navigation. *Cox v. New York*, 26 Misc. 177, 55 N. Y. Supp. 74.

A grant to a municipal corporation of the right to improve a portion of land under tidal water for purposes of navigation may be resumed by the state at any time. *People v. Vanderblit*, 26 N. Y. 287.

Procurement of funds.

A municipal corporation has no power to raise money by special assessment for the widening of a navigable river within its corporate limits, merely by virtue of the power conferred upon it by its charter to deepen or widen such river, in the absence of express statutory authority so to do. *Chicago v. Law*, 144 Ill. 569, 33 N. E. 855.

Especially where other provisions of its charter give express authority to make such levy for certain specified improvements, thereby implying that particular authority is necessary for that purpose. *Wright v. Chicago*, 20 Ill. 252.

A statute imposing a direct tax upon certain townships to improve the channel of a river is within a constitutional provision forbidding the state from engaging in the work of internal improvement except by the grant of lands therefor. *Anderson v. Hill*, 54 Mich. 477, 20 N. W. 549.

A statute appropriating for the improvement of a river lands bid in by the state for delinquent taxes, and providing for the imposition of a tax for such improvement if the lands prove inadequate, is in conflict with a constitutional provision prohibiting the state from carrying on any work of internal improvement. *Gibson v. State Land Office*, 121 Mich. 49, 79 N. W. 919.

That a property owner already has a channel in the river opposite his premises suitable and adequate for all his purposes does not relieve him from liability for assessment for a dredging improvement when the public in-

terests require a wider channel than that provided by the property owner; nor is he entitled to credit for work done by him, where the assessment represents the benefits derived by him from the improvement as a whole, and is made in the same proportion as that placed upon the other property benefited. *Delaware & H. Canal Co. v. Buffalo*, 39 App. Div. 333, 56 N. Y. Supp. 976.

The improvement of the navigation of a river and the removal of obstructions therefrom within the county under an act authorizing the improvement and the issuance of bonds in aid thereof is a county purpose, within a constitutional provision for legislative authority to the several counties to assess and impose taxes for county purposes, although the commerce on the river local to the county is small, and the river is used as a public highway for commerce far beyond the county limits. *Stockton v. Powell*, 29 Fla. 1, 15 L. R. A. 42, 10 So. 688.

Property in a stream above the point where the stream is dredged and deepened cannot, as matter of law, be said not to be benefited by the improvement, so as not to be subject to assessment therefor, when, by the removal of obstructions at a comparatively small expense, the navigation will extend to such land. *People ex rel. Lehigh Valley R. Co. v. Buffalo*, 147 N. Y. 675, 42 N. E. 344.

The widening by a municipal corporation of a navigable river within its limits, over which the United States has assumed jurisdiction, and upon which it has expended money, being one of the channels over which the commerce of the country passes, for the purpose of improving the navigation thereof, is not a "local improvement" within the meaning of that term as used in a general act authorizing cities, etc., to make local improvements by special assessment; and such municipal corporation has no power to assess the cost thereof by special assessment upon the property fronting on the river. *Chicago v. Law*, 144 Ill. 569, 33 N. E. 855.

Under a statute authorizing a city to clear obstructions and keep a stream within its limits in navigable condition, and cause not less than one half the expense to be assessed upon the property benefited, the city may remove wrecked vessels and assess one half the cost upon adjacent riparian owners, although the wrecks were caused by the negligence of the city, and might have been abated by it as a nuisance. *Buffalo Union Iron Works v. Buffalo*, 1 Sheldon, 244.

An act authorizing the improvement of the river, bay, and harbor of Mobile, and providing for a county tax to pay for such improvement, is not a taking of property for public use without due compensation, where the taxation is not so excessive as to deprive it of that character, and, in view of the immediate benefits accruing to the county, not so restricted as to induce the imputation of compelling a single district to assume and discharge a state obligation. *Revenue Comrs. v. State*, 45 Ala. 399; *Slaughter v. Mobile County*, 73 Ala. 134.

The legislature has no power to confer upon the probate judge of a county authority to appoint a commissioner to superintend the work of improving a river, where the improvement extends along its course into another county, and to assess taxes for benefits upon lands in such latter county. It is an unconstitutional encroachment upon the right of local self-government. *Wilcox v. Paddock*, 65 Mich. 23, 31 N. W. 609.

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That assessors took into consideration the frontage of property benefited by a dredging improvement to aid them in determining what part of the cost should be levied upon it does not indicate that the assessment was not made according to benefits, when the assessors acted in entire good faith. *Delaware & H. Canal Co. v. Buffalo*, 39 App. Div. 333, 56 N. Y. Supp. 976.

The location, value, and accessibility to the channel of each parcel of land should be considered in determining the assessment levied for a dredging improvement. The fact that property on one side of the river is assessed at a higher rate per foot front than other property does not establish the fact that the assessment is erroneous. *Ibid.*

An assessment of the benefits derived by riparian owners by provision for the maintenance of the permanent height of water in a navigable lake is invalid unless provision be made for compensating such owners for injuries resulting from the maintenance of a height of water in the lake permanently above its ordinary stage. *Re Minnetonka Lake Improvement*, 56 Minn. 513, 58 N. W. 295.

Money paid on a judgment rendered against real estate for nonpayment of a special assessment levied thereon for the cost of widening and deepening a river cannot be recovered back on the ground that such assessment was void, and therefore the judgment, because the city had no authority under its charter to levy assessments for the deepening of that river, where the money was paid voluntarily and not under process, for an object such landowner had helped originate, with a full knowledge of all the facts of the case and in ignorance only of his legal rights, the accomplishment of which benefited his estate,—especially as such judgment is valid, at least in so far as the assessment upon which it was based was for the cost of widening such river, for which purpose such city had the power to levy assessments, and therefore, the court having jurisdiction, could not be attacked in a collateral proceeding. *Elston v. Chicago*, 40 Ill. 514, 89 Am. Dec. 361.

Use of stream as canal.

The use of a navigable stream, and the appropriation of its bank for a towpath as part of a canal system to connect the waters of another stream with Lake Erie, are not a violation of the ordinance of 1787, if they result merely in the improvement of the stream within the limits of the state, and in no way interfere with navigation and commerce. *Carpenter v. State*, 12 Ohio St. 457.

Remedies.

A Federal court will, at the suit of the government, grant an injunction to protect and secure the safety of such public structures as are made to improve the navigation of rivers and to facilitate commerce. *United States v. Rum River & M. Boom Co.* 1 McCrary, 397, Fed. Cas. No. 16,206.

When a special remedy is provided for the recovery from a navigation corporation of damages caused by the exercise of its franchise, it must be strictly pursued, and the corporation will only be liable to suit by common-law process when damages have been incurred by its negligence. *Fehr v. Schuykill Nav. Co.* 69 Pa. 161.

H. P. F.

KANSAS SUPREME COURT.

D. J. FAIR *et al.*, Plffs. in Err.,
v.

CITIZENS' STATE BANK of Sterling.

(.....Kan.....)

- *1. An affidavit of a renewal of a chattel mortgage in favor of a corporation after it is received and filed by the register of deeds of the county is not void, so as not to impart constructive notice of the lien of the mortgage, by reason of the fact that the affidavit is sworn to by an officer of the corporation before a notary public, who is an officer and stockholder in said corporation.
2. The act of the notary public in administering the oath in such case is ministerial, and not judicial, and is at most voidable, not void.
3. A chattel mortgage regular upon its face, duly filed for record, and accompanied by an affidavit of renewal, filed in proper time, and regular upon its face and regular in fact, except for the latent defect that the notary public who administered the oath was a stockholder in the mortgagee corporation, imparts notice as fully as if such defect did not exist.

(January 7, 1905.)

ERROR to the District Court for McPherson County to review a judgment in favor of plaintiff in an action brought to enforce a chattel mortgage. *Affirmed.*

The facts are stated in the opinion.

Messrs. Frank Doster and Prigg & Williams, for plaintiffs in error:

The affidavit of renewal of plaintiff's mortgage was verified before an officer disqualified by his interest to administer the oath, and was, therefore, void.

Warner v. Warner, 11 Kan. 121; *Docking v. Frazell*, 34 Kan. 29, 7 Pac. 618; *Carr v. Hooper*, 48 Kan. 256, 29 Pac. 398; *Wills v. Wood*, 28 Kan. 411; *Davis v. Beazley*, 75 Va. 491; *Wilson v. Traer*, 20 Iowa, 231; *City Bank v. Radtke*, 87 Iowa, 363, 54 N. W. 435; *White v. Connelly*, 105 N. C. 65, 11 S. E. 177; *Turner v. Connelly*, 105 N. C. 72, 11 S. E. 179; *Stevenson v. Brasher*, 90 Ky. 23, 13 S. W. 242; *Beaman v. Whitney*, 20 Me. 413; *Goodhue v. Berrien*, 2 Sandf. Ch. 630; *Hogans v. Carruth*, 18 Fla. 587; *Groesbeck v. Seeley*, 13 Mich. 329; *Laprad v. Sherwood*, 79 Mich. 520, 44 N. W.

*Headnotes by SMITH, J.

NOTE.—As to validity of acknowledgment taken by officer of corporation which is one of the parties, see cases in note to *Havemeyer v. Dahn*, 33 L. R. A. 337, and the later cases in this series of *Cooper v. Hamilton Perpetual Bldg. & L. Asso.* 33 L. R. A. 338, and *Read v. Toledo Loan Co.* 62 L. R. A. 790. 67 L. R. A.

943; *Hubble v. Wright*, 23 Ind. 322; *Hammers v. Dole*, 61 Ill. 307; *Baater v. Howell*, 7 Tex. Civ. App. 198, 26 S. W. 453; *Rothschild v. Daugher*, 85 Tex. 332, 16 L. R. A. 719, 34 Am. St. Rep. 811, 20 S. W. 142; *Wasson v. Connor*, 54 Miss. 351; *Long v. Crews*, 113 N. C. 256, 18 S. E. 499; *Green v. Abraham*, 43 Ark. 420; *Hainey v. Alberry*, 73 Mo. 427; 21 Am. & Eng. Enc. Law. 2d ed. p. 569.

An instrument acknowledged before a disqualified officer is not entitled to record, and its record does not impart constructive notice.

Smith v. Clark, 100 Iowa, 605, 69 N. W. 1011; *Blackman v. Henderson*, 116 Iowa, 578, 56 L. R. A. 902, 87 N. W. 655; *Withers v. Baird*, 7 Watts, 227, 32 Am. Dec. 754, and note; *Wasson v. Connor*, 54 Miss. 352.

Messrs. Samuel Jones, Ansel R. Clark, and John D. Milliken, for defendant in error:

The affidavit was merely voidable. A voidable instrument is not subject to collateral attack.

Scearingen v. Houser, 37 Kan. 126, 14 Pac. 436; *Carr v. Hooper*, 48 Kan. 257, 29 Pac. 398; *Horkey v. Kendall*, 53 Neb. 522, 68 Am. St. Rep. 623, 73 N. W. 953; *Keene Guaranty Sav. Bank v. Lawrence*, 32 Wash. 572, 73 Pac. 681; *Bierer v. Fretz*, 32 Kan. 336, 4 Pac. 284; *Cooper v. Hamilton Perpetual Bldg. & L. Asso.* 97 Tenn. 285, 33 L. R. A. 338, 56 Am. St. Rep. 795, 37 S. W. 12; *Reed Fertilizer Co. v. Thomas*, 97 Tenn. 478, 37 S. W. 220; *Stevens v. Hampton*, 46 Mo. 404; *Titus v. Johnson*, 50 Tex. 224; *Bancks v. Ollerton*, 26 Eng. L. & Eq. 508; *Dobry v. Western Mfg. Co.* 57 Neb. 228, 77 N. W. 656; *Read v. Toledo Loan Co.* 68 Ohio St. 280, 62 L. R. A. 790, 96 Am. St. Rep. 663, 67 N. E. 731; *Ferguson v. Smith*, 10 Kan. 404; *Re Huron*, 58 Kan. 154, 36 L. R. A. 822, 62 Am. St. Rep. 614, 48 Pac. 574; 1 Cyc. Law & Proc. p. 530; *Ogden Bldg. & L. Asso. v. Mensch*, 196 Ill. 554, 89 Am. St. Rep. 330, 63 N. E. 1052; *Banking House of A. Castetter v. Stewart* (Neb.) 98 N. W. 34; *Horbach v. Tyrrell*, 48 Neb. 514, 37 L. R. A. 434, 67 N. W. 485; *Bank of Woodland v. Oberhaus*, 125 Cal. 320, 57 Pac. 1070; *Bank of Benson v. Hove*, 45 Minn. 40, 47 N. W. 449; *Stevens v. Hampton*, 46 Mo. 408; *Heilbrun v. Hammond*, 13 Hun, 480; *Titus v. Johnson*, 50 Tex. 224; *National Bank v. Conway*, 1 Hughes, 37, Fed. Cas. No. 10,037; *Dussaupe v. Burnett*, 5 Iowa, 103; *Webb, Record of Title*, §§ 65, 67; *Rousain v. Norton*, 53 Minn. 560, 55 N. W. 748; *Noerenberg v. Johnson*, 51 Minn. 75, 52 N. W. 1069.

Smith, J., delivered the opinion of the court:

On November 16, 1896. one H. L. Sturgeon was indebted to the Citizens' State Bank of Sterling, Kansas, in the sum of \$858.33, and gave his note to said bank therefor, due on or before April 1, 1897. To secure the payment of this note he gave the said bank a chattel mortgage on 12,000 bushels of corn, a portion of which was described as having been gathered and cribbed, and the remaining was to be gathered and cribbed on lot 280 Broadway street, Sterling, Kansas. This chattel mortgage was filed for record in the office of the register of deeds of Rice county, Kansas, in which county the parties thereto resided, and in which the mortgaged property was located, on the day following its execution. On October 26, 1897, a renewal affidavit in regular form, sworn to by Thomas Atkinson, the cashier of said bank, was filed in the office of the register of deeds of said county. This affidavit was sworn to before Curtis A. Stubbs, a notary public, who, it is admitted, was assistant cashier of, and was a stockholder in, the defendant in error corporation at the time he administered the said oath. Said lot 280 Broadway and lot 282 Broadway are in the same block, and said two lots were in the same inclosure, and evidently contiguous; and the corn for which judgment was rendered was cribbed on lot 282, and not 280, as described in the mortgage. There was no corn cribbed on lot 280. There is also some question as to the particular tract of land upon which the corn was raised.

We have examined the evidence with some care, and think that the mortgage is not void for uncertainty of description of the mortgaged property. It seems evident that a third person having the description given in the chattel mortgage, by the aid of such inquiries as the chattel mortgage itself suggests, could identify the corn which was mortgaged. *Mills v. Kansas Lumber Co.* 26 Kan. 574. A portion of the corn cribbed on said lot 282 was shelled by said Sturgeon, and sold to plaintiffs in error about September 1, 1898. This action was brought in the district court of Rice county by the defendant in error to recover from the plaintiffs in error the value of the corn so bought of said Sturgeon to the amount remaining unpaid on said note and mortgage to the bank. After one mistrial and a second trial, which resulted in a judgment in favor of the plaintiffs in error, and which judgment was reversed in this court (66 Kan. 761, 71 Pac. 1125), a third trial has resulted in a judgment in favor of the defendant in error. To reverse this last judgment the plaintiffs in error bring the case here again for review. 67 L. R. A.

The plaintiffs in error in their brief make twenty assignments of error, but seem to urge only a few of them. The first and most difficult question presented is, Was the renewal affidavit void by reason of the fact that the notary public who administered the oath was at the time an officer and stockholder of the corporation which was the mortgagee? It is a question upon which the authorities differ. Some of the authorities, by analogy, at least, hold it void; others that it is voidable only. Some authorities reason that such act of an officer interested would be void or voidable, according as the transaction is or is not tainted with fraud, or even undue advantage. That one who is of counsel, or is related to either party, or is otherwise interested in the event of an action, should be barred, even in the absence of our statutory provision, is too evident for discussion. Even administering the oath to an affidavit in a judicial proceeding by an officer interested in establishing the facts sworn to, especially as the officer may also write the affidavit, apparently gives opportunity for undue advantage, and the act of the officer savors more of a judicial proceeding. In the case at bar the statute by implication makes the filing of the chattel mortgage or a copy of it in the office of the register of deeds of the proper county notice of the rights of the mortgagee under the mortgage for the period of one year from the date of the mortgage, and if within thirty days prior to the expiration of the year an affidavit is filed setting forth the required facts, such notice is by implication extended for another year. The affidavit proves no fact upon which any tribunal or person has to pass; in fact the statute expressly provides (differing from most other records) that a duly certified copy of same shall be received as evidence of no other fact except that "the affidavit was received and filed according to the indorsement." It simply allows the warning to creditors, subsequent purchasers, and mortgagees to stand for another year. It is not apparent how anyone other than the mortgagee could be prejudiced by even a false statement in the affidavit, unless it should state an exaggerated or fictitious amount due on the mortgage to shield the property of the debtor from the other creditors who might look to it to satisfy their claims. If such a case should arise, a remedy could be found. The instrument in question is "a written declaration under oath, made without notice to the adverse party." It was sworn to before an officer authorized by law to administer oaths. It states the facts required by statute to be stated in a renewal affidavit. It is sufficient in all respects to continue the life and notice of the mortgage lien, unless it is

absolutely void by reason of the interest of the notary public who administered the oath. The weight of authority seems to be that it is not void, but at most only voidable. In *Swearingen v. Howser*, 37 Kan. 126, 14 Pac. 436, an affidavit in a judicial proceeding sworn to before a notary public who was the attorney of record of the affiant in the proceeding was held to be at most only voidable, and the reasons for holding the affidavit void in that case seem much stronger than in this case. That decision has not been reversed. The case of *Wills v. Wood*, 28 Kan. 411, is not in point. This case decides that an interested party was incompetent to take an acknowledgment to a conveyance of an estate, it being a quasi-judicial proceeding. In such case the officer conclusively determines and certifies to a fact, and his certificate of the same is taken as evidence thereof the civilized world over. Not so in this case. The case of *Wills v. Wood* was decided before

Swearingen v. Howser, 37 Kan. 126, 14 Pac. 436, yet was not mentioned in the latter case, as it probably would have been if this court had considered it conflicting, or that it deserved to be distinguished. In this case the notary public simply administered the oath and certified to that fact. He determined nothing. His act was purely ministerial, and at most only voidable by reason of his interest, and we do not decide that it was voidable even.

We have examined the other assignments of error in this case, and do not find any unsettled questions of law to elaborate. We do not think the court erred in overruling the demurrer to plaintiff's evidence, nor that it committed any material error in admitting or excluding evidence or in giving or refusing to give instructions.

The judgment of the District Court will be affirmed.

All the Justices concur.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Edgar D. TURNER, *Appt.*,

v.

William McCORMICK.

(.....W. Va.....)

- *1. An acceptance in writing of a formal and carefully prepared option of sale of land, within the time allowed by it for acceptance, using the formal words, "according to terms of the option given me," to which there is added, by the conjunction "and," a request for a departure from its terms as to the time and place of performance, is unconditional, and converts the option into an executory contract of sale.
2. A mere request by one of the parties thereto for an alteration or modification of a fully accepted proposed contract, which by acceptance has been wrought into a blinding contract, is not a breach thereof, giving right of rescission thereof or action thereon. Neither does it effect such alteration, unless assented to by the other party.
3. Such request relates to performance of the contract, and is not an element in the making thereof, although written and connected as aforesaid, with the acceptance, on a single sheet of paper, so as to make of the acceptance and request a compound sentence.

(November 1, 1904.)

*Headnotes by POFFENBARGER, P.

NOTE.—As to rights conferred by "refusal" or "option," including question of what constitutes an acceptance, see also note to *Litz v. Goosling*, 21 L. R. A. 127; and the later case in this series of *Dyer v. Duffy*, 24 L. R. A. 839. 67 L. R. A.

APPEAL by plaintiff from a judgment of the Circuit Court for Monongalia County sustaining a demurrer to a bill seeking specific performance of contracts for the sale of coal. *Reversed.*

The facts are stated in the opinion.

Messrs. H. L. Robinson and Moreland & Glascock, for appellant:

The law draws a very clear distinction between matters made material and essential to the making or coming into existence of a contract and matters material to its proper performance. If not essential terms of the contract, a collateral arrangement as to these matters, or a proposal by either party of such an arrangement, not inconsistent with the contract, cannot be held to have interfered with the meeting of the minds of the parties completely and fully on the terms contained in the original proposal where that is unequivocally and unconditionally accepted.

Watson v. Coast, 35 W. Va. 463, 14 S. E. 249; *Valpy v. Gibson*, 4 C. B. 864.

An acceptance may be complete though it express dissatisfaction at some of the terms, if the dissatisfaction stops short of dissent, so that the whole thing may be described as a "grumbling assent."

3 Am. & Eng. Enc. Law, p. 854, note; *Matteson v. Scofield*, 27 Wis. 671; *Fitzhugh v. Jones*, 6 Munf. 83; *Neufville v. Stuart*, 1 Hill, Eq. 159.

Mr. Henry M. Russell, for appellee:

The notice was not a plain and uncondi-

tional acceptance of the options, but it was an attempted acceptance incorporating conditions with respect to time and place which did not constitute a proper acceptance within the established rules.

Weaver v. Burr, 31 W. Va. 736, 3 L. R. A. 94, 8 S. E. 743; *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220; *Dyer v. Duffy*, 39 W. Va. 148, 24 L. R. A. 339, 19 S. E. 540; *Potts v. Whitehead*, 23 N. J. Eq. 512; *Sawyer v. Brossart*, 67 Iowa, 678, 56 Am. Rep. 371, 25 N. W. 876; *Corcoran v. White*, 117 Ill. 118, 57 Am. Rep. 858, 7 N. E. 525; *Coffin v. Portland*, 43 Fed. 411; *Larned v. Wentworth*, 114 Ga. 208, 39 S. E. 855.

Mr. W. S. Meredith, also for appellee:

In unilateral contracts, called options, the time fixed for the acceptance is of the essence of the contract.

Dyer v. Duffy, 39 W. Va. 148, 24 L. R. A. 339, 19 S. E. 540.

If to the acceptance a condition be fixed, or any modification or change in the offer be requested by the party to whom the offer is made, this, in law, constitutes a rejection of the offer.

Weaver v. Burr, 31 W. Va. 744, 3 L. R. A. 94, 8 S. E. 743; 1 Benjamin, Sales, § 39; 1 Parsons, Contr. 475, 476; 1 Chitty, Contr. 15, 16; 1 Story, Contr. § 502; *Ocean Ins. Co. v. Carrington*, 3 Conn. 357; *Hamilton v. Lycoming Mut. Ins. Co.* 5 Pa. 339; *Boston & M. R. Co. v. Bartlett*, 3 Cush. 225; *Eliason v. Henshaw*, 4 Wheat. 225, 4 L. ed. 556; *Robinson v. Weller*, 81 Ga. 704, 8 S. E. 449; *Northwestern Iron Co. v. Meade*, 21 Wis. 475, 94 Am. Dec. 557; *Egger v. Nesbitt*, 122 Mo. 667, 43 Am. St. Rep. 596, 27 S. W. 385; 1 Beach, Modern Law of Contracts, 51.

Poffenbarger, P., delivered the opinion of the court:

In this case the circuit court sustained a demurrer to a bill praying the specific performance of two alleged contracts for the sale of the Pittsburg vein of coal, underlying two separate tracts of land in Monongalia county. The owner of the land executed two options of sale to the plaintiff, each of which provided that it should be accepted within a certain time, and, if not so accepted, it should be void. The demurrer was sustained upon the theory that what is relied upon in the bill as constituting acceptance is insufficient, because it sought to introduce a new element into the proposed contract, and make, not the contract originally proposed, but a new and different contract. The first option bears date December 31, 1901; was executed by William McCormick, as party of the first part, and E. D. Turner, as party of the second part; 67 L. R. A.

covers the coal in a tract of about 150 acres at the price of \$50 per acre, one third to be paid in cash on delivery of deed, and the balance in two equal annual payments; and provides, as to acceptance, that "the party of the first part agrees that the party of the second part shall have until the 1st day of March, 1902, to accept the coal herein described as the same may be determined by the county surveyor. . . . And, if the party of the second part does not give notice of such acceptance by said date, this contract shall be void, and of no further effect." The other option, executed by the same parties, is dated February 2, 1902: covers the Pittsburg vein of coal in and underlying a tract containing about 104 acres, at the price of \$41 per acre, one third to be paid in cash on delivery of deed, and the balance in two equal annual payments; and provides, as to acceptance, that "if the second party, heirs, or assigns, fails to notify said first party in writing, on or before the 1st day of March, 1902, that he or they elect to purchase said coal, then this agreement is to be considered as rescinded, null and void, and neither party to be bound thereby or liable in any way." As to performance and the consummation of the proposed sale, the written option provided as follows: "The first party shall and will, within ninety days, after the notice in writing that the said second party, his heirs or assigns, elect to purchase said coal at his own proper cost and charge, make, execute, and deliver to the said second party, his heirs or assigns, a good and sufficient deed or deeds for said coal and mining rights, in fee simple, clear of all encumbrances, with clause of general warranty," etc. The first option does not require acceptance in writing, nor performance within ninety days after notice of acceptance. The second does impose these conditions. Besides alleging a verbal acceptance of both of these options on the 21st day of February, 1902, the bill avers an acceptance and notice thereof in writing, and sets out a copy of the notice of acceptance, which reads as follows:

Morgantown, W. Va., Feb. 21, 1902.

William McCormick:—

I hereby notify you that your coal will be accepted according to terms of the option given to me on same and respectfully request you to make delivery of deed, with abstract of title, to me, in Morgantown, W. Va., on Saturday, June 28th, 1902, hour and place to be decided later.

Yours truly,

E. D. Turner.

Two objections to the written acceptance

are urged. One of these relates to the first clause, and is that its language relates to the future, and imports a promise to accept, and not to notice of a completed acceptance. The other objection is that the request that deed be made on June 28, 1902, in Morgantown, at an hour and place thereafter to be decided, superadded to the alleged notice of acceptance, made it conditional, and not absolute, by attempting to introduce new terms into the proposed contract. Acceptance of the first option gave the right to have immediate performance, and allowed no time to the vendor in which to perform thereafter. Absolute acceptance of the second option would have included, as one of the terms thereof, an agreement that the vendor should have ninety days within which to tender the deed. As it required acceptance on or before the 1st day of March, 1902, and performance within ninety days thereafter, the request or condition in the notice that the deed be delivered on the 28th day of June, 1902, named a date more than ninety days after the 1st day of March, the limit for acceptance, and one more than ninety days after the notice of acceptance.

The first objection overlooks the substantial and legal meaning of the terms, and amounts to a mere criticism of the phraseology. By turning this weapon upon the appellees themselves, their contention is completely overthrown. The language is not that the option will be accepted, but that the coal will be accepted in the future; and the contract itself contemplates performance in future, and after acceptance of the option. It is in the very nature of a contract that it shall be first made, and then performed. Moreover, the language of the acceptance, in strictness, more nearly conforms to the language of the contract than that which it is said should have been used. The provision of the option as to notice of acceptance uses this language: "That he or they elect to purchase said coal." It requires notice of intention and election to do a thing in the future. Hence it may be said, without doing any violence to the language of the option, that notice of an election to purchase according to the terms of the option should be understood and deemed to carry with it, by necessary implication, prior or contemporaneous acceptance of the terms of the option. Acceptance of the coal according to the terms of the option could not take place without a full accession to all the terms of the option. To this it may be added that it is not usual to refer to the instrument by its date or otherwise, and merely say it is accepted or its terms agreed to. Thus, in *Watson v. Coast*, 35 W. Va. 47 L. R. A.

463, 14 S. E. 249, the vendee had telegraphed as follows: "Will take the property. Meet me at Toronto first train. Answer." Another telegram responding to another proposal was: "Will accept your proposal." No substantial distinction between these forms of acceptance was discovered. In both instances the future tense was used. In *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220, there was a verbal notice in which the plaintiff told the defendant, after looking over the land, he was satisfied with it, and was ready to pay the money when the deed should be made. Then a day or two afterwards he wrote a letter in which he said: "I am here at your place of business ready to take the land and pay the money whenever the deed is made." In these instances the language, with one exception, related to performance, and it never occurred to anybody to question its sufficiency on that ground. In the same case, at page 745, 33 W. Va. and page 222, 11 S. E. Judge Brannon took this view. He said: "Why talk about the execution of a deed if the land was not satisfactory? Why talk about a deed if Barrett had not accepted the option? The fact that they so talked about a deed proves that Barrett had accepted the option and informed McAllister of it. Indeed, this conversation about a deed is of itself acceptance."

But it is further urged that the reference to the future in the first clause coupled with the request in the second clause, bears out the theory of a promise to accept in the future, and precludes the view that the writing conveys notice of a prior or contemporaneous acceptance. It has already been pointed out that the declaration of intent to take the coal in accordance with the terms of the option presupposes and necessarily implies present or past acceptance of the terms. The notice does not say, "I will take the coal according to the terms of the option on the 28th day of June," or "if you will deliver the deed on the 28th day of June." Its terms are positive. The notice is that the coal will be accepted according to the terms of the option given. This is followed by a request, not a condition, that the deed be delivered on the 28th day of June, instead of at an earlier date. To couple the two clauses in the manner suggested would be to depart from the plain, common-sense meaning of the notice. It would do violence, also, to the grammatical construction of the notice. No reason is given why the latter clause limits and qualifies the former. It is not pointed out, nor even suggested, that the rules of grammatical construction require it, nor that the two clauses have such logical connection. The copulative conjunction used

simply makes grammatical connection of the two clauses. It does not make them mutually dependent, nor the former conditional.

Yielding the first contention for the purpose of argument, counsel for appellee say that if the first clause, standing alone, would amount to unconditional acceptance, converting the option into a contract binding upon both parties, the addition of the request that delivery of the deed be made on the 28th day of June,—a date more than ninety days after acceptance, and after the time in which acceptance could be made,—renders the notice insufficient. They say this request does not relate to performance of the contract after the making thereof as proposed, and that the insertion thereof in the written notice was an attempt to ingraft upon the contract proposed conditions or terms not embodied in the original proposition; and, as the bill does not show any acceptance in writing of this new condition, the effort to change the original proposition has failed, and no contract has been made. If this last clause of the deed thus qualified the first, it would work a change as to the time of payment of the purchase money and delivery of the deed. It would also designate a place of payment as to which the options are silent. The bill avers, as the reason for requesting delivery on the 28th day of June, that the plaintiff had similar options upon the coal underlying several other tracts of land in the neighborhood of those owned by the defendant, and desired to close them all on the same day; it being his purpose to obtain an aggregate of 1,000 or 1,200 acres of coal in a body. While this averment is not important, it well illustrates the fact that such a request may be added to an acceptance for a good purpose, and it does not necessarily indicate an intention to change the terms of the proposed contract. The plaintiff desired the land, and was willing to take it and pay for it. He preferred to close all the options on the same day, and therefore added this request. Suppose he had on one day put the first part of the notice in writing, and sent it to the defendant. That would have closed the contract undoubtedly. Then suppose on the next day he had written a request that the performance be delayed until the 28th of June. That would not have been a repudiation of the contract. It would have been a mere request for an extension of time. The defendant could not have treated the contract as broken for that reason. He could have enforced it notwithstanding this request. The mere fact that the acceptance and the request are in juxtaposition, standing in the same sentence, united by a con-

junction, does not change their character or legal sense.

The contention of counsel for appellee, is unsupported by authority. "If an offer is accepted as made, the acceptance is not conditional, and does not vary from the offer, because of inquiries whether the offerer will change his terms, or as to future acts, or the expression of a hope or suggestions, etc." 9 Cyc. Law & Proc. p. 269. "Plaintiff answered a proposition to lease, 'I will accept your offer to lease to you at \$200 per year for three or five years as you choose.' Defendant answered, 'Make out lease for place for five years at \$200 per year.' He also said in this letter that he would like to build on a cookroom, with privilege to remove it. Plaintiff recognized that a lease for five years existed. Held, these letters made a lease and the request as to the cookroom did not attach a condition to defendant's acceptance." *Culton v. Gilchrist*, 92 Iowa, 718, 61 N. W. 384. In *Phillips v. Moor*, 71 Me. 78, the court held that an acceptance coupled with a request for a modification is an absolute and unconditional acceptance, and closes the contract. In that case the subject of the contract was a lot of hay. The defendant offered \$9.50 per ton for part of it, and \$5 for the balance. The plaintiff sent him a postal card in reply saying he had hoped the defendant would pay him \$10 for his hay of the best quality, and closed by saying, "But you can take the hay at your price, and when you get it hauled in, if you can pay the \$10.00 dollars, I would like to have you do it, if the hay proves good enough for the price." The defendant, having received this card on Friday morning, made no reply, and Sunday morning the hay was burned in the barn. The court held that there was a contract, and that, under the peculiar circumstances dispensing with actual delivery, which ordinarily is necessary to the passing of title, the defendant was liable for the price of the hay. In *Stevenson v. McLean*, L. R. 5 Q. B. Div. 346, the principle is well illustrated. The defendant had certain warrants for iron. He wrote to plaintiffs, asking whether they could get him an offer for them. After some correspondence the defendant fixed a net cash price of 40 shillings per ton, the offer to hold good until the following Monday. On the morning of that day, at 9:42, plaintiffs telegraphed this request: "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you could give." No answer having been received, the defendant, after receipt of this telegram and without having replied to it, sold the warrants, and at 1:25 P. M. telegraphed to the

plaintiffs that he had done so. Before the sending of this telegram, the plaintiffs found a purchaser for the iron, and at 1:34 P. M. telegraphed the defendant, stating that they had secured his price. The defendant refused to deliver the iron, and thereupon the plaintiffs brought an action against him for nondelivery, and recovered. The court held that the inquiry as to whether the defendant would modify the terms of his offer was not a rejection of the offer, and, he not having withdrawn the offer before the sale was effected, a binding contract was effected by the acceptance of the plaintiffs upon finding the purchaser at 1:00 P. M., twenty-five minutes prior to the sending of defendant's telegram. The ruling in that case is a very strong adjudication against the contention of the appellee here. The request or suggestion for modification of the offer made before its acceptance might well have been regarded as an indication of a purpose not to accept. Here the acceptance precedes the request for a modification.

Among the cases relied upon as authority sustaining the action of the court in dismissing the bill is that of *Potts v. Whitehead*, 23 N. J. Eq. 512. The report of the case in that volume does not set out the fact fully. They are given at length in 20 N. J. Eq. 55. There it is shown that the offer was such that an unqualified acceptance of it would not have constituted a contract, for the offer and acceptance would have left open to further negotiation important elements of the contract. In that case the defendant signed a paper embodying an offer to sell certain land in consideration of \$20 per acre; \$500 of the price to be paid on the execution of a deed, and the balance to be secured by a mortgage on the land, with interest at 6 per cent. When the deferred payments of the purchase money should become due was not stated, and this paper and the alleged acceptance did not fix any time. If the latter had, it would not have been binding, unless assented to by the defendant. This was one ground of the decision of the chancellor, holding that there was no contract. The alleged acceptance said: "Have twice attempted the tender of the first payment of \$500.00 upon the agreement made between us on the 7th of December last. I will meet you, . . . when I shall be ready to make tender of the money and execute the proper agreements thereupon." This acceptance did not say, as does the one under consideration here, that the plaintiff would take the property in accordance with the terms of the agreement. He said he would pay \$500 upon the agreement and execute the proper agreement thereupon. There is scarcely a

resemblance between the two papers. What was meant by "proper agreement," the court had no means of knowing. He might have meant such agreements as were just and fair, or such as the offer indicated. The paper was indefinite and ambiguous. Respecting it, the chancellor said: "It doubtless might fairly be inferred from this letter that the complainant intended to accept the offer in some way, and expected to enter into an agreement for the purchase of this property, at the price fixed, but he did not bind himself so to do."

Another case relied upon is *Sawyer v. Brossart*, 67 Iowa, 678, 56 Am. Rep. 371, 25 N. W. 876. In that case the defendant, a resident of Los Angeles, California, offered for sale, by letter, two business rooms in Iowa City, saying to the plaintiff: "You can have that building for thirty-five hundred dollars, or the two for \$5,000. Let me hear from you at once." The alleged acceptance was by telegram from Iowa City, saying: "Accept your offer for two buildings at five thousand dollars. Money at your order at First National Bank here." The court held that the defendant "was entitled, under his offer, to have the money paid to him at his place of residence, and to deliver the deed there, and that, as the acceptance of plaintiff was not an acceptance of the offer as made, it did not bind B.," the plaintiff. It is to be noted here that the plaintiff did not request permission to pay the money into the bank to the defendant's credit at Iowa City, but said, in effect, that the money had been paid there to his credit. Therefore the payment into the bank at Iowa City was made a part of the acceptance. By such payment and notice, plaintiff attempted to add a new condition to the contract proposed, which was silent as to the place of payment, and therefore, in law, contemplated payment at Los Angeles. It was not an unqualified acceptance, coupled with a request for permission to pay at Iowa City. *Corcoran v. White*, 117 Ill. 118, 57 Am. Rep. 858, 7 N. E. 525, does not support the position taken by the appellee. The letter purporting to be an acceptance said the party would accept the offer, provided the title was perfect. It further said: "I will call at your office Monday at 10 o'clock, at which time I can get the abstract and have it examined." The common sense of this letter was that the writer had not accepted, and would not accept if he did not find the title perfect. In *Coffin v. Portland*, 43 Fed. 411, relating to an attempted sale of bonds, the letter said: "We will take your . . . bonds . . . at par, you to furnish us written opinion of your city attorney as to

legality of bonds, certified copy of council proceedings and ordinance, certified statement of your city debts, assessed value of your taxables, probable real value, the amount of your debt, and your present [approximate] population." After putting upon its minutes an acceptance of this proposition to purchase, the council passed a resolution rescinding what the resolution called a contract, and accepted the proposition of another person for the same bonds. The court says in its opinion: "It is more reasonable to regard the proposition of the plaintiffs in this respect as being conditional, and the acceptance of it as being upon the same condition. This being so, the plaintiffs, of course, have no right of action." What is meant by this is that there had not been, in fact, any proposition to buy, or acceptance of such proposition. The plaintiffs were simply considering the advisability of purchasing, and, in the exercise of prudence, desired to examine all the proceedings relating to the issue before making an unqualified proposition to buy. There is nothing in that case that seems to have any bearing upon the question under consideration here.

Three cases referred to in one of the briefs for the appellee are, in all material respects, alike. They are *Robinson v. Weller*, 81 Ga. 704, 8 S. E. 449; *Northwestern Iron Co. v. Meade*, 21 Wis. 475, 94 Am. Dec. 557; and *Egger v. Nesbitt*, 122 Mo. 667, 43 Am. St. Rep. 596, 27 S. W. 385. They enunciate the proposition that an acceptance of an offer to sell land, but fixing a different place for the delivery of the deed and payment of the money than the residence of the offerer, or the place named in the offer, is not an unconditional acceptance, so as to bind the seller. This is asserted by several cases. *Gilbert v. Baxter*, 71 Iowa, 327, 32 N. W. 364; *Langellier v. Schaefer*, 36 Minn. 361, 31 N. W. 690. But they are all cases arising upon loose, informal correspondence, making it necessary to look to the whole of each paper to ascertain the true meaning and intent of the parties. None of the letters relied upon as acceptances said an offer was accepted in accordance with its terms, or that the property would be taken according to the terms of the letter of proposal. In none of them was the word "request" used, after language of unequivocal and definite acceptance, as in this case. In *Robinson v. Weller* the reply said: "Offer accepted. Money ready; send deeds at once." In *Northwestern Iron Co. v. Meade*, the letter said: "If this is the very best offer you can make, you may properly execute the within deed," etc. In *Egger v. Nesbitt* the reply said: "I will accept your

proposition, with the understanding that you will deliver to me all papers," etc. Owing to the distinctions pointed out, these precedents are not regarded as applicable or controlling in the present case.

Moreover, the reasoning in some of these cases is not entirely satisfactory. Nor does it seem to accord with principles announced in *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249. If a man says, "I accept your offer," that makes a contract. It assents to all the terms of the offer. What more is necessary? There is a complete *aggregatio mentium*. The acceptance conforms to the offer in every particular. How can a mere request, relating, not to the making of the contract, but to its performance, be deemed to change it? Would the acceptor be permitted to excuse himself from performance on the ground of such request? No precedent of that kind has been found. They are all cases in which the proposer, desiring to escape from the consequences of his offer, because somebody else has proposed a higher price than the first asked, seeks to repudiate the transaction and sell to the other party. Property rights are sacred, and should be well guarded by the law; but, when a man has deliberately made a fair contract of sale, he ought not to be permitted to avoid it on some flimsy pretext, in order to avail himself of a better bargain. Time and place of payment, when not mentioned in an accepted offer, are fixed by law, and are matters of performance, carrying out the contract,—a thing wholly distinct and separate from the making of the agreement. If, contemporaneously with or subsequent to the making of the contract, either party suggest, request, or propose a time, place, or mode of performance different from that agreed upon, that does not of itself effect such change, nor does it cause a breach, giving right of action or rescission to the other party. *Swiger v. Hayman* (decided at this term) 48 S. E. 839. Either can compel the other to perform the contract as made. He may ignore the suggested, requested, or proposed alteration of or deviation from the contract, as to the performance thereof. *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249. But if the suggested departure in performance is not accompanied by a declaration of unqualified and unconditional acceptance of the offer, it would be otherwise, of course. Some of the cases here referred to disclosed such acceptance, and others did not. The former do not harmonize with the principles enunciated by this court, and the latter do.

As much weight is accorded to the use of the word "request" here, and some of the books say that, if a request for a modifi-

cation be made, it is deemed a rejection of the proposal, a case illustrating this rule will be noticed. It is *Burmester v. Phillips*, 25 Fed. 805. *Burmester & Company*, of Charleston, South Carolina, on the 14th day of March, 1885, wrote *Phillips & Company*, of Fredericksburg, Virginia, as follows: "On receipt of letter [you] can ship us a cargo of 10 to 15,000 bushels choice dry Rappahannock white corn at 51 cents, free on board, freight 7 cents a bushel." *Phillips & Company* did not have the corn, but on the 16th of the same month they replied that they were endeavoring to get it. On the 20th they wrote that they could get it at the price, and were then endeavoring to secure a vessel to carry it at 7 cents. On March 23d, *Burmester & Company* wrote that they hoped *Phillips & Company* would succeed in getting a vessel promptly, and gave some directions about ship's papers. On the 30th *Phillips & Company* wrote that they hoped to succeed in getting a vessel, and, if so, would observe the directions about ship's papers. On April 4th *Phillips & Company* notified *Burmester & Company* by wire that they had succeeded in getting a vessel, and that as soon as she arrived at the landing they would advise, and that they would send a letter giving particulars. To this *Burmester & Company* replied by letter of April 4th that they were awaiting letter's arrival as to particulars. On April 9th *Phillips & Company* reported that the vessel had arrived, and would be ready to receive the cargo on the following Saturday, and that they would draw for the cargo at sight, without grace, etc. To this *Burmester & Company* made no reply. On April 11th *Phillips & Company* telegraphed as follows: "Not hearing from you, we have resold the cargo of corn." *Burmester & Company* telegraphed back that they had not canceled the order, and would expect cargo as ordered. *Burmester & Company* afterwards sued, and the court held as follows: "The letter and telegram of the 4th of April were a new proposal, and that the failure of the Charleston house to answer before the 11th prevented the meeting of minds necessary to a contract, so that there was no contract, and defendants were at liberty to resell." In the opinion the court applied general principles, expressed as follows: "If a condition be affixed by the party to whom the offer is made or any modification or change in the offer be requested, this constitutes, in law, a rejection of the offer, and a new proposal, equally ineffectual to complete the contract until assented to by the first proposer." In the light of the facts in that case as above stated, the proposition is sound and applicable.

Instead of accepting *Burmester & Company's* proposition for an immediate shipment, *Phillips & Company* announced their inability to do so, and made a counter proposition to obtain and ship the corn later. This was a request for a new contract, different from the one first proposed. The court held that to be a rejection of the first proposition. It being a new proposal on the part of *Phillips & Company*, not accepted by *Burmester & Company*, but treated with silence, there was no contract between the parties. There was no pretense of an acceptance of the original proposal of purchase.

This somewhat lengthy review of the authorities bearing upon the question seems to establish the following propositions: First, a request for a change or modification of a proposed contract, made before an acceptance thereof, amounts to a rejection of it; second, a mere inquiry as to whether the proposer will alter or modify its terms, made before acceptance or rejection, does not amount to a rejection, and, if the offer be not withdrawn before acceptance made within a reasonable time, the offer becomes a binding contract; third, a request, suggestion, or proposal of alteration or modification, made after unconditional acceptance, and not assented to by the opposite party, does not affect the contract put in force and effect by the acceptance, nor amount to a breach thereof, giving right of rescission; fourth, acceptance of a formal and carefully prepared option of sale of land, within the time by it allowed, and according to its terms, although accompanied by a request for a departure from its terms as to the time and place of performance, is an unconditional acceptance, and converts the option into an executory contract of sale, provided the request be not so worded as to limit or qualify the acceptance.

The bill alleges a verbal acceptance of both options at the time of delivery of the acceptance in writing, and a verbal agreement extending the time of performance until June 28th. These allegations have provoked a good deal of argument on the subject of extensions of time of performance and alterations of written contracts by parol agreement. The conclusion above indicated renders it unnecessary to go into these questions, or to examine the authorities cited as bearing upon them.

Our conclusion is that the acceptance in writing of the second proposal is unconditional, and converts the proposal into a binding contract. The other option does not require the acceptance to be in writing.

It was verbally accepted, and that is sufficient, when the option does not require a written acceptance. *Weaver v. Burr*, 31 W. Va. 736, 3 L. R. A. 94, 8 S. E. 743; *Watson v. Coast*, 35 W. Va. 463, 14 S. E. 249; *Barrett v. McAllister*, 33 W. Va. 745, 11

S. E. 220; *Creigh v. Boggs*, 19 W. Va. 240; *Capehart v. Hale*, 6 W. Va. 547.

For the foregoing reasons, the decree complained of is reversed, the demurrer overruled and the cause is remanded for further proceedings.

WYOMING SUPREME COURT.

John A. JONES *et al.*, *Plffs. in Err.*,
v.

Margaret H. BOWMAN.

(.....Wyo.....)

1. Religious belief will not, in the absence of statutory requirement, be taken into consideration in determining the proper custodian for an infant.
2. A guardian appointed for an infant by a court in one state will not, on the ground of comity, be given custody of the child, against its best interests by the courts of another state into which the child has been taken, although the child was removed from the state where the guardian was appointed contemporaneously with, and possibly for the purpose of escaping the effect of proceedings for, the guardian's appointment.
3. In determining the question of the proper custody of an infant, that disposal should be made, if possible, which will keep the family together.

(July 6, 1904.)

ERROR to the District Court for Johnson County to review a judgment in favor of petitioner in a habeas corpus proceeding instituted to restore the custody of Ida May Bowman to her legally appointed guardian. *Reversed*.

The facts are stated in the opinion.

Messrs. Parmelee & Hill, for plaintiffs in error:

The removal from the county deprived the probate court of that county of jurisdiction; and an appointment made without jurisdiction is void.

State ex rel. Giroux v. Giroux, 19 Mont. 149, 47 Pac. 800.

The authority of Miss Bowman as guardian was at all events local, and her power over the ward confined to the state of Minnesota.

Story, *Conf. L.* § 499.

While acting as guardian under proper authority, the custody of the child by Mr.

Jones could not in any sense be said to be unlawful.

Woerner, *Guardianship*, p. 159.

A demand is necessary before bringing legal proceedings, and no demand was made. 9 Am. & Eng. Enc. Law, p. 242.

The welfare of the child is the paramount consideration, and must control the custody, even as against the legal guardian.

Woerner, *Guardianship*, 159; *Re Welch*, 74 N. Y. 299; *Wilcox v. Wilcox*, 14 N. Y. 576; *People ex rel. Pruyn v. Walts*, 122 N. Y. 238, 25 N. E. 266; Church, *Habeas Corpus*, § 446; *Re Bullen*, 28 Kan. 781; Hochheimer, *Custody of Infants*, §§ 44, 46.

Even if Miss Bowman had been at the time the legal guardian of the child, and the plaintiffs in error had forcibly taken her away, it does not follow that she should be restored to Miss Bowman.

Foster v. Alston, 6 How. (Miss.) 406; Hochheimer, *Custody of Infants*, § 18.

In selecting a custodian of a child a preference will be given to one of the same lineage with the parents.

Re Doyle, 16 Mo. App. 159.

Mr. John W. Lacey also for plaintiffs in error.

Mr. Gibson Clark, for defendant in error:

A determination by a court or judge of habeas corpus proceedings is not a final order upon which proceedings in error may be predicated, because it does not affect a "substantial right," nor does it "determine the action."

21 Am. & Eng. Enc. Law, p. 129; *Miskimins v. Shaver*, 8 Wyo. 392, 49 L. R. A. 831, 58 Pac. 411; 11 Enc. Pl. & Pr. p. 820; 9 Enc. Pl. & Pr. p. 1072; *Ex parte Thompson*, 93 Ill. 89.

The state statute extends the appellate jurisdiction of the supreme court to "a judgment rendered, or a final order made,

NOTE.—For other cases in this series as to right to custody of child, see *Sheers v. Stein*, 5 L. R. A. 781; *Weir v. Marley*, 6 L. R. A. 672; *Whalen v. Olmstead*, 15 L. R. A. 593; *Re Lally*, 16 L. R. A. 681; *Van Walters v. Children's Guardians*, 18 L. R. A. 481; *Kelsey v. Green*, 38 L. R. A. 471; *Stringfellow v. Somers*, 67 L. R. A.

ville, 40 L. R. A. 623; *Anderson v. Young*, 44 L. R. A. 277; *Prieto v. St. Alphonsus Convent of Mercy*, 47 L. R. A. 656; *Hibbette v. Balna*, 51 L. R. A. 839; *Stapleton v. Poynter*, 53 L. R. A. 784, and *State ex rel. Lasserre v. Michel*, 54 L. R. A. 927.

by the district court," not to a judgment or final order by a district judge.

Hammond v. People, 32 Ill. 446, 83 Am. Dec. 286.

Appellate procedure was never invented to review matters lying in the judicial discretion.

Elliott, App. Proc. § 598; Powell, App. Proc. p. 322.

The determination in question is a matter of discretion.

Church, Habeas Corpus, § 389; *Jenkins v. Clark*, 71 Iowa, 552, 32 N. W. 504; *People ex rel. Brush v. Brown*, 103 N. Y. 684, 9 N. E. 327; *Re Welch*, 74 N. Y. 299; *State ex rel. Lembke v. Bechdel*, 38 Minn. 278, 37 N. W. 338; *People ex rel. Pruyn v. Walts*, 122 N. Y. 238, 25 N. E. 266; *State v. Noble*, 70 Iowa, 174, 30 N. W. 396.

The boy Oscar, being a minor, could not change his own domicil, much less that of his sister.

The domicil of the children is that of the father.

10 Am. & Eng. Enc. Law, 2d ed. p. 112.

Upon the death of the father and mother the children became wards of the probate court having jurisdiction over said domicil, and that court is the one to appoint a guardian over such children.

Jenkins v. Clark, 71 Iowa, 552, 32 N. W. 504; *Wells v. Andrews*, 60 Miss. 373; *Re Hubbard*, 82 N. Y. 90; *Lewis v. Castello*, 17 Mo. App. 593; *Montgomery v. Smith*, 3 Dana, 600; *Allgood v. Williams*, 92 Ala. 551, 8 So. 722; Woerner, Guardianship, § 26; 9 Am. & Eng. Enc. Law, p. 94; 15 Am. & Eng. Enc. Law, 2d ed. p. 33; *De Jarnett v. Harper*, 45 Mo. App. 415.

As the aforesaid court appointed Marguerite Bowman as guardian for the child, the district court of Johnson county, Wyoming, could not have had the power to act on the subject-matter before it in that instance, as neither the residence, property, or domicil of said minor lay within its jurisdiction.

The doctrine of comity between states allows the foreign guardian to recover her ward.

Woodworth v. Spring, 4 Allen, 324; Church, Habeas Corpus, § 457d; *Taylor v. Jeter*, 33 Ga. 195, 81 Am. Dec. 202; *Warren v. Hofer*, 13 Ind. 167; *Townsend v. Kendall*, 4 Minn. 412, 77 Am. Dec. 534, Gil. 315; *People ex rel. Allen v. Allen*, 105 N. Y. 628, 11 N. E. 143.

Knight, J., delivered the opinion of the court:

The defendant in error, Margaret Bowman, plaintiff below, under the habeas corpus act by petition alleged that Ida May Bowman, at that time—May, 1900—of the age of 67 L. R. A.

five years, was unlawfully restrained of her liberty by J. A. Jones and Ella Jones, plaintiffs in error here, at their residence in the town of Buffalo, in Johnson county, Wyoming, without legal justification, they having caused said Ida May Bowman to be forcibly abducted and spirited away from said petitioner. Margaret Bowman, in the city of St. Paul, Minnesota, on or about February 15, 1900, said petitioner being at the time the qualified and acting guardian of said Ida May Bowman, an orphan, and the child of her brother, John J. Bowman, who on his deathbed gave said child into her charge: and that subsequently and within a few days thereafter said petitioner was duly appointed the guardian of said child by the probate court of Ramsey county, state of Minnesota. In obedience to a writ of habeas corpus, the defendants there, John A. Jones and Ella Jones, his wife, brought the child, Ida May Bowman, into the district court of Johnson county, Wyoming, where the testimony of witnesses then present and the depositions of others then absent was heard at great length, and the court found for the petitioner, Margaret Bowman, awarding to her the custody of said child, Ida May Bowman, and gave its judgment to that effect, and for costs. To that judgment plaintiffs in error, John A. Jones and Ella Jones, his wife, duly excepted, and come here on error.

It seems to be necessary and proper to say, to start with, that it is evident throughout this case that most of the difficulties and disagreements have arisen from differences in religious opinions, and as the statutes of this state not only fail to make any distinction as to religious belief, but absolutely prohibit any distinction being made on account thereof, we cannot and will not give such evidence the slightest weight in our decision, which will be an attempt to decide what shall be best for the welfare of the child, Ida May Bowman, independent thereof, as we fully believe we are authorized to do by all the authorities, when not otherwise directed by statute. We say this because in discussing the facts as shown it might, without this statement, appear that this unfortunate condition might have some consideration in our determination, especially since some reputable courts, by reason of local statutes, have considered such differences of religion. The facts appear to be substantially as follows: John J. Bowman, prior to his death on February 5, 1900, had sought to remove the child, Ida May Bowman, from the care, control, and influence of his sister, Margaret Bowman. Evidence of this fact is beyond dispute, and prior to his death he charged his son Oscar to carry out this wish. Immediately after the funeral the petitioner, Margaret H.

Bowman, informed the boy Oscar that if he and the other relatives insisted on interfering with her care and custody of his sister, Ida May Bowman, she would take her away where he would not see her again; and he says that, believing she would keep her word good, and remembering his promise to his father, he took counsel of a witness, produced by deposition, and was told that the court should order otherwise; he had as much right to care for his little sister as had her aunt; and on the 15th day of February he took the child to his mother's sister, and related to her his promise given his father, and the child was brought to Wyoming by another sister of the mother, and he and a younger brother followed; and the plaintiff in error Ella Jones, and her husband, J. A. Jones, are presented and declared to have illegally received the child, and assisted her little brother Oscar in carrying out the wishes of his dead father, as he had promised to do.

On the 16th of February letters of guardianship were issued to Margaret H. Bowman out of the probate court of Ramsey county, Minnesota, but the child had been, or was being, taken out of the state of Minnesota when these letters of guardianship were issued. The father, John J. Bowman, just before his death, had requested one William F. Beck, who was his friend, to act as guardian of his three children, which included the little girl, Ida May; and the little boy Oscar, in his distress, appealed to Mr. Beck, who, on the 14th day of February, 1900, filed his petition to be appointed the guardian of said Ida May Bowman and of her brothers, J. Oscar Bowman and Charles D. Bowman; and the brother Oscar testifies that, relying on this petition, and upon the advice of the attorney, as above recited, he took the child to his aunt, his mother's sister, as aforesaid. A letter from this little boy to his other aunt, the plaintiff in error here, explains her action in receiving the child Ida May Bowman, and is in evidence:

Dear Aunt Ella:—

Papa died Monday morning. We buried him yesterday. Aunt Marguerite had all the money in the house and wouldn't let us telegraph you. I went to work and Chas to school and just got home about half an hour before he died. Just before I went to work Aunt Marguerite went to get breakfast and I was left alone with Papa. He asked me to remember what he had told me about taking care of Ida and said don't let Aunt Marguerite bring her up. You know I do not wish it and Mama wouldn't like her to. I don't know what to do. I must get her away from Aunt Marguerite and am

going to ask Cousin Ida to take care of her. Cousin Eugene can get me a job I think. I haven't made any plans yet but I must have some one else appointed Guardian. I may bring her out there. I wish you were here. for I know mama would like you to have Ida. With love to all I remain.

Your nephew Oscar Bowman.

P. S. Please excuse the pencil as I was in a hurry.

2/8/1900

O. B.

Upon receipt of the above letter, as shown by the evidence, and without information of any action of any court, the plaintiff in error Ella Jones proceeded to the assistance of the boy Oscar, who had already interested his cousin Ida Saunders to take the child Ida May, and save her from being taken where he could never see her again. It is not necessary to recount all that was done. The boy Oscar bravely kept his promise made his father, and, if any further wrong could be done him and his young sister than that already received in this case, it would be for this court to affirm the decision rendered herein, and separate them, which we find the law will not permit us to do.

Margaret H. Bowman, who seeks the custody of this child, is, by her own evidence, without a home, and entirely dependent upon her needle for support; a maiden lady past middle age; and she admits the possibility of her return to Pennsylvania. Upon reaching Wyoming with the child here in controversy, and her brothers Oscar and Charles having followed, plaintiff in error John A. Jones, the husband of Ella Jones, the child's aunt, was duly appointed guardian of the child Ida May Bowman by the district court of Johnson county, Wyoming, and the evidence discloses him to be a man of means, and willing and able to perform the duties thereof. The foregoing statement of facts by no means includes all, but it is sufficient to show that the interest of the child Ida May Bowman should be the sole consideration here. And, while other questions were raised by defendant in error in the brief, it was admitted that the sole question should be that above stated. The trial court seems to have been of the opinion that the action of the probate court in Ramsey county, Minnesota, where Margaret Bowman was appointed guardian of the child Ida May Bowman, precluded the making of the appointment of John A. Jones as her guardian in his court after the child had been brought into the jurisdiction of his court, and at first that question was urged here; but the authorities do not support such a contention.

A leading case in point, and one which

calls attention to many others, is found in *Re Stockman*, 71 Mich. 180, 38 N. W. 876, and in that case the court says, among other things: "Guardians for infants may be appointed by the last will of the parent, instead of by the court, in which case the court will recognize their authority and their control of the ward so long as it is right and proper, and for the best interest of the ward. The powers of a testamentary guardian are just the same precisely as are those of a guardian appointed by the court, and are allowed to be exercised or withheld for the same reasons. Who shall or may be appointed guardian is within the discretion of the court. Relatives of the infant are usually selected, and those nearest of kin are usually preferred when otherwise competent, and as between those entitled the question is to be determined in making the selection is, and always should be, What will be for the best interest of the ward under all the circumstances? It should control everything else." And again, in the same case, the court says: "Comity cannot be considered in a case like this, when the future welfare of the child is the vital question in the case. The good of the child is superior to all other considerations. It is the polar star to guide to the conclusion in all cases of infants, whether the question is raised upon a writ of habeas corpus or in a court of chancery."

The Missouri court of appeals, in the case *Re Delano*, 37 Mo. App. 185, says: "It has become a settled principle in the jurisprudence both of England and America that the interest of the child . . . is the paramount consideration." In *Townsend v. Kendall*, 4 Minn. 412, 77 Am. Dec. 534, Gil. 315, Justice Flandrau says: "When a foreign guardian or anybody else attempts to exercise any restraint over the person of anyone within this state, the writ of habeas corpus or any other appropriate remedy will always be effectual to inquire into the propriety of such attempted restraint, and upon such inquiry the proper court can make such order or judgment as the case may require. If the facts stated in the answer in this case had been interposed as a return to a writ of habeas corpus, and nothing else had been made to appear, there can be very little doubt that they would have been a good answer to a discharge under the writ. The courts of this state have full powers to investigate the whole subject of the guardianship, and may, upon a proper showing, refuse the guardian the custody of his ward, or restore him to such custody." In New York the question is, how much importance should be placed upon foreign judgments where the welfare and interests of children are under consideration; and in the 67 L. R. A.

case of the *People ex rel. Allen v. Allen*, 105 N. Y. 628, 11 N. E. 143, the court says: "We dismiss this appeal for the reason that the courts below, upon a view of all the existing facts relating to the welfare and interests of the infants, exercised their discretion in awarding to the mother the custody of the children, and in so doing gave to the Illinois decree, not the force of an estoppel, or the conclusive effect sometimes due to a judgment, but simply regarded it as a fact or circumstance bearing upon the discretion to be exercised, without dictating or controlling it."

An interesting case, and one in point here, is that of *Woodworth v. Spring*, 4 Allen, 321, and from the opinion of Chief Justice Bigelow we quote: "If the right to the possession and control of the person of the child depended on his domicile, the right of the petitioner to claim the custody of his person would be indisputable. But we are unable to see that the facts that the child was born in another state, and that he has never by an act or election of his own or of his guardian obtained a new home here, have a decisive bearing on the question at issue in the present case. He is now lawfully within the territory, and under the jurisdiction of this commonwealth, and has a right to claim the protection and security which our laws afford to all persons coming within its limits irrespective of their origin or of the place where they may be legally domiciled. Every sovereignty exercises the right of determining the status or condition of persons found within its jurisdiction. The laws of a foreign state cannot be permitted to intervene to affect the personal rights or privileges even of their own citizens while they are residing on the territory and within the jurisdiction of an independent government. Effect may be given by way of comity to such laws by the judicial tribunals of other states and countries; but, *ex proprio vigore*, they cannot have any extraterritorial force or operation. The question whether a person within the jurisdiction of a state can be removed therefrom depends, not on the laws of the place whence he came, or in which he may have his legal domicile, but on his rights and obligations as they are fixed and determined by the laws of the state or country in which he is found." Further on in this same opinion this court says: "An administrator appointed under the laws of a foreign state cannot act as such in this commonwealth. Nor, for like reasons, can a guardian appointed by virtue of the statutes of another state exercise any authority here over the person or property of his ward. His rights and powers are strictly local, and circumscribed by the jurisdiction of the govern-

ment which clothed him with the office. Story, Conf. L. § 499; *Morrell v. Dickey*, 1 Johns. Ch. 153; *Kraft v. Wickcy*, 4 Gill & J. 332, 23 Am. Dec. 569; *Johnstone v. Beattie*, 10 Clark & F. 42, 113, 145. So far, therefore, as the claim of the petitioner to the custody of the child in the present case rests on a supposed rightful authority to control his person in this commonwealth by virtue of his appointment as a guardian in the state of Illinois, it is not supported either on principle or authority. He cannot assert his tutorial power *de jure* in our courts or within our territory. . . . But the decree of the probate court does not deprive this court of the power to adjudicate and determine the question of the proper custody of the child as between a domestic guardian and one appointed in the place of the domicil of the infant. The jurisdiction of this court to decide, on habeas corpus or other proper process, concerning the care and custody of infants, is paramount, and cannot be taken away by any decree of an inferior tribunal. *Com. v. Briggs*, 16 Pick. 203. The result is that neither of the parties to the present proceeding can assert or maintain an absolute right to the permanent care and custody of the infant who is now before the court. But it is for this court to determine, in the exercise of a sound judicial discretion, having regard to the welfare and permanent good of the child as a predominant consideration, to whose custody he shall be committed." While in this case it was admitted by the respective counsel that the consideration that should govern the court is that of the welfare of the child, we are unable to return this case for final determination without references to some of the rulings on that subject, and to some showing that the courts have always held that, where it is possible, a family, or those remaining, should be kept together; and this latter consideration becomes of great importance in the case here under consideration for the reason that the plaintiff in error John A. Jones has shown by undisputed evidence that during the lifetime of John J. Bowman, the father of the child, 67 L. R. A.

he assisted with money in the care of his family; that he has the means to support and educate the child, and is willing to keep the family together, not only because they are the children of his wife's sister, but because it was the wish of their dead father. We will refer to only a few of the authorities in point: *Bennett v. Byrne*, 2 Barb. Ch. 216; *Holley v. Chamberlain*, 1 Redf. 333; *Watson v. Warnock*, 31 Ga. 718; *Albert v. Perry*, 14 N. J. Eq. 540; *Com. v. Addicks*, 5 Binn. 520; *Underhill v. Dennis*, 9 Paige, 202; *English v. English*, 32 N. J. Eq. 738; *Lusk v. Lusk*, 28 Mo. 91; *Com. v. Addicks*, 2 Serg. & R. 174; *Coffee v. Black*, 82 Va. 587; *Taylor v. Jeter*, 33 Ga. 195, 81 Am. Dec. 202; *Warren v. Hofer*, 13 Ind. 167; *Markicell v. Perseles*, 95 Wis. 406, 69 N. W. 798; *Re Doyle*, 16 Mo. App. 159; *Schiltz v. Roenitz*, 86 Wis. 31, 21 L. R. A. 483, 39 Am. St. Rep. 873, 56 N. W. 194; *Oosine v. Horn*, 1 Bradf. 143; *Rust v. Vanocater*, 9 W. Va. 600. But the case which would seem to more than sustain the argument of counsel for plaintiff in error, and appeal to the human feelings of any court, and where the rule that the interests of the child must be found and followed, is that of *Re Bullon*, 28 Kan. 781.

And this court, under the authorities cited and others too numerous to set out (while it may appear that we practically annul an appointment made by the court in Minnesota, not because of its illegality, but because of the interests of the child, under the evidence submitted), believe that we can make a wiser arrangement, and one authorized by law, and direct that this case be remanded to the district court of Johnson county, Wyoming; that the appointment of Margaret Bowman, so far as she has been appointed in this state, be annulled; and that John A. Jones be appointed guardian of Ida May Bowman, subject to the further order of that court; and that the plaintiffs in error, John A. Jones and Ella Jones, have judgment for their costs herein expended.

Corn, Ch. J., and Potter, J., concur.

MINNESOTA SUPREME COURT.

John A. BRASIE, *Appt.*,
v.
MINNEAPOLIS BREWING COMPANY
et al., *Respts.*

(87 Minn. 456.)

- *1. The legal title to property alleged to have been transferred with intent to hinder, delay, and defraud creditors is in the fraudulent grantee, the fraudulent character of the transfer not appearing upon its face; and the title continues in such grantee, notwithstanding a sale of the property by a creditor on execution against the grantor, until the fraud is exposed, and the transfer set aside in some judicial proceeding.
2. The title of a fraudulent grantee is protected by the statute of limitations, and, unless defrauded creditors effect

*Headnotes by BROWN, J.

NOTE.—Effect on legal title of a conveyance of land in fraud of creditors.

- I. Scope of note, 863.
- II. As to creditors.
 - a. Conveyance executed by debtor, 863.
 - b. Land purchased and paid for by debtor, but conveyed to another, 882.
- III. Title of fraudulent grantee as to parties not creditors, 889.
- IV. Title of bona fide purchaser from fraudulent grantee, 891.
- V. Title conveyed by bona fide purchaser to one having knowledge of the fraud, 893.
- VI. When title is in fraudulent grantee as to his creditors, 899.
- VII. Rights of purchaser other than judgment creditor at execution sale, 900.
- VIII. Conclusion, 900.

I. Scope of note.

The discussion of the above subject will be limited strictly to those cases which involve conveyances of real property by a debtor in fraud of his creditors, and will not be extended to cases of fraudulent sales of personal property with a like intent and for the same purpose, although the latter are not infrequently cited and sought to be applied in the attempts by the courts to define the rules governing the former. It will also be confined to creditors, although from necessity some cases will be included in which the question of conveyances fraudulent as to bona fide purchasers has been brought in, to illustrate, either by analogy, or contradistinction. It will also be restricted to those cases which have arisen and been decided at common law and the rules of equity jurisdiction, and under the statute 13 Ellz., chap. 5, and the statutes of similar import of the several states, and no account will be taken of those special statutes of some of the states on the subject, in which, in applying the creditor's remedy for the fraud, the proceeding is as though the legal title was in the fraudulent grantor, when in reality it is not, except as is

a cancellation thereof in some appropriate action brought within six years from the discovery of the fraud, his title becomes absolute and unassailable.

3. The defrauded creditor may cause the property so transferred to be sold on execution against a fraudulent grantor, and then maintain ejectment to recover the possession of the same, but can recover only upon establishing that the transfer was in fact fraudulent as to him; and that question must be tried and determined in accordance with the rules of law, statutory and otherwise, applicable to litigated questions generally. If it appear, either from the pleadings, or from the evidence in cases where the pleadings do not disclose the source of title, and no opportunity is presented to plead the statute, that six years elapsed from the discovery of the fraud before the commencement of the action, his right to have the transfer set aside is barred by the statute of limitations, and he cannot recover. He cannot

stated in the introductory remarks contained in II., a, *infra*.

II. As to creditors.

a. Conveyance executed by debtor.

The question as to what is the effect of a conveyance of land made in fraud of the creditors of the grantor upon the legal title to the land is one which has given rise to a variety of opinion and a large amount of discussion. While the statute 13 Ellz., chap. 5, is generally acknowledged to be the source of judicial decision, not only as to when a conveyance is fraudulent, but as to what effect upon the legal title such a conveyance will have when thus declared fraudulent, yet it is said by nearly every court which has considered the question at all to have been declaratory, and to have done nothing which the common law would not have done without it; and in *Clark v. Douglass*, 62 Pa. 408, *Sharswood, J.*, at page 16, remarks that we must at least receive it as a true and accurate declaration of what the law is, and, as stated by *Swayne, J.*, in *Moore v. Clements* (*Clements v. Nicholson*) 6 Wall. 209, 18 L. ed. 786, that it was remarked by Lord Mansfield in *Cadogan v. Kennett*, 2 Cowp. 432, that the common law, without the statute, would have worked out the same results. Statements substantially to the same effect are made in *Hamilton v. Russell*, 1 Cranch, 300, 2 L. ed. 118; *Meeker v. Wilson*, 1 Gall. 419, Fed. Cas. No. 9,392; by *Spencer Ch. J.*, in *Sands v. Hildreth*, 14 Johns. 493; *Carter v. Castleberry*, 5 Ala. 277; *O'Ferrail v. Simplot*, 4 Iowa, 381; *Rice v. Burnett*, *Speers, Eq.* 579, 42 Am. Dec. 336; *Goshorn v. Snodgrass*, 17 W. Va. 717.

It must be borne in mind that conveyances of land in fraud of creditors are of two kinds or characters. In the one the fraudulent debtor, having the legal title to the land, himself conveys the same to another for the purpose of divesting himself of that title and putting the land beyond the reach of his creditors. Under such circumstances it is believed that the general rule is, that the legal title to the land for all purposes, except the satisfaction of his cred-

avoid the statute by bringing an action in ejectment, instead of an action to remove a cloud from his title.

4. In cases where the creditor levies upon and sells the property on execution, the statute of limitations commences to run from the date of sale, unless it be made to appear that the creditor did not discover the fraud until some later time.

(*Start, Ch. J., dissents.*)

(November 21, 1902.)

APPEAL by plaintiff from an order of the District Court for Wright County denying a new trial after a dismissal of an action brought to recover possession of certain real estate. *Affirmed.*

The facts are stated in the opinion.

itors of their debts, passes from the fraudulent grantor to the fraudulent grantee (it may be here said that there would appear to be no question but that the grantee in such a conveyance must be a participant in the fraud in order to make it fraudulent as to creditors, as, if he is a bona fide purchaser for a valuable consideration, he will take the title free from the claim of the creditors); but that, so far as creditors are concerned, and for the purpose of enabling them to overcome the attempt to defraud them of the payment of their just debts, in the absence of special statutes on the subject, the title still remains in the fraudulent grantor, and may be pursued in the same manner as though the conveyance had not been made. This is not only so, but the creditor is given by equity tribunals relief in rendering the legal title that he or any other purchaser at a legal sale may recover and obtain, clear and free from the encumbrance of the fraudulent conveyance.

The mere rendering and docketing of a judgment do not change the legal title to land of the judgment debtor, whether that land is in his name or has been previously conveyed in fraud of creditors. It merely establishes a lien, which the judgment creditor can reduce to a legal title by the levy of an execution issued upon the judgment and a sale thereunder, and consequent sheriff's deed to the purchaser.

And a sale of land upon an execution issued upon a judgment rendered after the judgment debtor has conveyed his land in fraud of creditors will ordinarily convey to the purchaser at such execution sale the legal title which was originally in the judgment debtor, and which, as to all persons except creditors of the latter, passed to his fraudulent grantee.

And statutes which declare conveyances made in fraud of creditors void as to them operate, not only upon conveyances directly from the debtor, made with such fraudulent intent, but also upon transfers whereby his title and ownership are passed to another for the like dishonest purpose through the agency of a judicial sale. *Lynch v. Burt*, 132 Fed. 417; *Haas v. Haas*, 35 La. Ann. 885; *Decker v. Decker*, 108 N. Y. 128, 15 N. E. 307; *Burt v. C. Gotzian & Co.* 43 C. C. A. 59, 102 Fed. 937; *Watson v. Bonfils*, 53 C. C. A. 535, 116 Fed. 157. See also *Dobson v. Erwin*, 18 N. C. (1 Dev. & B. L.) 569, *infra*, 11. b.

The following are cases of the class mentioned, *i. c.*, where the debtor, having in himself the legal title to the land, conveys the same in fraud of his creditors:

Mr. James C. Tarbox, for appellant:

The statute of limitations—"actions can only be commenced within the periods prescribed in this chapter"—uses the word "actions" in its technical sense.

Baker v. Kelley, 11 Minn. 480, Gil. 358; *Goleher v. Brisbin*, 20 Minn. 453, Gil. 407.

It is always a matter of discretion on the part of the plaintiff whether he will plead his title in general terms or allege the specific links which constitute his chain of title.

Bracket v. Wilkinson, 13 How. Pr. 102; *Wade v. Rusher* 4 Bosw. 537; *Jones v. Cohen*, 82 N. C. 75.

The wording of the statute of limitations—"an action for relief on the ground of fraud"—applies only to an action the ob-

tioned, *i. c.*, where the debtor, having in himself the legal title to the land, conveys the same in fraud of his creditors:

In an action of ejectment, where the plaintiff claimed under a deed from his father, and the defendant claimed that such deed was in fraud of the creditors of the father, and offered in evidence a judgment, *ieri facias*, and sale subsequent to the conveyance, in an action against the grantor in the deed, and that the cause of action originated before the date of the deed, and the land was sold under the *ieri facias* to the party under whom the defendant claimed title, the court instructed the jury that, if the deed was made with intent to hinder, delay, and defraud the creditors of the grantor, the defendant was entitled to recover; and there was a verdict for the defendant. *Middleton v. Sinclair*, 5 Cranch, C. C. 409, Fed. Cas. No. 9,534.

In *Carver v. Castleberry*, 5 Ala. 277, the court said that it was unable to perceive any reason why, if a deed fraudulent as to creditors could be avoided in equity, because the statute of frauds has declared it void, it is not alike void at law.

In *High v. Nelms*, 14 Ala. 350, 48 Am. Dec. 103, the court said that there is no principle better settled than that a person indebted cannot make a valid gift of his property to the prejudice of his creditors, who may, under ordinary circumstances, after having obtained judgment, proceed and sell the property, disregarding the gift. In this case, where it appeared that a father, being indebted at the time, had made a voluntary conveyance of land to a child, such conveyance being void as to existing creditors, a charge of the court that the deed being absolutely void, the sheriff might sell, notwithstanding the fraudulent grantor was not in possession at the time the judgment was obtained, or when the sheriff levied on the land, was affirmed.

A judgment creditor may, at law, proceed to the sale under execution of lands which his debtor has fraudulently aliened; and the purchaser may, in ejectment, recover them of the fraudulent donee. *Flewellen v. Crane*, 58 Ala. 627.

In *Smith v. Cockrell*, 66 Ala. 64, the court said: "If the property of a debtor has been conveyed by him with intent to delay, hinder, and defraud his creditors, it remains, as to his debts, as if no attempt had ever been made to

ject or gravamen of which is relief on the ground of fraud, *e. g.*, the cancelation of a fraudulent conveyance.

Helms v. Green, 105 N. C. 251, 18 Am. St. Rep. 893, 11 S. E. 470; *Potter v. Adams*, 120 Mo. 118, 46 Am. St. Rep. 478, 28 S. W. 490; *Rogers v. Brown*, 61 Mo. 187; *Hunter v. Hunter*, 50 Mo. 445; *Jackson v. Holbrook*, 36 Minn. 494, 1 Am. St. Rep. 683, 32 N. W. 852.

The judgment creditor may rest exclusively upon his rights and remedies at law, without invoking the aid of a court of equity.

Jackson v. Holbrook, 36 Minn. 494, 1 Am. St. Rep. 683, 32 N. W. 852.

If the party has a right to several actions,

convey it. As to creditors, and those claiming under them and in their right, the legal title remains in the judgment debtor until the sale and conveyance by the sheriff, and then it passes to the purchaser. This, because the fraudulent conveyance is treated as a nullity,—as if it had never been. The purchaser's title is legal, or it is nothing. If the debtor's conveyance, in defiance of which he purchased, is fraudulent, then his title acquired at the sheriff's sale is legal, without a semblance of an equitable title entering into it. So, if the debtor's conveyance is not fraudulent, the purchaser has no title, legal or equitable." Approved and followed in *Pettus v. Glover*, 68 Ala. 417.

The lien of a judgment operates and binds, not only the property subject to its mandate, which is in possession of the judgment debtor, or the title to which stands in his name, but it operates equally on all such property, with the title to which he has parted for the purpose of hindering, delaying, and defrauding his creditors, until there is the coming in of a bona fide purchaser, without notice, and for a valuable consideration, from the fraudulent grantee or donee having possession. A conveyance or transfer of the property, though it may be valid between the parties, is invalid—it is void—as to creditors; and they may disregard it entirely, and proceed to levy and sell the property under legal process. *Mathews v. Mobile Mut. Ins. Co.* 75 Ala. 85.

The existence of the right of a judgment creditor at law to proceed to the sale under execution of lands which his debtor has fraudulently aliened does not interfere with the right to resort to a court of equity for the vacation of the fraudulent conveyance, as an obstacle in the way of the full enforcement of the judgment, and a cloud on the title to the property. *Flewellen v. Crane*, 58 Ala. 627.

While creditors may disregard entirely a conveyance made by their debtor in fraud of their rights, and proceed to levy and sell the property under legal process, they may also proceed, in a court of equity, to remove the conveyance or transfer, as an obstacle to the advantageous enforcement of their legal rights; as, whichever is the remedy they elect to pursue, it is but a remedy for the enforcement of the lien of the fieri facias. *Mathews v. Mobile Mut. Ins. Co.* 75 Ala. 85.

In *Rountree v. Marshall* (Ariz.) 59 Pac. 100, the court, in affirming a judgment which de-

clares a conveyance of the property which had been sold to the plaintiff on an execution after a conveyance fraudulent as to the creditors of the grantor, who was the judgment debtor in the execution, had been made, said, in answer to the claim on the part of the transferee that, until the transaction should be attacked for fraud, and such transfer be vacated or set aside, the legal title would be in the transferee, and beyond the reach of legal process against the judgment debtor and grantor, and that, therefore, the levy on and sale of the grantor's title to, and interest in, the property after such deed, and before any proceedings for the cancelation thereof, conveyed nothing to the purchaser at the execution sale,—that, if the transaction was voidable, that doctrine would apply, but that a deed in fraud of the rights of creditors is absolutely void, and conveys no legal interest; and approved the doctrine which it was stated was the rule in California, that under the statute of that state, which was almost identical with that of Arizona, the attempted transfer by a fraudulent grantor was ineffectual to divest him of the legal title, and vest such title in the grantee, and therefore did not place the grantor's title beyond the reach of legal process invoked in aid of a bona fide creditor of such fraudulent grantor, but that, such conveyance being void, a creditor ignoring the ineffectual attempt of the fraudulent grantor to make such transfer, could levy upon and sell the property as if no conveyance had ever been made by the debtor.

Lamb v. Clark, 5 Pick. 193; *Ivey v. Owens*, 28 Ala. 641; *Angell*, Limitations of Actions, 6th ed. § 72; *Stewart v. Thompson*, 32 Cal. 260; *Currier v. Studley*, 159 Mass. 25, 33 N. E. 709; *Amaker v. New*, 33 S. C. 28, 8 L. R. A. 687, 11 S. E. 386.

Messrs. Cobb & Wheelwright, for respondents:

A judgment creditor seeking relief against prior fraudulent conveyances of land has the choice of three remedies: He may sell the debtor's land upon execution, or, secondly, he may bring an action in equity to remove the fraudulent obstruction to the enforcement of his lien, or thirdly, he may, on the return of an execution un-

dered, declare a conveyance of the property which had been sold to the plaintiff on an execution after a conveyance fraudulent as to the creditors of the grantor, who was the judgment debtor in the execution, had been made, said, in answer to the claim on the part of the transferee that, until the transaction should be attacked for fraud, and such transfer be vacated or set aside, the legal title would be in the transferee, and beyond the reach of legal process against the judgment debtor and grantor, and that, therefore, the levy on and sale of the grantor's title to, and interest in, the property after such deed, and before any proceedings for the cancelation thereof, conveyed nothing to the purchaser at the execution sale,—that, if the transaction was voidable, that doctrine would apply, but that a deed in fraud of the rights of creditors is absolutely void, and conveys no legal interest; and approved the doctrine which it was stated was the rule in California, that under the statute of that state, which was almost identical with that of Arizona, the attempted transfer by a fraudulent grantor was ineffectual to divest him of the legal title, and vest such title in the grantee, and therefore did not place the grantor's title beyond the reach of legal process invoked in aid of a bona fide creditor of such fraudulent grantor, but that, such conveyance being void, a creditor ignoring the ineffectual attempt of the fraudulent grantor to make such transfer, could levy upon and sell the property as if no conveyance had ever been made by the debtor.

Under the statutes of California, as construed in *Hager v. Shindler*, 29 Cal. 47, a conveyance of real estate, made in fraud of the creditors of the grantor, passes no title to the grantee, and a sale upon execution issued upon a judgment against the grantor rendered subsequent to the fraudulent conveyance will pass the title to the purchaser at the execution sale. In this case the court said that, in an action to have certain deeds of land executed by a debtor, fraudulent and void as against the plaintiff, a purchaser of the land at an execution sale upon a judgment against the debtor rendered after said fraudulent conveyance, set aside, there was no necessity to allege the insolvency of the judgment debtor; but, without the allegation or proof of that fact, the action might be maintained to set aside and eradicate from the record the fraudulent conveyance as being a cloud upon the title which was in the

satisfied, bring an action in the nature of a creditor's bill, to have the conveyance adjudged fraudulent and void.

Jackson v. Holbrook, 36 Minn. 494, 1 Am. St. Rep. 683, 32 N. W. 852; *Lane v. Innes*, 43 Minn. 137, 45 N. W. 4.

The deed which is claimed to have been fraudulent is not void, but voidable, and stands as a valid conveyance until declared void by some court of competent jurisdiction; so that plaintiff's execution sale in itself confers no title.

Cogel v. Raph, 24 Minn. 190; 14 Am. & Eng. Enc. Law, 2d ed. p. 312; *Merrill v. Dearing*, 47 Minn. 137, 49 N. W. 693; *Stuart v. Lourry*, 49 Minn. 96, 51 N. W. 662; *Freeman v. Brewster*, 70 Minn. 203, 72 N. W. 1068; *Travelers' Ins. Co. v. Walker*, 77

Minn. 440, 80 N. W. 618; *Duxbury v. Boice*, 70 Minn. 113, 72 N. W. 838.

The right of recovery is not based upon any legal title. It is only by the exercise of equitable powers that the court could decree possession to plaintiff. If the court could not exercise such equitable powers in a direct action brought to set aside the deeds, why should it do it in this case where the same powers must be exercised in order to grant to plaintiff the possession which he demands in his complaint.

McMillan v. Cheeney, 30 Minn. 519, 16 N. W. 404.

There was in law a delivery of the deed as against all the world.

Crowley v. C. N. Nelson Lumber Co. 66 Minn. 400, 69 N. W. 321; *Conlan v. Grace*.

plaintiff as the purchaser at the execution sale. That in such a case the plaintiff, by his purchase at the execution sale, is owner in judgment of law; but, though he sues as owner, still he is clothed with the rights of the creditor, and stands in his place so far as may be necessary for the protection of his own title.

In a similar action to remove a cloud upon the title of the purchaser at an execution sale on the ground that the conveyance constituting such cloud was in fraud of the creditors of the grantor, the court, after approving *Hager v. Shindler*, 29 Cal. 47, said, further, that the fraudulent deed was void as to the creditor,—an absolute nullity,—and for this reason was not in his way; and that, after obtaining his sheriff's deed on the sale on the execution, he was in a position to recover possession of the land, notwithstanding the fraudulent conveyance, without first procuring its cancellation in equity; that he could protect himself against it at law, and there was no necessity for going into equity for a remedy. The only substantial remedy to him, requiring relief in equity, was, therefore, that, being upon the record, the void deed was a cloud upon the title to the creditor and those claiming under him, and that that was the real ground of the relief sought in the action. *Stewart v. Thompson*, 32 Cal. 260.

In *Re Beadle*, 5 Sawy. 351, Fed. Cas. No. 1,155, the statement is made by the court that by the law of California it appears to have been settled, ever since the case of *Hager v. Shindler*, 29 Cal. 47, that a conveyance in fraud of creditors may be treated by the judgment creditor as absolutely void *ab initio*, and as if nonexistent. That in that case it was held that the purchaser of land at a sheriff's sale may maintain a bill to set aside and annul as a cloud upon the title a deed of the land given before the judgment by the judgment debtor without consideration and to defraud his creditors; and that that decision had been followed or approved in numerous subsequent cases.

The doctrine of *Hager v. Shindler*, 29 Cal. 47, was also approved in *Bull v. Ford*, 66 Cal. 176, 4 Pac. 1175; *Judson v. Lyford*, 84 Cal. 505, 24 Pac. 286; and *First Nat. Bank v. Maxwell*, 123 Cal. 360, 69 Am. St. Rep. 64, 53 Pac. 980. In the last case the court said that *Re Estes*, 6 Sawy. 459, 3 Fed. 134, 5 Fed. 60, *infra*, appeared to sustain a contrary view; but that, as the point was conclusively settled by 67 L. R. A.

California decisions, it was not necessary to review it.

The purchaser of the undivided interest of one of three tenants in common of a parcel of land conveyed such undivided interest to a son, which conveyance was fraudulent as to his creditors. Thereafter the then three tenants in common (the son and the two other original common tenants) made the same partition among themselves that the law would, and executed each to the other quitclaim deeds to effectuate the same. It was held that a judgment creditor of the father, who had made the conveyance of his undivided interest to his son in fraud of creditors, might treat the partition as legal, as having been made by the defendant, through the agency of the son, by means of his deed, although at the same time insisting that it was void so far forth as it was designed to defraud the defendant's creditors, and of this the defendant had no right to complain. *Staples v. Bradley*, 23 Conn. 167, 60 Am. Dec. 630. The judgment creditor had levied upon the land so set off to the son of the defendant as the property of the latter, and caused the same to be set off to him, the plaintiff and judgment creditor; and this was an action of ejectment brought to recover possession. On the trial the plaintiff had offered evidence to prove that the deed of the defendant to his son was fraudulent and void, as against the creditors of the defendant, of whom the plaintiff was one. To the reception of this evidence the defendant objected, upon the ground that the plaintiff, by the levy of his execution, had acquired no title to the demanded premises, and the trial court had excluded the evidence. The supreme court held that the testimony should have been received, and granted a new trial. It would seem that the effect of the decision was that the plaintiff had, by the levy and extension of his execution, secured such a legal title to the land as would enable him to maintain the ejectment action.

In a voluminous opinion in *Colquitt v. Thomas*, 8 Ga. 258, in considering the effect of what was claimed to be a vendor's lien, the question as to subjecting the land under consideration to a judgment being also under consideration, the court, in stating all that might be proved under the brief issue arising where one claimed real property levied upon by an execution, said: "Prima facie, the property belongs to the defendant at the date of plaintiff's judgment, and

36 Minn. 276, 30 N. W. 880; *Thompson v. Easton*, 31 Minn. 99, 16 N. W. 542.

Brown, J., delivered the opinion of the court:

Action to recover the possession of real estate, which was dismissed on the trial in the court below, and plaintiff appealed from an order denying a new trial.

The complaint alleges substantially the following facts: On December 3, 1888, one Austin Knights was the owner of the real estate in question, and was then indebted to plaintiff in the sum of \$160. That on or about January 1, 1889, he executed and caused to be recorded a deed of the property to Michael Knights, his brother. That the deed was without consideration, and was ex-

ecuted and recorded for the sole purpose of placing the property beyond the reach of the creditors of Austin Knights, and to hinder, delay, and defraud them. Though it was claimed on the argument that the deed was never in fact delivered, the facts stated in the complaint show a delivery, beyond any serious doubt. It is alleged that the deed was executed and recorded pursuant to a conspiracy between the two Knights, and for the purpose of hindering and defrauding creditors. Clearly, they intended the title to pass from one to the other, and the delivery of the deed is sufficiently shown. The complaint further alleges that on the 23d day of May, 1890, in an action brought by plaintiff in the district court of Wright county against Austin Knights, plaintiff

the lien attachés, and the claimant is driven to show whatever he can show, to remove the presumption, and to displace the lien. But if the title to the claimant be older than the date of the judgment, . . . then the plaintiff may proceed to show, notwithstanding that fact, that the property is the property of the defendant in execution, and liable to his judgment. For example, he may show that the conveyance of the property, by the defendant in execution, was with intent to delay, hinder, and defeat him, as a creditor, and that the claimant had notice of such intention, and claim thereby the protection of the statute 13 Elizabeth." The decision is not of particular force upon the subject under consideration, but it would indicate that, in the mind of the judge who wrote the opinion at least, there was such a title in the claimant, which it was necessary to demolish as fraudulent in order to retain the lien of execution and secure the title by a sale under it.

Where an attachment had been issued and levied upon land previously conveyed by the attachment debtor in fraud of his creditors, whenever there has been a final judgment ascertaining the indebtedness, the judgment lien relates back to the date of the levy, upon the attachment, as against the judgment debtor and his fraudulent grantee, or as against anyone purchasing the real estate as the property of the judgment debtor subsequent to the attachment; and the title of the purchaser at a sale under the judgment dates, as against such parties, from the date of the levy of the attachment. *McClellan v. Solomon*, 23 Fla. 437, 11 Am. St. Rep. 381, 2 So. 825.

But in *Gormerly v. Chapman*, 51 Ga. 421, where a judgment creditor had levied upon certain real property which was claimed by another, and in the issue which, under the provisions of the statutes of Georgia, may be raised under such circumstances, the jury had found that the conveyance from the judgment debtor to the claimant was made with intent to delay and defraud his creditors, and that such intention was known to the claimant at the time, the court held that, the conveyance of the land to the claimant being void as to the creditors of the judgment debtor, they had the right to levy on it in satisfaction of their debts, even though the judgment debtor had other land.

An assignment or transfer by a debtor, insolvent at the time, of any kind or character of

property, when any trust or benefit is reserved to the assignor, is fraudulent and void. Ga. Civ. Code, § 2695. Being void, such transfer or assignment may be attacked by a party interested, in either a direct or collateral legal proceeding, when it is sought to be set up. If an assignment or transfer of this character is made to a named trustee with power of sale, an execution of the power conveys no title to the purchaser, and a deed purporting to convey to him any part of the property so transferred is likewise void and the property is subject to the execution of a creditor. *Coleman & B. Co. v. Rice*, 115 Ga. 510, 42 S. E. 5.

As to creditors, a conveyance made in fraud of their rights is absolutely void, and a creditor of the grantor in such a deed may levy upon the land thereby attempted to be conveyed and sell the same, and, after receiving the sheriff's deed, may maintain a suit in equity to have such fraudulent deed set aside as a cloud upon his title. *Gould v. Steinburg*, 84 Ill. 170.

Under the statute of Illinois, in order to render a judgment a lien upon land fraudulently conveyed by a judgment debtor, an execution must be issued on the judgment, and the lands subjected to a sale in payment of the judgment, before an action in equity may be maintained to set aside the fraudulent conveyance; as such suit could not be sustained if the judgment was not a lien upon the land, and no lien would exist unless an execution had been issued within a year. *Wels v. Tierman*, 91 Ill. 27.

Under the statute which provides that fraudulent conveyances shall be held void as against creditors, creditors have the right to treat such conveyances as void, and may levy attachments specially on the land thus fraudulently conveyed as the property of the judgment debtor, the grantor in the fraudulent deed, and such attachments become a lien against the lands with the same effect as if the fraudulent conveyance had never been made; and so, where one creditor of such a fraudulent grantor had thus caused writs of attachments to be levied specially upon the lands sought to be conveyed by the fraudulent deed, and thereafter another creditor recovered judgment against the grantor and caused execution to be issued and levied upon the same lands, and they thereafter filed their bill in equity against the judgment debtor and his grantee, seeking to have the conveyance made by the former set aside as made in fraud

recovered a judgment for the indebtedness due him, which judgment was duly docketed as required by statute. Thereafter an execution was duly issued upon such judgment, and the property in question levied upon, and on April 15, 1893, sold by the sheriff; plaintiff being the purchaser at the sale. It further alleges that on May 31, 1897, Michael Knights, the alleged fraudulent grantee of Austin Knights, conveyed the property to one Carroll; that on February 11, 1899, Carroll conveyed it to defendant in this action; and it also alleges that Carroll and this defendant had notice prior to their purchase of the fraudulent character of the deed from Austin to Michael; that defendant is in possession of the property; and the prayer for relief is that such

possession be awarded to plaintiff. Plaintiff does not, in his demand for relief, ask to have the alleged fraudulent conveyance set aside, or the record thereof canceled, but simply demands judgment for the possession of the premises. This action was commenced September 25, 1899,—more than ten years after the date of the alleged fraudulent conveyance, and more than six years after the sale on execution. The complaint does not allege when plaintiff discovered the alleged fraudulent character of the conveyance from Austin to Michael. The answer of defendant denies that the conveyance was fraudulent; alleges that it was made in good faith; that defendant was a purchaser of the property for a valuable consideration; sets up certain improvements under

of creditors, and to subject the land to sale under their judgments, the attaching creditor, by virtue of the lien thus acquired, obtained a priority over the subsequent judgment creditor; and his claim is entitled to be first satisfied out of the land in question. *McKinney v. Farmers' Nat. Bank*, 104 Ill. 180.

In *Hallorn v. Trum*, 125 Ill. 247, 17 N. E. 823, it was held that, where a debtor has conveyed his land prior to a recovery of judgments against him with a fraudulent intent to defeat the rights of his creditors, there is nothing upon which the lien of such judgments can attach, and no importance is to be attached to the fact that one was rendered prior to the rendition of the other, and, the legal title having passed from the judgment debtor before the rendition of either judgment, by a valid deed as between him and his grantee, the judgments did not become liens on the lands conveyed, in the order of their rendition; and in order, therefore, to determine the priority of liens between the two contesting creditors, the court must look to the proceedings in equity instituted by them to remove the fraudulent conveyance, and subject the lands to the satisfaction of their judgments.

These two cases would seem to indicate that, while a judgment becomes a lien generally on all real property, the title to which is in the judgment debtor, it would not be a lien upon the property which he had, previous to the rendition thereof, conveyed in fraud of creditors; yet an attachment against the specific property thus fraudulently conveyed will in Illinois be treated with the same consideration in favor of the priority of the creditor procuring it as though he had brought an equity action either after a sale of the specific property on execution to set aside the fraudulent deed as a cloud upon his title, or to set aside the deed as to him as fraudulent after the return of an execution *nulla bona*.

In *Talcott v. Grant Wire & Spring Co.* 131 Ill. 248, 23 N. E. 403, the court, in deciding another question, enunciated the doctrine laid down in *Hallorn v. Trum*, 125 Ill. 247, 17 N. E. 823.

The same doctrine was held in *Union Nat. Bank v. Lane*, 177 Ill. 171, 69 Am. St. Rep. 216, 52 N. E. 361, and in that case the court remarked upon the difference in the position of a creditor who simply issued an execution upon his judgment, and the sheriff indorsed a levy

upon the execution and a certificate of such levy was filed for record in the recorder's office but no sale made thereunder, and that of a creditor who had elected to treat the land fraudulently conveyed by his debtor as the property of the latter, levied on it, had it sold, and obtained a sheriff's deed therefor, and then brought his bill to remove the fraudulent conveyance; and said it was not necessary to determine at what step of such proceedings, made effective by the sheriff's deed, the lien would attach, for the reason that in this case the creditor did not pursue this remedy, but, after making the levy, and after another creditor had filed bills to set aside the conveyance, filed its bill.

Where an attachment had been levied upon land which had been previously conveyed by the attachment debtor to another in fraud of his creditors, and the attachment suit had proceeded to judgment, and at a sale under an execution issued upon such judgment another judgment creditor had bid upon the lands an amount sufficient to satisfy both judgments, it was permissible to the judgment creditor, who had made such bid, to decline to complete the bid by payment of the amount thereof, for the reason that the title to the land did not stand in the attachment debtor (and judgment creditor), and such title was not affected by the sale, and there was no actual satisfaction of the judgment in attachment, or that in favor of the judgment creditor making the bid, which would preclude the latter from thereafter proceeding in equity to set aside the fraudulent transfer in order that his execution might be levied on the land. *Scott v. Aultman Co.* 211 Ill. 612, 71 N. E. 1112.

A judgment creditor has a right to sell lands under execution, notwithstanding they may have been fraudulently alienated. Such creditor has a right to treat the fraudulent deed as a nullity, and hold the property to levy and sale under execution the same as if such transfers had not been attempted. *Willard v. Masterson*, 160 Ill. 443, 43 N. E. 771. The court said that in such a case the creditor may treat the debtor as the owner of the property, and pursue his proper remedy at law as if the title was unembarrassed by the pretended deed, and approved and affirmed a statement in *Gallman v. L'errle*, 47 Miss. 131, that the jurisdiction of a court of equity is ample, either before or after a sale under a judgment, to set aside a

the occupying claimant's act; and pleads the statute of limitations. Plaintiff, in reply, puts in issue the new matters alleged in the answer, but does not set forth any facts to obviate defendant's plea of the statute of limitations. No attempt is made to bring the case within any of the exceptions preventing the running of the statute.

At the trial the court dismissed the action, upon defendant's motion, on the ground that, upon the face of the pleadings, plaintiff's cause of action, if any he had, was barred by the statute of limitations, the same not having been commenced within six years after the discovery of the fraud complained of; and this order dismissing the action is the only error complained of by appellant. The position of appellant is that

the question of the statute of limitations has no application to this case. It is insisted that, though the complaint sets out all the facts,—those upon which plaintiff relies to establish his title to the property, and those upon which he relies to impeach defendants' title,—the action is one in ejectment, pure and simple, and that the question whether the conveyance from Austin to Michael Knights was fraudulent, and made for the purpose of hindering and defrauding creditors, and therefore void as to them, is merely incidental to the relief he demands, which he insists may be determined without reference to the statute of limitations.

Where property is transferred by an insolvent debtor for the purpose of placing it beyond the reach of creditors and defrauding

deed made in fraud of creditors,—before sale, in order that the creditors may realize the full value of the property by offering an unembarrassed title to bidders; after sale, so that the clouds which obscure, and which, if permitted to remain, might endanger it, may be put away.

Real property conveyed by a husband pending an action of divorce against him by his wife, in which action he was restrained by an order of the court from conveying such property, all of which was known to the grantee at the time of the conveyance, makes the same fraudulent; and the purchaser at the sale under an execution issued upon a judgment for alimony in the divorce action will take a good title as against the fraudulent grantee. *Frakes v. Brown*, 2 Blackf. 295.

Under the statutes of Indiana providing that a judgment shall be a lien upon real estate and chattels real, liable to execution, and that lands fraudulently conveyed with intent to delay or defraud creditors shall be liable to all judgments and attachments, and to be sold on execution against the debtor, a judgment against one who had made a fraudulent conveyance of his real estate previous to the docketing thereof becomes a lien and charge upon such real estate. *Re Lowe*, 19 Fed. 589.

If the deed of a debtor to his land is actually fraudulent, then his execution creditor may disregard it, and, without attacking it, levy his execution upon and sell it for his debt. As against the fraudulent transferee, the creditor may seize the property as that of the fraudulent debtor; and the title that may be thus acquired is not a mere equity or right to control the legal title, and have the fraudulent sale vacated by an appropriate proceeding, but it is the legal title itself against which the fraudulent transfer is no transfer at all, as the legal title remains in the debtor, as to his creditors, notwithstanding the fraudulent transfer, and the possession of the fraudulent transferee may properly be regarded as that of the debtor; and, where such a judgment creditor has levied his execution previous to the commencement of an action in equity by another judgment creditor, in which action the fraudulent transfer is declared to be such, the purchaser at the execution sale will be given a priority over the plaintiff in the equity action. *Scott v. Scott*, 85 Ky. 385, 3 S. W. 598, 5 S. W. 423.

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A fraudulent deed passes no title, and land fraudulently conveyed by a debtor may be levied upon by his creditor. *Snapp v. Orr*, 4 Ky. L. Rep. 355.

By the statutes of Maine a levy may be made upon the land fraudulently conveyed by a debtor, *i. e.*, land of which the debtor had the legal title before the conveyance, and by another statute all real estate liable to be thus taken in execution may be attached on mesne process; and by such attachment the creditor acquires a lien upon the property which is preserved and perfected by the levy, so as to be good against any intervening conveyance. In *Hall v. Sands*, 52 Me. 355, the court said that the statutes 13 Eliz., chap. 5, and 27 Eliz., chap. 4, although entirely distinct, had often been connected, for the reason that a voluntary conveyance by an insolvent debtor is also presumed to have been fraudulent, with the reservation of a secret trust for his own benefit; and that, such a conveyance being void for one reason as to one class of persons, and void for another reason as to another class, some confusion had resulted in the judicial decisions.

If a debtor had the legal title to land levied upon when the debt was contracted upon which the judgment was rendered, execution issued, and levy made, if a conveyance from the debtor to his wife, and from her to another previous to such judgment, is in fraud of the creditors of the grantor, a creditor thus defrauded may levy his execution on the land fraudulently conveyed, and then proceed to perfect his title by bill in equity. *Wyman v. Fox*, 59 Me. 100; *Wyman v. Richardson*, 62 Me. 293.

A deed fraudulent as to the creditors of the grantor is good as between the parties, but void as against creditors, and, when dealing with the property in behalf of creditors, the law treats it as if no deed had been made; as to them it is no deed at all. And a creditor whose judgment is subsequent to the deed may levy upon and sell the land; and the purchaser takes all that the grantor owned in the property at the time of the conveyance, and is substituted by law in the place of the judgment debtor. *Spindler v. Atkinson*, 3 Md. 409, 56 Am. Dec. 735.

Under the statute of Massachusetts, if an execution on a judgment be levied and extended upon lands the lands are appraised at their true value, and the creditor holds the land in fee, subject to redemption by his debtor in one

them, the defrauded creditor has the election of one of three remedies: First, he may place his demand in judgment, levy upon the property alleged to have been fraudulently transferred, cause the same to be sold under execution, and leave the purchaser at the sale to contest the validity of the fraudulent grantee's title; second, he may bring suit against the grantor, and, upon the recovery of judgment against him, bring an action in equity to remove the alleged fraudulent conveyance as an obstruction to the enforcement of his lien, and await the result of the action before selling the property; or, third, he may, on the return of his writ of execution unsatisfied, bring an action in the nature of a creditors' bill to have the conveyance adjudged fraudulent and void as to his judg-

ment, and in the absence of redemption within that time absolutely forever. *Gore v. Brazler*, 3 Mass. 523, 3 Am. Dec. 182.

In holding that, in order to avoid a deed as made without consideration and fraudulent as to creditors, a creditor of the grantor must not only levy upon the land, but must have the same appraised and extend the execution thereon before he can have a right to a writ of entry as against the fraudulent grantee, the court, in *Leonard v. Bryant*, 2 Cush. 32, said: "If any creditor of the grantor would avoid the deed, as made without consideration, and therefore fraudulent as respects creditors, he must do so by an extent upon the land by a levy duly made, which would avoid such voluntary deed of the debtor." To the same effect, *Foster v. Durant*, 2 Gray, 538.

A judgment creditor may, notwithstanding a conveyance of his real estate by the judgment debtor, made with intent to hinder, delay, or defraud creditors, levy upon and sell the real estate, because as to the creditor, to defraud whom the conveyance is made, it is void. *Campbell v. Jones*, 25 Minn. 155.

A judgment creditor seeking relief against prior fraudulent conveyances of land has the choice of three remedies. He may sell the debtor's land upon execution issued on his judgment, and leave the purchaser to contest the validity of the defendant's title in an action of ejectment; or, secondly, he may bring an action in equity to remove the fraudulent obstruction to the enforcement of his lien by execution, and await the result of the action before selling the property; or, thirdly, he may, on the return of an execution unsatisfied, bring an action in the nature of a creditor's bill, to have the conveyance adjudged fraudulent and void as to his judgment, and the land sold by a receiver or other officer of the court, and the proceeds applied to the satisfaction of the judgment, as in the case of equitable interests the debtor's assets are reached and applied. In the first two classes the creditor will have enforced his judgment at law, and the sale upon execution must necessarily be subject to prior statutory liens. The purchaser in such case succeeds to such title only as the debtor had, treating the debtor's fraudulent transfer as void. As to cases falling within the second class, the object of the equitable suit is to make the legal remedy more effective. In such case no trust is created in respect to the prop-

erty, but the creditor falls back upon his legal remedy, and, instead of bringing his equitable suit before the sale, he may, if necessary, maintain it after sale in the form of an action to remove a cloud from his title. The court said it was not necessary to determine whether, if the proceedings had fallen within the third class above mentioned, and the sale had been made by a receiver, and the senior judgment creditors had not been brought in, the rule would have been otherwise, but that it was held in *Chautauque County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347, that it would not, and that the soundness of the conclusion in that case, that a statutory lien upon real estate cannot be divested by the court in proceedings to which the holder is not a party, can hardly be questioned. *Jackson v. Holbrook*, 36 Minn. 494, 1 Am. St. Rep. 683, 32 N. W. 852.

Just what these cases hold as to where the legal title to land conveyed in fraud of creditors resides, seems to have been the contention between the majority of the court in *BRASIE v. MINNEAPOLIS BREWING COMPANY*, and the dissenting chief justice, the prevailing opinion containing the statement that that court had never held that the act of the creditor in causing the property alleged to have been fraudulently transferred to be levied upon and sold on execution against the fraudulent grantor operated to vest the absolute title to the property in the purchaser at the sale; while the dissenting justice stated that that was exactly what was decided in *Campbell v. Jones* and *Jackson v. Holbrook*.

Under the Mississippi statute which condemns a fraudulent conveyance to be null and void as to the creditor, he has precisely the same extent of right against the property embraced in it as though it had never been made. In effect, the debtor owns the property with the same extent of interest as though he never had conveyed, and the creditor has a lien under his judgment, quite as controlling over the title as though the fraudulent deed had never been executed, and may treat his debtor as owner of the property and may pursue his process for satisfaction as if the title were unembarrassed by the fraudulent deed. *Thomason v. Neeley*, 50 Miss. 310; *Shaw v. Millsaps*, 50 Miss. 380.

In the latter case it was said that a sale of the property under the execution would pass a good title, quite as available as though the fraudulent deed had not been executed.

made in good faith, with honest motives, and for a valuable consideration. The burden was upon plaintiff to prove to the contrary, and, manifestly, until he established that fact, and obtained a judicial determination of it, the legal title to the property remained in the alleged fraudulent grantee. Transfers of property made for the purpose of hindering and defrauding creditors are not absolutely void. They are only voidable, at the election of the creditors defrauded. While the statutes pronounce such transfers void, the word "void," as there used, is construed by all the courts to mean voidable. 14 Am. & Eng. Enc. Law, p. 280, and cases cited. They are valid between the parties, and operate to transfer the title to the grantee, subject to being impeached at the suit

of creditors. *Spooner v. Travelers' Ins. Co.* 76 Minn. 311, 77 Am. St. Rep. 651, 79 N. W. 305; *Hathaway v. Brown*, 22 Minn. 214. The mere election by the creditor to treat the conveyance as fraudulent and void, by levying upon and selling the property under execution, cannot have the effect of canceling or annulling it, as a matter of law. The creditor must procure its cancellation in some judicial proceeding instituted for that purpose. As remarked in *Wait, Fraud. Conv.* § 60: "The seizure of the property on [execution in cases of this kind] subjects the creditor to the peril incident to proving that the transfer was fraudulent." If the creditor fails to do so, the transfer becomes effectual as to all the world. The logical conclusion, therefore, is that *prima facie*

Under the statute of Mississippi which denounces absolute nullity, upon every gift, grant, and conveyance made with intent to hinder, delay, or defraud creditors, so far as a judgment creditor is concerned, a conveyance made in fraud of the rights of creditors is as though the same had never been made and the title is still in the debtor, the fraudulent grantor; so that, notwithstanding that conveyance, the property is open to creditors, and they can reach it as though that deed had never been made. *Pennington v. Seal*, 49 Miss. 518; *Pulliam v. Taylor*, 50 Miss. 551.

Where a judgment debtor has made a fraudulent conveyance, the creditor may sell the property under execution, and afterwards go into chancery and set aside the deed made by his debtor in fraud of creditors, so that the clouds which obscure the title, and which, if permitted to remain, might endanger it, may be put away; or he may bring his action in equity before the sale, in order that he may realize the full value of the property by offering an unembarrassed title to bidders. *Gallman v. Perrie*, 47 Miss. 131; *Partee v. Mathews*, 53 Miss. 140.

In case of a fraudulent conveyance by a judgment debtor he, by force of the statute, remains owner, for the deed is declared by the statute to be utterly void as to creditors; so that the judgment imposes a lien upon the property, and the aid administered in chancery is to put out of the way the embarrassment to the title by reason of the erroneous deed. *Partee v. Mathews*, 53 Miss. 140.

And where a debtor had conveyed lands to one creditor in consideration of his debt to that creditor and an agreement on the part of the latter to convey a certain portion of the land back to the wife and children of the debtor, the court, distinguishing *Carlisle v. Tindall*, 49 Miss. 229, II., b, *infra*, said this came under the head of a fraudulent conveyance by the debtor, but that in the case just mentioned the execution debtor had never had any title to the property attempted to be sold under execution, and it was, for that reason, held not to be vendible thereunder. *Johnson v. Ingram* (Miss.) 9 So. 822.

A deed made in fraud of the rights of the creditors of the grantor is void as to them, and a creditor who has sold the property upon an execution issued upon his judgment, and become the purchaser, may maintain an action against the debtor and his fraudulent grantee 67 L. R. A.

to set aside the conveyance, as the fraud renders the deed absolutely void as to creditors, and the creditor, who has become the purchaser, is entitled to recover the property and its rents as though no such fraudulent deed had ever been made. *Allen v. Berry*, 50 Mo. 90.

Where a debtor had fraudulently conveyed his real property, and a creditor had thereafter obtained judgment against him and levied his execution upon the land, and thereafter another creditor had brought an attachment and levied the same on the same property, and after the levy of such attachment the land was sold upon the execution, the trial court held that a judgment is not a lien upon property fraudulently conveyed prior to its rendition, and that such a transfer is not void, but only voidable as against creditors, and that the levy of the attachment created a superior lien to the supposed lien of a judgment thus rendered, and decreed the title in the attachment creditor, but this was reversed by the supreme court, which held, as it had in former cases, that the judgment was a lien; that, as the conveyance was under the statute absolutely void as to the judgment creditor, the judgment became a lien at the time of its rendition, which was previous to the attachment, and by the levy and sale the judgment creditor took the same title and as of the same time that he would had no such conveyance been made, and therefore his title was superior to that of the attaching creditor. *Slatery v. Jones*, 96 Mo. 216, 9 Am. St. Rep. 344, 8 S. W. 554; *Woodard v. Mastin*, 106 Mo. 324, 17 S. W. 308.

In the last case it was said that the land might be sold as if no such conveyance had ever been made, and the purchaser, upon proof of the fraud, is entitled to a decree vesting the title in him.

Where a debtor holding the legal title to land makes a conveyance thereof in fraud of his creditors, the purchaser at a sheriff's sale made by virtue of a creditor's judgment may sue in ejectment, and in such a suit he may defeat the fraudulent conveyance by proof of its fraudulent character. The fraudulent deed being thus declared void from the beginning, the sheriff's deed carries the title. *Potter v. Adams*, 125 Mo. 118, 46 Am. St. Rep. 478, 28 S. W. 490.

Where a debtor had made a fraudulent conveyance of land, and the creditor had obtained his judgment and sold the property on his execution, and received the sheriff's deed, and

the legal title to property alleged to have been transferred with intent to defraud creditors is in the fraudulent grantee. the fraudulent character of the transfer not appearing on its face; and this continues, notwithstanding a sale of the property by a creditor on execution against the fraudulent grantor, until the fraud is exposed and the transfer set aside. Plaintiff in this action was not, therefore, strictly speaking, the holder of the legal title to the property in question, and could not recover the possession thereof without first obtaining a judicial determination that the transfer was in fact fraudulent and void. Perhaps his contention in this respect would be sound if the invalidity or fraudulent character of the deed appeared upon its face. In that case

no judicial proceedings would be necessary to cancel or set it aside. It would not constitute a cloud upon the title, and plaintiff would be the legal owner and entitled to the possession. But in a case like that at bar, where extrinsic evidence is necessary to show the invalidity of the alleged fraudulent transfer, an action of some nature must be brought, wherein that question may be litigated in the usual way; and that, too, before the title of the fraudulent grantee becomes fully vested by operation of the statute of limitations.

But it is urged that the question may be determined in this action,—one to recover the possession of the property,—and that plaintiff is entitled to prove the fraudulent character of the conveyance, and thus defeat

thereafter had commenced his action to be relieved from the fraudulent conveyance, it was held that the creditor had obtained a full and complete title to the land, and that the trial court had no authority to make a conditional judgment providing that, in case the fraudulent debtor paid the full amount of the plaintiff's claim and costs and charges and expenses, the complaint should be dismissed, and a judgment to that effect was reversed, the court holding that the judgment creditor's title to the land through the sheriff's deed was full, ample, and complete. *Kinealy v. Macklin*, 2 Mo. App. 241.

All a judgment creditor of one who has conveyed his land in fraud of creditors is entitled to is, that his judgment should constitute a lien upon the property of his debtor, and that upon his claim being satisfied his title to the land obtained by sale on execution shall be surrendered. *Smith v. Vreeland*, 16 N. J. Eq. 198, *infra*.

By a statute of New Hampshire it is provided that an execution may be levied and extended upon any real estate of the judgment debtor, and that all such real estate levied upon shall pass by the levy against all persons whatsoever if the levy is recorded on or before the return day of the execution. In *Russell v. Dyer*, 33 N. H. 186, judgments had been recovered against one who had previously transferred the same to another in fraud of his creditors; the transferee had leased the property, and thereafter the judgment creditor levied upon the property upon executions issued upon his judgments, and caused them to be extended and received, and selsin was delivered and accepted thereon. He also caused the right of the judgment debtor to redeem to be sold on one of the executions, and thereafter compelled one holding under a lease from the fraudulent transferee to attorn to him, and received money from such tenant. The action was brought by the fraudulent transferee against the judgment creditor thus holding the land to compel him to pay over the money thus received. In giving judgment for the defendant, the court held that, upon all the provisions of the statute, it was clear that the judgment creditor acquired by the levy an absolute estate of inheritance in the land, subject to the defeasance, and that, while in possession under the levy, he is seised of a freehold, and his estate is as perfect and

complete as if he were the absolute, unqualified owner.

Advancements in the shape of conveyances of land to his children, by one who was liable upon a guaranty for the payment of a judgment against another, are fraudulent in law, and void as against the debt due by the guaranty; and, a judgment having been rendered upon the bond against the father, and an execution issued by virtue thereof, and the premises so fraudulently conveyed sold at auction, the purchaser may successfully maintain ejectment to recover possession of the same. *Jackson ex dem. Van Wyck v. Seward*, 5 Cow. 67.

The judgment in this case was afterwards reversed in 8 Cow. 408, but upon other grounds.

In *Codwise v. Gelston*, 10 Johns. 522, it was held that, where one executes a fraudulent conveyance, and afterwards becomes a bankrupt, a judgment against him intervening the conveyance and bankruptcy will be a lien upon his land, and entitled to a priority over subsequent judgments or liens (the bankruptcy act of Congress makes it a lien ahead of the bankruptcy proceedings), as to hold otherwise would be contrary to the established principles, as to the right of creditors, and operate as a discouragement to the attentive and vigilant creditor.

That fraud in a conveyance of land by a judgment debtor would be proof in an action of ejectment to rebut the defense of title in the defendant, who was the fraudulent grantee in a fraudulent conveyance of the same land, seems to have been conceded by all parties, and taken for granted by the court in *Jackson ex dem. Hooker v. Mather*, 7 Cow. 301. The land had been sold under an execution issued upon a judgment rendered subsequent to the fraudulent conveyance, and the purchaser had taken the sheriff's deed and then brought ejectment to recover the land, and the action was sustained.

Where a father made a conveyance in fraud of creditors to his son; and thereafter one of his creditors recovered judgment for a debt existing at the time of the conveyance, and issued an execution thereon, and sold the land thus fraudulently conveyed, and received a sheriff's deed for the same, and thereafter filed a bill to set aside the conveyance as fraudulent and void, and to obtain possession of the land and premises in question and for an account of the rents and profits thereof,—it was held that the defendants must deliver up the possession

it. The authorities sustain the proposition that the question may be determined in an action of ejectment, but it is clear, upon principle, that it must be tried as all other issues and questions are tried, and determined and judged by the rules of law, statutory and otherwise, applicable generally to litigated questions. In this action plaintiff made the fraudulent character of the transfer, by his complaint, an affirmative issue in the action; and the burden was upon him to establish all the material allegations there set forth, to warrant a recovery in his favor. The situation with respect to the trial of this particular question would be the same, however, if the allegations of the pleadings were general, alleging title in the respective parties in general terms. In that

case no opportunity would be given to plead the statute of limitations (they were pleaded in this case), and advantage could be taken thereof upon the fact appearing from the evidence offered on the trial. 13 Enc. Pl. & Pr. p. 187; *Dreutzer v. Baker*, 60 Wis. 179, 18 N. W. 776; *Emory v. Keighan*, 88 Ill. 482; *Fairbanks v. Long*, 91 Mo. 628, 4 S. W. 499. The authorities are very uniform, wherever the question has been presented, to the effect that the title of a fraudulent grantee is protected by the statute of limitations; and if creditors do not, by proper judicial proceedings, effect the cancellation of his title within the statutory period, it becomes final and conclusive. *Bump, Fraud. Conv.* 571; *Porter v. Cooke*, Mart. & Y. 264; *Reeves v. Dougherty*, 7

of the premises to the complainant. *Mohawk Bank v. Atwater*, 2 Paige, 54.

The opinion is not very luminous on the subject under consideration, but, as the equity action was based upon legal sale under the execution, it would seem as if the effect of it must be practically to decide that such a legal title, so far as the creditor was concerned, remained in the fraudulent grantor as might be levied upon under the judgment.

In *Chautauque County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347, the court of appeals, after stating the equitable remedy which a judgment creditor has for relief in equity against a conveyance of his debtor fraudulent as to creditors, further said: "But no creditor having a statutory lien by judgment can be compelled to take the equitable remedy. He may, if he prefer, stand upon his lien and the means which the law has given him of enforcing it. If his debtor has made a prior fraudulent conveyance, he may, nevertheless, sell upon his execution, and the purchaser will have the right and will take the risk of impeaching such conveyance." Approved and followed in *Bergen v. Carman*, 70 N. Y. 146; *Smith v. Reld*, 134 N. Y. 568, 31 N. E. 1082; *O'Brien v. Browning*, 49 How. Pr. 113; *Erickson v. Quinn*, 15 Abb. Pr. N. S. 168; *Morss v. Purvis*, 5 Thomp. & C. 140.

Where a judgment debtor has conveyed his land in fraud of his creditors, judgment creditors who have not issued executions and sold the title of their judgment debtor to the land are not entitled to distribution in the surplus moneys arising from a sale by a receiver in an action brought by another judgment creditor to set aside the conveyance as fraudulent, where they did not become parties to that action. *Warden v. Browning*, 12 Hun, 497. The respondent in this case was the receiver appointed in the action of *O'Brien v. Browning*, 49 How. Pr. 113, and claimed the surplus moneys arising from a sale of the mortgaged premises under the judgment in that action. The court distinguished *Chautauque County Bank v. Risley*, 19 N. Y. 374, 75 Am. Dec. 347, and said that the judgment creditors could have done here what was done there, but that they did neither of the things that was done in that case, but rested upon a mere docketing of the judgment, and that the creditors here had passive, not active, liens, because they had not adopted any steps to make their liens effective, either by execution or action.

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Where a judgment has been recovered before other creditors have instituted proceedings in equity to set aside a fraudulent conveyance made previous to the rendition of the judgment, nothing in the course or in the result of those equity proceedings can affect the rights of the judgment creditor. *Chautauque County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347; *Shand v. Hanley*, 71 N. Y. 319; *White's Bank v. Farthing*, 101 N. Y. 344, 4 N. E. 734; *Scouton v. Bender*, 3 How. Pr. 185.

Where a debtor has made a fraudulent conveyance of his real estate, a subsequent judgment creditor may proceed to sell under his execution, and the purchaser will have the right to impeach the conveyance, in an action at law to recover the premises. *Bergen v. Snedeker*, 8 Abb. N. C. 50, 79 N. Y. 146, *Reversing* 18 Hun, 335.

That the effect of a judgment is to impress upon the real estate of the judgment debtor a lien, not only as to such as is then actually held by him, but as to any that had been transferred by him in fraud of his creditors, is a proposition which is too firmly fixed by the decisions of the courts of New York to be now questioned. *Hillyer v. Le Roy* (N. Y.) 72 N. E. 237. The court, citing and following *Chautauque County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347, and kindred cases, said that the property of a debtor, which had been transferred by him in fraud of creditors, still remains, as to them, the debtor's property, and the lien of the creditor's judgment attaches to the real estate; and that the judgment creditor may enforce his judgment by a sale of the land under execution, or he may bring an action to remove the obstruction caused by the debtor's fraudulent act, and proceed to enforce his judgment by a sale of the land, unembarrassed by the cloud of the transfer.

A debtor had conveyed his land in fraud of creditors, and thereafter the land had been levied upon and sold upon judgments against him rendered subsequent to the conveyance, and it was held that one having a sheriff's deed of the land upon such sale could not maintain an action to have the fraudulent conveyance brought in and canceled upon the ground of removing a cloud from his title. The reason for the decision was that the purchaser already had the legal title to the land under the sheriff's deed, and that there was no ground for him to come into a court of equity and ask for that

Yerg. 222, 27 Am. Dec. 496; *Blantin v. Whitaker*, 11 Humph. 313; *Lockard v. Nash*, 64 Ala. 385; *Osborne v. Wilkes*, 108 N. C. 651, 13 S. E. 285; *Strutton v. Young*, 15 Ky. L. Rep. 657, 25 S. W. 109. Nor is the fraudulent grantee precluded from invoking the statute by the fact that he is, in law, held as a trustee for the benefit of creditors; for he is so held against his will. *Musselman v. Kent*, 33 Ind. 452; *Bobb v. Woodward*, 50 Mo. 95; *Sims v. Gray*, 93 Iowa, 38, 61 N. W. 171. This court, in *Lane v. Innes*, 43 Minn. 137, 45 N. W. 4, recognized the necessity of bringing an action to cancel a fraudulent conveyance after the sale on execution; for it there said, speaking in reference to the different remedies creditors have in such cases, that a

judgment creditor may bring an action to remove the obstruction caused by a fraudulent conveyance before selling the property, or "he may acquire title by execution sale, and then bring his action." Of necessity, such an action must be brought, or at least the question as to the fraudulent character of the conveyance must be determined, in some proceeding, and in accordance with the rules of law applicable to all controverted questions. So long as it remains undetermined, the legal title to the property remains in the fraudulent grantee, and becomes final and conclusive after the lapse of six years from the discovery of the fraud by creditors. The question as to the fraudulent character of the conveyance is not a mere incidental fact, but a vital and con-

which he already had. *Thigpen v. Pitt*, 54 N. C. (1 Jones, Eq.) 49.

In an action to recover land, where the plaintiff showed the title in a judgment debtor, and an execution issued upon the judgment and levied upon the land in question, and a sale thereunder, and the purchase by the plaintiff; and the defendant showed a conveyance from the judgment debtor to himself previous to the rendering of the judgment,—it was held that the plaintiff might, in reply, prove that the deed offered by the defendant was fraudulent and inoperative. *Helms v. Green*, 103 N. C. 251, 18 Am. St. Rep. 893, 11 S. E. 470.

Where a debtor previous to the rendering of a judgment executed a deed of trust to secure the payment of a certain amount of debts, which deed was fraudulent as to creditors; and the trustee thereunder, by a fraudulent transfer, thereafter sold the lands (and other property) to irresponsible persons for the benefit of the judgment debtor; and, after the return of an execution against property *nulla bona* the judgment creditor secured the arrest of the judgment debtor upon a ca. sa.; and after his arrest the judgment debtor executed another deed of trust to a trustee, in which he conveyed, for the benefit of his creditors, nearly all of the property which he had previously conveyed to the former trustee, and which the latter had pretended to sell under the deed of trust to him.—it was held that the title to the property remained in the judgment debtor notwithstanding his original deed to the first trustee, and that, consequently, he could convey it bona fide to his creditors or to a trustee for them, and that would be good against the judgment creditor if done when he had no lien by execution on it, which was the case here, for the fieri facias had been returned, and the debtor was under arrest on the ca. sa. *King v. Trice*, 38 N. C. (3 Ired. Eq.) 568.

The effect of the statute of North Dakota is that, as to creditors, the title and ownership of the property transferred with intent to delay or defraud creditors remains in the grantor, and is subject to levy and sale on execution at law against him, as fully as though no transfer had been attempted. *Lynch v. Burt*, 132 Fed. 417.

Under the statutes of North Dakota, conveyances made to defraud creditors are void as to them (while valid between the parties) at their election; and the levy of a writ of attachment

upon the property conveyed is deemed to be a declaration by the creditor of his election to treat the conveyance as void. *Salomonson v. Thompson* (N. D.) 101 N. W. 320.

If a debtor alienates land with the intent and for the purpose of defrauding his creditors, such alienation, as against such creditors, is void, and the estate is considered as remaining in the debtor for all purposes beneficial to the creditors. It may be attached if the debtor absconds; it is subject to the lien of a judgment; and is in every way liable to be appropriated to the payment of the creditors in the same manner as if no conveyance had been made. *Barr v. Hatch*, 3 Ohio, 527.

A conveyance from a father to a son in fraud of creditors is to be treated as a nullity, and the lien of a judgment subsequent thereto attaches to the land from the date of its entry, and continues to the day of sale; the consequence of which is that a purchaser at the sheriff's sale takes a title which cannot thereafter be gained by the fraudulent trustee. *Miner v. Warner*, 2 Grant, Cas. 448.

Where land has been conveyed with the intent to hinder, delay, or defraud the creditors of the grantor, if a creditor seeks to recover the estate from the fraudulent grantee, he may levy upon and sell it, if his judgment is against the personal representatives (without notice to the widow and heirs, for they are strangers to the contest), and may maintain ejectment against the one in possession to recover the whole. *Drum v. Painter*, 27 Pa. 148.

Where the owner of land encumbered with liens makes a conveyance which is fraudulent as against creditors, a sheriff's sale, under a judgment subsequently obtained against him, does not disturb the liens existing before the conveyance, and therefore they should not be discharged out of the proceeds of the sale, as what is sold, and what a purchaser obtains at such a sale, is the right which the defrauded creditors had, to contest or avoid the conveyance. *Byrod's Appeal*, 31 Pa. 241; *Fisher's Appeal*, 33 Pa. 294; *Hoffman's Appeal*, 44 Pa. 95.

Where the title of a wife is disputed, and the creditor of the husband has a right to proceed against the property to test her title, the fraudulent concealment of the title of the husband in the name of the wife lies at the bottom of such cases, while on the surface her title may be apparently good; and, where one having a judgment against the husband proceeds to sell

trolling issue between the contending parties.

Gen. Stat. 1894, § 5136, provides that an action for relief on the ground of fraud shall be brought within six years from the discovery of the fraud; and it has been held by this court that an action to set aside a conveyance alleged to have been executed for the purpose of defrauding creditors comes within the meaning of that statute. *McMillan v. Cheeney*, 30 Minn. 519, 16 N. W. 404; *Duxbury v. Boice*, 70 Minn. 113, 72 N. W. 838. The complaint in the case at bar contains no allegations as to when plaintiff discovered the fraud complained of; but, presumably, it was discovered by him at the time of the levy upon the property under his execution, for he now insists that he

then elected to treat the transfer as fraudulent. This being the fact, his right of action to have the conveyance set aside is barred by the lapse of six years from that time. The statute must run from the date of the sale on execution, and not, as suggested by plaintiff's counsel, from the expiration of the period of redemption. Whatever title plaintiff acquired under his execution became vested at the time of sale, subject to being defeated by redemption. *Curriden v. St. Paul & N. P. R. Co.* 50 Minn. 454, 52 N. W. 966. So that, immediately upon the completion of the sale and the execution of the sheriff's certificate, plaintiff was in position to maintain an action of this kind, and the statute must run from that date.

Statutes of limitations, affecting as they

land thus situated, he will not be enjoined in equity at the suit of the husband and wife from levying and selling the land and thereafter contesting the title of the wife. *Winch's Appeal*, 61 Pa. 424.

Where two judgments were recovered against the debtor subsequent to his fraudulent conveyance of land to his wife, it was held that, as the fraudulent conveyance was no conveyance, the judgment first recovered was entitled to the priority in the moneys received from a sale of the lands under an execution issued upon the second judgment. *Jacoby's Appeal*, 67 Pa. 434.

In *Girard Nat. Bank v. Magulre*, 15 Phila. 313, it was held that where a debtor had conveyed his land, which conveyance was fraudulent as to creditors, the remedy of a creditor thereafter obtaining a judgment against the grantor was to issue execution upon the judgment, levy upon the land, and by a venditioni exponsa sell the same, and thereafter he or any purchaser at the sheriff's sale could test the character of the alleged fraudulent conveyance in an action of ejectment; and that a suit in equity would not lie because of this adequate remedy at law.

A sale on a judgment which is a lien upon land prior to the fraudulent conveyance thereof will pass the grantee's title, honest or not, for it takes the title against which the lien was created, and not the changed or vitiated one. A sale on a judgment subsequent to the fraudulent transfer of land passes only the right to contest the grantee's title for fraud; it passes the quantity of interest that was fraudulently conveyed and subject to the same lien,—that is to say, it passes the title of the fraudulent grantee, because it is fraudulent, and its purpose and effect are to take away such title. *Fidler v. John*, 178 Pa. 112, 35 Atl. 976.

Where a judgment creditor seeks to remove a fraudulent encumbrance out of the way of his execution he may, where the judgment is by statute made a lien upon the real estate of the judgment debtor, file his bill as soon as he obtains his judgment, or, where a levy is necessary to establish a lien in his favor, as soon as he obtains his judgment and levy. The reason for this is that equity is resorted to in aid of the law, to enable the creditor to sell the property to better advantage. *McKenna v. Crowley*, 16 R. I. 364, 17 Atl. 354.

The difference between such a case and one where the creditor is seeking to reach some

equitable estate of the debtor which is not liable to a levy and sale under an execution at law is that in the latter he must exhaust his remedy at law by obtaining judgment and getting execution returned *nulla bona* before he can come into a court of equity for the purpose of reaching the equitable estate of the defendant. And, to the same effect, see *Stone v. Westcott*, 18 R. I. 517, 28 Atl. 662.

And in *First Nat. Bank v. Randall*, 20 R. I. 319, 78 Am. St. Rep. 867, 38 Atl. 1035, the court said that the strict application of the rule above stated has been so far relaxed in *McKenna v. Crowley*, 16 R. I. 364, 17 Atl. 354, as to hold that, after a creditor has secured a lien by attachment upon property fraudulently conveyed, and has recovered a judgment against the grantor, upon which execution is to issue, the court in equity has the independent and auxiliary jurisdiction to set aside the conveyance in order to clear away a cloud upon the title, so that the interest of the debtor may be sold to better advantage for both his and his creditor's benefit, the jurisdiction being quite distinct from that of a creditor's bill to reach equitable assets: and that the court there remarked that "it is a levy of the execution giving a lien, and not its return unsatisfied, which is the prerequisite to it."

The court had previously said that in that case it was alleged that the transfer was fraudulent and void as to the creditor, and that, as to such creditor, the debtor retained his interest in the property, notwithstanding the conveyance, and that it could, therefore, be attached in an action at law. The reasoning throughout these cases indicates very clearly that the rule in *Rhode Island* is that, as to the creditor, what remains in the debtor after his conveyance of land in fraud of creditors is the legal title, and not a mere equitable interest.

Where one recovered a judgment for breach of promise of marriage against one who had, previous to the commencement of the suit for such breach of promise, made an agreement for the sale of his land, which was fraudulent as to creditors, she may, notwithstanding such agreement, levy upon and sell the land under an execution upon the judgment, and the purchaser will take a valid legal title under the sheriff's deed. *Lowry v. Pinson*, 2 Ball. L. 324, 23 Am. Dec. 140.

Where a deed is set aside as interfering with the rights of creditors, it is as to those cred-

do legal remedies only, are universally regarded with favor by the courts, as statutes of repose, and are construed liberally. They fix periods within which controversies and disputes with respect to rights and liabilities must be brought to an end, and beyond which courts will not lend their aid to litigants. The courts do not volunteer their enforcement when not insisted upon by the parties, nor refuse to apply them when properly invoked to do so; neither will the courts aid or facilitate parties in their attempt, by "mere strategy in judicial proceedings," or by circuitous route of action, to avoid and escape their consequences. Such statutes are applied alike to all. Yet to adopt the contentions of appellant would result in permitting him to accomplish that

which he could not accomplish in any other form of action, viz., avoid the statute. Had he brought an action direct for the express purpose of procuring a decree of the court canceling the alleged fraudulent conveyance, he could not have maintained it, because of the bar of the statute; and there is no sound logic or reason in permitting him to effect that result in this indirect manner. The cases cited in his behalf from Massachusetts, which seem to sustain him, are illogical, and were, no doubt, influenced to some extent, at least, by the old judicial prejudice against the statute of limitations. The case of *Jackson v. Holbrook*, 36 Minn. 494, 1 Am. St. Rep. 683, 32 N. W. 852, cited and relied upon by plaintiff, is not in point, except that it tends to sustain the position of the

litigant as if it had never existed, and the effect of setting aside the deed is to leave the creditors to enforce their claims and obtain satisfaction according to their legal priorities, as the court will not disturb legal liens. *Gracey v. Davis*, 3 Strobb. Eq. 55, 51 Am. Dec. 663.

An existing creditor who wishes to subject property to the payment of his debt, which has been conveyed by his debtor, by a voluntary deed to another, before judgment obtained, has two remedies, to either of which he may resort, to wit: He may disregard the conveyance as fraudulent and void, and proceed to sell the property under his execution, leaving the validity of the deed to be determined in an action of the purchaser at such sale to recover possession of the land; or he may, by an action on the equity side of the court, have the deed set aside on the ground of fraud, and the land conveyed by it subjected to the payment of his debt. *Amaker v. New*, 33 S. C. 28, 8 L. R. A. 687, 11 S. E. 386.

In *Shepherd v. Woodfolk*, 10 Lea. 593, it was held that where a creditor has acquired a specific lien upon the property, and an obstruction in the form of a fraudulent conveyance by the judgment debtor is interposed, which prevents a sale at a fair valuation, the creditor has a right to come into equity to remove the obstruction that he may obtain a full price for the property; and he must therefore proceed at law until he obtains such lien, in the case of land a judgment alone being commonly sufficient.

A judgment creditor may cause his execution to be levied on land fraudulently conveyed by the debtor, and, if he himself becomes the purchaser at the execution sale, he may then bring his suit to have the fraudulent conveyance set aside and recover the land. *Lynn v. Le Gierse*, 48 Tex. 138.

In some respects a conveyance intended to defraud creditors is not void, but voidable only, at the instance of the creditor. As between the parties to the deed it conveys the legal title, which is good, also, as against the creditor until he pursues his remedy as such creditor, and acquires a lien upon or interest in the land. When he has done this, the deed is void as to him, and may be treated by him in the prosecution of his remedies as creditor as absolutely void in law as well as in equity. And so the essential rights of the parties may be fully and definitely established, and a fraudulent deed as fully and effectually set aside in an action of 67 L. R. A.

ejection by a court of law as upon a bill in a court of equity. *Cleland v. Taylor*, 3 Mich. 201.

In *Trask v. Green*, 9 Mich. 358, it was said that where a debtor has conveyed land for the purpose of defrauding his creditors, the right of creditors to levy and sell rests upon the ground that, the deed being void as to creditors, the legal title, as to them, still remains in the debtor, as if no conveyance had been made; and the land may therefore be sold on execution at law, without invoking the aid of a court of equity; and the purchaser may, if he chooses, try the question of fraud in an action at law. In this case the creditor had issued an attachment, recovered judgment, and an execution had been issued thereon and a levy made upon the lands, and this was a suit in equity to aid of the execution; but this is by virtue of the statute of Michigan, which provides that real estate of a debtor, fraudulently conveyed, shall be subject to the payment of his debts, and may be sold on execution.

In *Messmore v. Huggard*, 46 Mich. 558, 9 N. W. 853, where a judgment creditor had levied his execution upon land upon which there was a previous mortgage, and purchased the land at the execution sale, and taken a deed from the sheriff, it was held that he could not thereafter maintain an action to set aside the mortgage as fraudulent, and that he should have levied his execution and then filed his bill to aid thereof; the reason being that a court of equity would not sanction the action of a judgment creditor, who, with knowledge of a fraudulent mortgage, purchased at a sale under his judgment in competition with others having no knowledge of the fraud, saying "that, if the judgment creditor could bid with the secret assurance that he was to have an unencumbered title, when others must suppose they were buying subject to the mortgage, this assurance gave him an advantage in bidding to the full amount of the mortgage, and practically put competition entirely out of the question."

And in *Cranston v. Smith*, 47 Mich. 189, 10 N. W. 194, it was held that an execution creditor, after levying upon and selling land which had been previously conveyed by a judgment debtor to his wife, could not levy his execution upon such land and purchase the same at the sheriff's sale and thereafter bring an action in equity to set aside the conveyance from the husband to the wife as fraudulent; the same reason being given as in *Messmore v. Huggard*.

defendants. In that case it appeared that an insolvent debtor conveyed his property for the purpose of hindering and defrauding creditors, and that subsequent to the conveyances several judgments were obtained against him upon debts and obligations existing at the time of the conveyance. Some of the junior judgment creditors brought an action to set aside the conveyances as fraudulent, and were successful. They then caused the land to be sold under executions, from which no redemption was ever made, and they subsequently conveyed the title thus acquired to a third person. Thereafter, and within ten years from the entry of his judgment, the plaintiff in the judgment first entered caused an execution to be issued on his judgment, and the property

levied upon and sold, from which the purchaser from the junior judgment creditors redeemed. He then brought that action to recover against the junior judgment creditors for breach of the covenant of quiet enjoyment contained in the deed from them to him. All the court decided in that case was that the senior judgment creditor had the right to proceed as he did,—to cause the land to be sold on execution, without first applying to equity to cancel the alleged fraudulent conveyance. No action was brought by such senior judgment creditor to cancel the conveyance, but his right to do so had not expired at the time of the redemption from his execution sale. The court stated at the close of the opinion that his right to bring such an action did not accrue

46 Mich. 558, 9 N. W. 853, and also, that he prevented any person from bidding against him, as purchasers under the levy made and interest sold could not have moved to have the conveyance declared void, and that he should have filed his bill after the levy and in aid of his execution, so that a fair sale of the premises could have been had.

In *Orendorf v. Budlong*, 12 Fed. 24, the court, reviewing the cases of *Trask v. Green*, 9 Mich. 358; *Maynard v. Hoskins*, 9 Mich. 485; *Messmore v. Huggard*, 46 Mich. 558, 9 N. W. 853; *Cranson v. Smith*, 47 Mich. 189, 10 N. W. 194; and also *Cleland v. Taylor*, 3 Mich. 201,—approved the distinction made by Mr. Justice Cooley in *Messmore v. Huggard*, between the case of an absolute and entire conveyance of the judgment debtor's land fraudulently, and a mortgage of the same which was not absolute, but left an equity of redemption in the judgment debtor; and, conceding and approving that rule, said that it seemed that the case of *Cranson v. Smith*, so far from being in affirmance of it, was a clear departure from it, and that there was no authority which supports the principle announced in that case.

In *Wagner v. Law*, 3 Wash. 500, 15 L. R. A. 784, 28 Am. St. Rep. 56, 28 Pac. 1109, 29 Pac. 927, it was held that a judgment creditor's issuing execution and levying upon and selling land which his judgment debtor has previously conveyed by a deed voidable as to him because of fraud renders the conveyance absolutely void and vests the legal title in the purchaser at the execution sale; and that a purchaser at such sale can maintain a suit to set aside the prior fraudulent conveyance by the execution debtor; and that the judgment creditor, by becoming the purchaser at such sale, does not waive his right to relief in equity. The court said that in Alabama, North Carolina, and Louisiana the other doctrine had been announced by the courts, some of them on general propositions, and others, especially in Louisiana, by reason of the provisions of local statutes; and that *Cranson v. Smith*, 47 Mich. 189, 10 N. W. 194, was a case exactly in point, which holds squarely the opposite doctrine to that held in this case. The court also called attention to the fact that in *Cranson v. Smith*, *Messmore v. Huggard*, 46 Mich. 558, 9 N. W. 853, had been cited as authority, and that on a motion for a rehearing the court had reaffirmed its reliance on that case; but a consideration of the opinion 67 L. R. A.

rendered by Judge Cooley in that case convinced the court that the decision had been misunderstood, or at least misinterpreted, in *Cranson v. Smith*, as that case was not an absolute conveyance, but a mortgage; and that Judge Cooley had distinguished *Messmore v. Huggard*, from *Cleland v. Taylor*, 3 Mich. 202, by saying that, where the judgment debtor had conveyed away his whole interest, any offer to sell on an execution against him necessarily attacked his conveyance, and that the judgment creditor, his grantee, and all persons who should be inclined to become bidders at the sale, would understand it, and all would stand on equality with the judgment creditor in making bids. There would be more force in this reasoning were it not for the fact that Judge Cooley concurred in the judgment in *Cranson v. Smith*.

The court further said that, as between creditor and fraudulent conveyancer, the conveyance is void; and, conceding that it is only voidable, and that something has to be done by the creditor to change it from a voidable into a void conveyance, that something will have been done if the judgment creditor issues execution and levies upon and sells the land by virtue thereof, as the property of the judgment debtor; and, if it was a fraudulent conveyance it then becomes absolutely void, and the legal title and right to the land become vested in the purchaser, and, having such right and title, he has a right to the interposition of a court of equity to remove any cloud that interferes with the free and perfect enjoyment of his rights. *Ibid.*

Thereafter came the case of *Sawtelle v. Weymouth*, 14 Wash. 21, 43 Pac. 1101, in which it appeared that, after a conveyance of community real property by the husband to the wife, a judgment was rendered against the husband upon a community debt existing at the time of the conveyance, and afterwards the wife and her husband conveyed the property in distinct parts to two prior creditors, and an action was brought by the judgment creditor to set aside these conveyances. The court held that the action could not be maintained because the conveyance from the husband to the wife was in form legally sufficient to pass all of the title and interest of the husband to the land; and that, as between the parties, the conveyance was absolute and good as against the grantor, and no interest, legal or equitable, remained in the grantor upon

until his purchase at the execution sale. The statute of limitations, as applied to this particular case, was not there involved, though the court intimates strongly that the statute bars the right to have a transfer of the kind set aside.

This court has never had occasion to pass upon the precise question involved in this action; nor have we ever held that the act of the creditor in causing property alleged to have been fraudulently transferred to be levied upon and sold on execution against the fraudulent grantor, wholly *ex parte* and nonjudicial in its nature, operates *ipso facto* to cancel the alleged fraudulent conveyance, and vest the absolute title to the property in the purchaser at the sale. The farthest we have gone in that direction is

to sanction and approve such proceedings; and the most that can be deduced from the decisions is that the sale in such cases places the creditor or purchaser, as the case may be, in position to attack the conveyance. The result of the decisions is that the creditor may bring an action to set aside the alleged fraudulent conveyance before sale on execution, and then make the sale, or he may make the sale, and then bring the action. In either case he must get rid of the alleged fraudulent conveyance.

Our conclusions from these considerations are that, without regard to the form of the action, the question as to the fraudulent character of a transfer such as that here complained of must be judicially determined within the period covered by the stat-

which a lien of a judgment subsequently rendered against him could attach; that the legal title to the land was in the wife and not in the husband, the judgment debtor, and hence no lien attached to the land as a consequence of the judgment, and the subsequent conveyance by the wife and husband to the creditors prior to any proceedings taken by the judgment creditor attacking the transfer from the husband to the wife was sufficient, and must be upheld.

The combined effect of these two decisions would seem to be that the judgment itself, rendered after the making of a fraudulent conveyance, is ineffectual to change or pass the legal title to the land, but that when the judgment creditor, by virtue of his judgment, levies upon and sells the land, the fraudulent conveyance as to the purchaser becomes absolutely void, and the legal title becomes vested in the purchaser.

In *Preston-Parton Mill. Co. v. Dexter, H. & Co.* 22 Wash. 236, 79 Am. St. Rep. 928, 60 Pac. 412, *Sawtelle v. Weymouth*, 14 Wash. 21, 43 Pac. 1101, was approved, and it was held that a conveyance of land, although fraudulent as to the creditors of the grantor, is yet good between the parties, and passes the legal title, so that a creditor thereafter obtaining a judgment does not thereby acquire any lien on the lands so conveyed, for the reason that no title or interest upon which a judgment can be a lien remains in the grantor after the conveyance.

Judgments are no liens on lands which had been deeded by the judgment debtor before the judgments were obtained, although the deed was in fraud of creditors. *Miller v. Sherry*, 2 Wall. 249, 17 L. ed. 880. In this case the court said that, the legal title having passed from the judgment debtor before its rendition, by a deed valid as between him and his grantee, it could not be a lien on the premises by operation of law.

A judgment is not a lien on lands which the judgment debtor has previously conveyed, though with intent to defraud creditors, under *Sandels & Hill's Dig.* § 4204, which provides that judgments shall be liens on lands of the judgment debtors, and § 3049, which provides for the sale on execution of lands of which the judgment debtor, or any person for his use, is seized in law or equity. *Doster v. Manistee Nat. Bank*, 67 Ark. 325, 48 L. R. A. 334, 77 Am. St. 37 L. R. A.

Rep. 116, 55 S. W. 137; *Parrott v. Crawford* (Ind. Terr.) 82 S. W. 688.

In *Howland v. Knox*, 59 Iowa, 46, 12 N. W. 777, the court made the broad statement that in its opinion the defendant in a judgment has no such interest, equitable or otherwise, in real estate which he has conveyed to defraud his creditors as is the subject of a lien in favor of the judgment creditor.

A judgment obtained by a creditor against his debtor after the latter has made a conveyance fraudulent as to creditors of his real estate is not a lien upon the land; but it may be made a lien thereon by an action in equity, provided the land would have been subject thereto if the title had remained in the debtor. *Joyce v. Perry*, 111 Iowa, 567, 82 N. W. 941.

By the laws of Louisiana, where there has been a judicial sale of the succession by a probate judge, a creditor of the estate, who obtains a judgment, cannot levy an execution upon the property so transferred, upon the ground that the sale was fraudulent and void; but he should first bring an action to set the sale aside. *Ford v. Douglas*, 5 How. 143, 12 L. ed. 89.

Where a conveyance of land is alleged to be fraudulent as to creditors, and the grantee is in possession thereunder, which conveyance is not void upon its face, the question of fraud cannot be inquired into collaterally, by commencing with a seizure; and the complaining creditor must resort to the revocatory action. *Trahan v. McMannus*, 2 La. 209; *Childress v. Allen*, 3 La. 477; *Burland v. Carrollton Bank*, 14 La. 189; *Barbarin v. Saucier*, 5 Mart. N. S. 361; *Kirkland v. New Orleans Gaslight & Bkg. Co.* 1 La. Ann. 300; *Holmes v. Barblin*, 13 La. Ann. 474; *Keller v. Blanchard*, 19 La. Ann. 53; *Collins v. Shaffer*, 20 La. Ann. 41; *Payne v. Graham*, 23 La. Ann. 771; *Currie v. Pierce*, 27 La. Ann. 268; *Theurer v. McGibbon*, 28 La. Ann. 29; *McAdam v. Soria*, 31 La. Ann. 864; *Johnson v. Kingsland & F. Mfg. Co.* 38 La. Ann. 248; *Lawler v. Cosgrove*, 39 La. Ann. 488, 2 So. 34; *Weathers v. Pecot*, 52 La. Ann. 932, 27 So. 538; *Burg v. Rivera*, 105 La. 144, 29 So. 482.

In *Willis v. Scott*, 33 La. Ann. 1026, where immovable property, which had been sold by a conveyance valid on its face, accompanied by a delivery and continuous possession by the transferee as owner, had been seized by a creditor in disregard of the transfer, and such seizure

ute of limitations, or it ripens into full title as against creditors and all others, and that, as it conclusively appears from the pleadings in this action that the plaintiff's right to have the fraudulent conveyance set aside is barred by the statute, the court below rightly dismissed the action, and the order denying a new trial is affirmed.

Start, Ch. J., dissenting:

I dissent for the reason that the majority opinion, in effect, overturns, as it seems to me, well-settled principles which have become rules of property. This action is one at law to recover possession of real estate, and not one in equity for relief on the ground of fraud; or, in other words, it is an action of ejectment, in which the plaintiff stands

had been enjoined by the transferee, it was decided that, where the third person enjoining held under such a conveyance, fraudulent simulation could not be sustained as a defense to an action to enjoin the seizure, but the creditor must resort to a direct action, revocatory, or *en declaration de simulation*; citing most of the authorities above. In the view of the court it would seem that the question as to whether it was a fraudulent simulation was the test as to whether the creditor could seize the property upon the execution without bringing an action for the purpose of having the conveyance set aside. The court, in answer to the claim of the defendant that this was such a case, said that it had examined the authorities referred to by the defendant's counsel, in which the doctrine that in cases of simulation the creditor might seize notwithstanding the apparent transfer, and, if enjoined, might plead and show the simulation on trial of the injunction, and that in all of the cases cited it appeared that the claimant had never had possession, and that it could not find any case distinctly holding that immovable property held under a title, translatable of property, valid on its face, and accompanied by actual delivery and continuous possession and control as owner, could be directly seized by a creditor of the transferrer.

And in *Emswiler v. Burham*, 6 La. Ann. 710, the court said that an action is necessary to annul a real transfer of property, but for a fraudulent purpose simulation does not transfer the property at all, and it is not necessary to annul the mere paper pretense of title. That simulated transfers of property may be made for a lawful purpose, as to give credit to the vendee to enable him to raise money, or other purposes rendering the property liable to third persons, while it is perfectly understood between the parties, that it remains the property of the vendor.

A judgment creditor, who resorts to a direct action to annul an outstanding title made by his debtor to a third person, cannot disregard such title during the pendency of his action, and proceed by seizure and sale of the property. A judgment perpetuating an injunction until the determination of the direct action of nullity will be maintained, although the judgment of nullity has been pronounced in the direct action. *Ulrich v. Duson*, 36 La. Ann. 989.

Where a debtor assumes to convey land to another, who thereafter conveys the same to

upon his legal rights. It is true that the complaint unnecessarily alleges evidentiary facts which are the proof of the plaintiff's title. It appears from such allegations that on December 3, 1888, the plaintiff was a creditor of Austin Knights, who then owned the real estate which is the subject-matter of this action, and who on January 1, 1889, made a fraudulent conveyance thereof to his brother Michael, which was recorded on the same day; that on May 23, 1890, the plaintiff recovered judgment, which was duly docketed on that day, upon his debt against the fraudulent grantor; that execution was issued thereon, and the land sold thereunder to the plaintiff on April 15, 1893, and was never redeemed; and that the defendant brewing company is in possession of the

his wife, but the judgment debtor never loses dominion or control of the property, but the same is at all times physically and really in his possession, a judgment creditor has the right to make a direct seizure of the property as that of his judgment debtor. *Cochrane v. Gilbert*, 41 La. Ann. 735, 6 So. 731.

In holding that the issue of an execution upon a judgment against one who had fraudulently conveyed his land to defeat the rights of his creditors was not necessary before commencing an equity action to set aside such conveyance, the court, in *Dunham v. Cox*, 10 N. J. Eq. 437, 64 Am. Dec. 460, said that when a creditor has established his debt by a judgment, by the statute he acquires a lien upon all the real estate of his debtor to satisfy his debt; and the judgment constitutes a lien upon the land, and there is no necessity of compelling the creditor, as a mere matter of form, to incur the further expense at law of issuing an execution.

In *Cook v. Johnson*, 12 N. J. Eq. 51, 72 Am. Dec. 381, the court said that it was true that a judgment creditor might sell the interest of his judgment debtor in property that he had fraudulently conveyed previous to the judgment "as it now stands with the legal title in the trustee;" but that he was not obliged to sell it with this fraudulent conveyance covering it and run the risk of it being satisfied, as he had a right to have the title cleared up before the sale; and that a court of equity was the only one that could do that.

In *Smith v. Vreeland*, 16 N. J. Eq. 198, the plaintiff had proceeded on the theory that the conveyance made by his judgment debtor was null and void, and had accordingly proceeded to a sale under his execution at law, and had become the purchaser at such sale for a very inadequate price, and in this action he asked the court to declare the previous conveyance fraudulent and thus confirm his title. The defendant was also a judgment creditor, and the court found that the property was sufficient to satisfy both judgments; and it was held that all that the complainant could ask in equity was that his debt should be paid, and that, if his legal rights were more extensive, they must be enforced at law, without the aid of a court of equity, and the fact that the defendant judgment creditor had been in complicity with the judgment debtor and his wife in effecting the fraudulent conveyance did not alter the case, as the legal fraud imputed to him involved no

land through mesne conveyances from the fraudulent grantor, but with full notice of the original fraudulent conveyance. This action was commenced September 25, 1899, and was dismissed by the trial court because the complaint did not state facts constituting a cause of action, in that it did not appear therefrom that the action was brought within six years after the discovery of the fraud. The allegations of the complaint, for the purposes of this appeal, must be taken as true; hence the defendant is not a bona fide purchaser, but stands in the shoes of the original fraudulent grantee, and we must consider the case as if it were between the creditor and such grantee. It may be conceded at the outset that the title of a fraudulent grantee is protected by the

statute of limitations. But if a party has two remedies, and one is barred, it by no means follows that he may not avail himself of the other. If the creditor avails himself of the equitable remedy which he has of bringing an action to set aside a fraudulent conveyance, the limitation is six years from the time he discovers the fraud: but, as I understand the decisions of this court, if he pursues his other remedy, and stands upon his legal rights,—recovers judgment, and seizes and sells the land on execution,—and never brings any equitable action to cancel the fraudulent conveyance, his action of ejectment to recover possession of the land can only be barred by fifteen years' adverse possession. The creditor, although he seizes and sells the land on execution.

moral turpitude. The latter statement was made by the court in view of the particular circumstances of the case which would not apply to every case, but the court was very positive and prompt in declaring that all the complainant could demand was that his judgment should constitute a lien upon the property of his debtor, and that upon that claim being satisfied his title to the property should be surrendered.

The contrary doctrine would seem to prevail in Missouri. *Kinealy v. Macklin*, 2 Mo. App. 241, *supra*.

In *Mulford v. Peterson*, 35 N. J. L. 127, it was contended by the counsel for the defendants that a deed fraudulently made with intent to defraud the creditors of the grantor could not be avoided in a court of law, but that the remedy was exclusively in equity; but the court held that this was not so, that the practice in the circuits had always been to admit evidence of fraud against creditors, in actions of ejectment, to overcome title made under fraudulent deeds of conveyance. That the statute of New Jersey was a re-enactment of the statute 13 Eliz. chap. 5, which made such conveyance "utterly void, frustrate, and of no effect."

Under the provisions of the Oregon Civil Code, providing that from the date of the docketing of a judgment such judgment shall be a lien upon all the real property of the defendant within the county or counties where the same is docketed, or which he may afterwards acquire therein, during the time an execution may issue thereon; and that an execution may be levied upon the real property belonging to the judgment debtor on the day when the judgment is docketed in the county, or at any time thereafter; and that all property, or right, or interest therein of the judgment debtor shall be liable to an execution.—a judgment is not a lien upon land which had been previously conveyed by the judgment debtor to another in fraud of creditors, as the operation of the lien is, by the statute, limited to all the real property of the defendant from the time the judgment was docketed. *Re Estes*, 6 Sawy. 459, 3 Fed. 134, 5 Fed. 60.

In Oregon a conveyance of real property which is fraudulent and void as to creditors nevertheless passes the title to the grantee, so that judgment creditors procuring their judgments after the execution of the fraudulent conveyance obtain no lien upon such real property; but the judgment creditor who first proceeds to

have the fraudulent conveyance set aside will be given priority from the time of bringing his suit for that purpose. *Neal v. Foster*. 36 Fed. 20.

The word "void," in § 2320, Wis. Rev. Stat., relating to fraudulent conveyances of property by debtors, means "voidable." *French Lumbering Co. v. Theriault*, 107 Wis. 627, 51 L. R. A. 910, 81 Am. St. Rep. 856, 83 N. W. 927.

See also cases in VII., *infra*.

b. *Land purchased and paid for by debtor, but conveyed to another.*

The second class of conveyances in fraud of creditors is where land is purchased for a valuable consideration which is paid by the debtor, but, in order to deprive his creditors of their rights, the legal title is taken in the name of another.

The rule at common law was that, if lands were conveyed to one person, the consideration for which was paid by another, a trust resulted in favor of the person who paid the price. But such a trust was not the subject of levy and sale under execution, because no legal title upon which an execution could fasten was in the person who had paid the price. In New York, however, it was held that such a trust was not within the statute of frauds, and by the former statute of uses of that state the interest of the *cestui que trust* could be seized and sold as a legal estate on execution against him. In *Walt v. Day*, 4 Denio, 439, it was held that these rules existed under the present Revised Statutes, but the proposition was denied by the court of chancery in *Brewster v. Power*, 10 Paige, 562, *infra*, 11, b. and in *Garfield v. Hatmaker*, 15 N. Y. 475, where the special and general term had both followed *Walt v. Day*, that decision was overruled by the court of appeals, and it was held that, whenever the statutes of a state had provided, in substance, that when a grant for a valuable consideration shall be made to one person, and the consideration thereof shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall vest in the person named as the alienee in such conveyance, but subject to the further provision that every such conveyance shall be deemed fraudulent as against the creditors, at the time of the person paying the consideration; such a statute abolishes the trust, which, by the rule of the com-

may, if he so elects, resort to equity to secure a cancelation of the fraudulent transfer; but he is not bound to do so. He may take his chances on being able to prove the conveyance fraudulent whenever his title is challenged. He acquires by the execution sale the legal title to the lands, and in an action at law by him to recover possession thereof, or in an action against him if he be in possession, he may, as against the fraudulent grantee and all persons claiming under him with notice, prove that the conveyance to such grantee was fraudulent. He may prove such fact precisely as he may any other fact which is a necessary link in his chain of title, as a matter of strict legal right, without first appealing to a court of equity to set the fraudulent conveyance

aside. See *Tupper v. Thompson*, 26 Minn. 385, 4 N. W. 621; *Furman v. Tenny*, 28 Minn. 77, 9 N. W. 172; *Cumbey v. Lovett*, 76 Minn. 230, 79 N. W. 99. If, however, the pleading of his adversary discloses the source of his alleged title (that is, the fraudulent transfer), the creditor must confess and avoid it by alleging in his answer or reply, as the case may be, the fact that the transfer was fraudulent, and prove such fact as a part of his evidence on the trial. Proving on the trial such fact, which is a necessary link in the creditor's title, must not be confounded with an action to cancel the fraudulent transfer. The conclusion that the legal title passes by the execution sale necessarily follows from the rule, which is well settled in this state, and in nearly

mon law, resulted therefrom to the fraudulent debtor, and it follows, therefore, that in place of that trust and of the common-law principles upon which it depended, the statute has declared a presumption of fraud, and, through the fraud, a resulting trust, not in favor of the debtor, but of the creditor only. There is no interest, legal or equitable, in the debtor, and therefore nothing to which a judgment and execution can attach; but, instead of this, there is a pure trust in favor of the creditor, which the statute impresses upon the legal estate in the hands of the grantee in the conveyance, and which can be enforced in equity only. It results in favor of the creditors, not so as to vest the title in them, or to the extent of the entire property, but only "to the extent that may be necessary to satisfy their just demands." And these words plainly imply that the legal title is not transferred by operation of the statute, either to the person paying the consideration, or to his creditor; but the estate vests in the assignee, and is made subject to the just claims of the creditor.

And in Massachusetts, where formerly, instead of selling the land under an execution issued upon a judgment, the execution was extended upon the land of the judgment debtor until the same was satisfied, and it was formerly held that when any real estate, or right, or interest therein, should be purchased by any debtor, or the purchase money therefor directly or indirectly paid by him, and the title to the same either retained in the vendor, or conveyed to any other person with the design and for the purpose of defrauding a creditor of such debtor, the real estate, or right, or interest therein, of the judgment debtor could not be levied upon by his judgment creditor, and, after the execution had been extended upon the land which had been so paid for by the debtor and the title to which had been fraudulently taken in the name of another, such judgment creditor could not maintain a writ of entry to recover the possession of the land from the grantee in the fraudulent conveyance. This was upon the theory that as to the legal-paper title such as would be subject to levy the judgment debtor clearly had none, as he never was a grantee from anyone having or claiming title to the premises. *Howe v. Bishop*, 3 Met. 26; *Hamilton v. Cone*, 99 Mass. 478. But by a subsequent statute it is provided that the right or interest of such debtor under the circumstances mentioned

may be attached on mesne process, or taken in execution in the same manner and to the same effect as real estate, the legal title to which is in such debtor.

In *Clark v. Chamberlain*, 18 Allen, 257, the court held that the statute mentioned, by its own terms, declares and creates the interest which it empowers the creditor to take, and that to hold that it only applied to lands to which the debtor had a title would render it senseless and absurd; citing *Livermore v. Bouteille*, 11 Gray, 217, 71 Am. Dec. 708; *Mill River Loan Fund Assn. v. Clafin*, 9 Allen, 101.

A statute of Michigan provides that "when a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the assignee in such conveyance, subject only to the provisions of the next section." The next section provides that "every such conveyance shall be presumed fraudulent, as against the creditors of the person paying the consideration, and, when a fraudulent intent is not disproved, a trust shall result in favor of such creditors to the extent that may be necessary to satisfy their just demands." In *Maynard v. Hoskins*, 9 Mich. 435, it was held that the trust here reserved in favor of creditors can only be reached by a bill filed by a judgment creditor after an execution has been taken out and returned, on or after the return day, unsatisfied in whole or in part.

It has not been deemed advisable to go through all the special statutes on the subject in the different states; but it is enough to say that wherever in any state the legislature thereof has arbitrarily condemned an interest which would not otherwise be liable to execution, to such liability by arbitrary law, there the decisions under the Massachusetts statutes will naturally apply, but, where the common-law rule has not been interfered with, or where, as in the case of New York and Michigan, the local statute expressly provides that there shall be no resulting trust in the fraudulent debtor who pays for land and takes the legal title in the name of another, but such a trust shall result to his creditors, such land will not be liable to levy and sale on execution, but the creditor must resort to his action in equity.

In *Gilbert v. Stockman*, 81 Wis. 602, 29 Am. St. Rep. 922, 51 N. W. 1076, 52 N. W. 1045, it

all of the states of the Union having statutes similar to our own (Gen. Stat. 1894, § 4222), that the title of the fraudulent grantee in such cases is, as to the creditor, a nullity, and his judgment a valid lien at law upon the land attempted to be fraudulently conveyed, which may be enforced in the same manner and with precisely the same effect as if there had been no such conveyance. It is true that a fraudulent conveyance is voidable, not void, in that it is good as between the parties to it; and, if the fraudulent grantee conveys the land to a bona fide purchaser before the creditor seizes the land on execution, it would destroy the lien of the judgment, and the title of the purchaser would be good. But as Mr. Freeman, in his work on Judgments,

aptly says: "As against the fraudulent transferee, the creditor may seize the property, whether real or personal, as that of the fraudulent vendor, and may proceed to sell it under execution. The title transferred by such sale is not a mere equity,—not the right to control the legal title, and to have the fraudulent transfer vacated by some appropriate proceeding. It is the legal title itself." 2 Freeman, Judgm. § 350. The effect of a fraudulent transfer of land on the rights of a creditor has never been more clearly or tersely stated than it was by Chief Justice Gilfillan in the opinion of the court in the case of *Campbell v. Jones*, 25 Minn. 155. He said: "That a judgment creditor may, notwithstanding a conveyance of his real estate by the judgment debtor,

was held that, under the statute of Wisconsin, before an action could be maintained to set aside a conveyance made by a debtor of his land to another in fraud of his creditors, an execution must have been issued and returned *nulla bona*. The decision was by a divided court, and seems to have been based upon the theory that there was no real distinction between such a case and one where a debtor not owning real property purchases and pays for land and takes the title in another's name for the purpose of defrauding his creditors. This would seem to be opposed to all the decisions on the subject, as, almost without exception, they make a clear distinction between the two cases for the reason generally given, that, in one case the title is originally in the fraudulent debtor and grantor, and that, while the conveyance as to him and his fraudulent grantee and their privies is good, as to creditors it is absolutely void, and, so far as they are concerned, the title remains in him, and is subject to his debts as though the conveyance had not been made, whereas, in the other case the title never was in the fraudulent debtor; but land which is paid for by him, and taken in the name of another person in fraud of his creditors, is subjected to the claim of the creditor upon the ground that the consideration paid by the fraudulent debtor for the property belonged to the creditor, and should have been used in paying his debt, and therefore the land will be subjected to the same debt. The reasoning of the dissenting opinion appears to be the stronger, and, as is well said there, the majority decision is right in the face of *Eastman v. Schettler*, 13 Wis. 325, *infra*, VII., and is opposed to the reasoning of the Pennsylvania cases and to the decision in *Chautauque County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347.

This case was followed by *French Lumbering Co. v. Theriault*, 107 Wis. 627, 51 L. R. A. 910, 81 Am. St. Rep. 856, 83 N. W. 927, in which it was stated that in *Gilbert v. Stockman*, 81 Wis. 602, 20 Am. St. Rep. 922, 51 N. W. 1076, 52 N. W. 1045, notwithstanding strong judicial opposition, as indicated by the able and exhaustive dissenting opinion, the early view of the law declared in *Hyde v. Chapman*, 33 Wis. 391, was adhered to, and that it, having been undisturbed for twenty-five years or more, should not be changed by a mere judicial declaration, but that the court must follow the maxim, *Stare decisis et non quicquid movere*. Considering the three cases of *Hyde v. Chapman*, *Gilbert v. Stock-*

man, and *French Lumbering Co. v. Theriault*, it may be said that the feature common to all of them is that a judgment against one who has conveyed his property in fraud of his creditors previous to the entry of the judgment is not of itself a lien, but only becomes so when an execution is levied upon the property so conveyed, or is returned unsatisfied, and that not until such execution has been so levied or returned may an action to relieve the land from the conveyance and subject it to the judgment be maintained.

The statutes of Indiana provide that "lands, tenements, and hereditaments, fraudulently conveyed with intent to defeat, delay, or defraud creditors," and such as are "holden by anyone in trust for, or to the use of, another," shall be liable to be sold on execution. In *Tevie v. Doe*, 3 Ind. 129, the court said that, if the land which was the subject of litigation had been contracted to be purchased by the judgment debtor, and nearly all of the purchase money paid by him, and, four days after the rendition of the plaintiff's judgment, the land was conveyed to another party by the procurement of the judgment debtor with intent to defraud the judgment creditor out of his judgment, and the grantee in the deed was a party to the fraud, then, without regard to the question of the payment of the consideration, the land was subject to an execution on the judgment.

Under the Iowa statute in reference to conveyances made in fraud of the rights of creditors, and also in reference to the lien of a judgment, a judgment is a lien upon the real estate of the defendant, by which is meant, all right thereto and interest therein, equitable as well as legal; and the equitable interest of a defendant in land or real estate, is as much subject to execution and sale as a legal interest or estate; and the creditor has his election, in the first instance, to levy upon and sell either; and does not in fact need the aid of a court of equity to enable him to subject the equitable estate to his judgment. If he elects to proceed with his execution and sell the property, he purchases at his own risk whatever interest the defendant may have in the property. And, when he seeks to draw to the equitable interest so purchased the outstanding legal title, if he shall fail he must ordinarily suffer the consequences. The court said that it thought he might, after the judgment, file his bill and have the title set-

made with intent to hinder, delay, or defraud creditors, levy upon and sell the real estate, there is no question. As to the creditor, to defraud whom the conveyance is made, it is void (Gen. Stat. 1878, chap. 41, § 18; Gen. Stat. 1894, § 4222), and is of no effect whatever in the way of passing the title. The title, for the purpose of enabling creditors to enforce their debts against the real estate, still remains in the grantor, as though the conveyance had not been made; and it is equally clear that the creditor who has proceeded to enforce his debt against the real estate, or anyone claiming through such proceedings, may show the conveyance to be void, as against such proceedings, whenever anyone shall claim under such conveyance, and in opposition to the creditor's proceed-

ings, or the title derived through them." The last case cited was approved in *Jackson v. Holbrook*, 36 Minn. 494, 1 Am. St. Rep. 683, 32 N. W. 852, in which it was directly held that the judgment of a creditor, recovered against his debtor who has made a prior fraudulent conveyance of real estate, which is void as to him, is a valid lien at law thereon, and that the creditor may rest exclusively upon his rights and remedies at law, without invoking the aid of a court of equity. This well-settled rule of this court that a creditor cannot be deprived of his legal right to enforce his judgment against the land of his debtor fraudulently conveyed prior to the entry thereof, that his judgment is a legal lien thereon, that the purchaser at the execution sale thereof acquires

titled, before selling, but that he was not bound to settle it in advance, but might sell under his execution, become the purchaser, and if there was no redemption, then file his bill and quiet his title. But the court said further that, when the creditor had thus levied, the person holding the legal or adverse title might, without doubt, file his bill and enjoin the creditor from interfering with his property until the title was settled. *Harrison v. Kramer*, 3 Iowa, 543.

But in *Bridgman v. McKissick*, 15 Iowa, 260, it was held that, where an elder judgment creditor sold the equitable title to real property of his judgment debtor, who had fraudulently taken the legal title to the same in the name of his wife, and a junior judgment creditor had commenced an action alleging the fraudulent conveyance and asking that the title in the wife of the fraudulent debtor, whereby the process of the court had been obstructed, might be removed, and making the elder judgment creditor a party, and claiming a priority over him as he had taken no steps in equity to remove the legal obstruction to the title of such real estate; and the elder judgment creditor answered and filed a cross bill claiming to have acquired a prior right by virtue of his attachment judgment and purchase at the execution sale,—the elder judgment creditor, filing his cross bill as an answer to the plaintiff's equity suit, was subsequent in point of time in the commencement of his chancery proceeding, and that the plaintiffs were entitled to the priority. This was under the provisions of chap. 127 of the Revision of 1860, in relation to equitable actions supplemental to execution. The court said that these provisions had been added to the law since the decision in *Harrison v. Kramer*. In answer to the suggestion, very naturally made after the decision in the above case, that, when it is conceded that a judgment is a lien upon any interest which the debtor may have in real estate, legal or equitable, this concession must determine the question of priority in favor of the oldest lien holder, and change the rule as it exists at common law, in the chancery practice, in regard to the rewards of vigilance,—the court said that, plausible as this proposition would seem, it was nevertheless to be received, at least, with some qualifications; that, in the first place, the general assembly of the state had legislated on the subject, and expressly provided for the

method of reaching the debtor's equities, by an equitable action and attachment, whereby a lien is created in favor of the party instituting such proceeding; that the implication is apparent that, in the judgment of the law-giving power, the lien which the creditor obtains by virtue of his judgment upon some interest or equities other than those which amount to a legal right is not available at law. The court reasoned further, that the elder judgment creditor got nothing by his levy, sheriff's sale, and purchase, as in this case the judgment debtor never had the legal title. He paid the price to an innocent grantor, and, for the purpose of defrauding his creditor, took the title in the name of his wife.

In *Hershy v. Latham*, 42 Ark. 305, a question arose whether, where a debtor in failing circumstances had bought property and had fraudulently taken the title in the name of his wife, he had such an interest as could be reached by the levy of an execution, or whether the creditor would be forced to go into equity to uncover the property; and it was stated that at common law the husband's interest could not be sold under execution, because he never owned the legal title, and to treat the conveyance to the wife as void would leave the title in the wife's grantor, and this would be of no benefit to the creditor; but, as the statute of Arkansas subjects to execution all real estate whereof the defendant, or any person for his use, was seized in law or equity on the day of the rendition of the judgment, or at any time thereafter, the husband, having paid the consideration on it, had an estate in the land by way of a resulting trust, and the wife, who had paid nothing, held the formal legal title, and would have no actual interest, and so the creditor of the husband, who had furnished the purchase money, could take the land in execution through the resulting trust, although, if it were a device to defeat creditors, no court would aid the *cestui que trust* for his own sake.

Stix v. Chaytor, 55 Ark. 116, 17 S. W. 707, approves and follows *Hershy v. Latham*, 42 Ark. 305, and holds, further, that the purchaser at the execution sale will take, "not only the beneficial interest in the lands, but also the legal title."

Where a creditor had seized, under a judgment against his debtor, property originally bought by the judgment debtor and paid for with his money, but the title to which he had caused to be made to a woman who lived with

the legal title thereto, and that he is not bound to pursue his equitable remedy to have the fraudulent transfer set aside, is sustained by the great weight of judicial authority. The following are some of the leading cases in other states which support the rule: *Chautauque County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347; *Bergen v. Carman*, 79 N. Y. 153; *Smith v. Reid*, 134 N. Y. 568, 31 N. E. 1082; *Thomason v. Neeley*, 50 Miss. 310. It has, however, been held by several able courts that the creditor's judgment is not a legal lien on land of a debtor who has made a prior fraudulent conveyance thereof; hence the legal title thereto does not pass to the purchaser by a sale on execution, but simply an equitable title, which gives him the right to control the legal title, and have the fraudulent transfer set aside by a direct equitable action. The leading case in support of this conclusion is *Doster v. Manistee Nat. Bank*, 67 Ark. 325, 48 L. R. A. 334, 77 Am. St.

Rep. 116, 55 S. W. 137. The opinion, which was by a divided court, repudiates the rule that judgments in such cases are valid liens at law, and, after quoting from the opinion in *Jackson v. Holbrook*, contains this statement: "Those states which hold, under statutes similar to ours, that a judgment is a lien upon property fraudulently conveyed prior to its rendition, may very properly and consistently adopt the first of the above-named remedies, to wit, to sell the debtor's land upon execution, and leave the purchaser to contest the validity of the defendant's title in an action of ejectment,"—and then proceeds to criticize the proposition that the judgment is a lien as an egregious fallacy.

The majority of the court in this case, it seems to me, have fallen into the fundamental error of assuming as their premises that the plaintiff's judgment was not a legal lien upon the land attempted to be as to him fraudulently conveyed by his debtor.

him, and she executed and signed a counter letter acknowledging a simulation and that the real title was in the judgment debtor, which letter had been stolen and destroyed by her; and it also appeared that the judgment debtor continued to administer the property, to rent it and collect revenues, and, while he assumed to act as agent of his transferee generally, did not in all cases observe even such precaution,—the court after stating the rule laid down in *Willis v. Scott*, 33 La. Ann. 1020, *supra*, II., a, held that this was a case of pure simulation; that the counter letter, establishing, as it did clearly, the simulation of the transfer, utterly destroyed its effect between the parties, and made it as if it had never been passed, and took away all the reasons which support the general rule laid down in *Willis v. Scott*. *Carter v. Farrell*, 39 La. Ann. 102, 1 So. 270.

An execution upon a judgment having been levied upon the land of the judgment debtor, he furnished the money to his daughter, and she purchased at the sheriff's sale, and the land was conveyed to her. Thereafter another execution creditor of the same judgment debtor levied upon the land and sold the same on his execution. It was held that the first sale, although the sheriff knew nothing about the fraud, was a fraudulent one and conveyed no title, and that the legal title still remained in the judgment debtor, upon which the second judgment creditor might legally, lawfully, and properly levy, and the purchaser on such sale took a good legal title as against one claiming under the fraudulent purchaser at the previous sale. *Dobson v. Erwin*, 18 N. C. (1 Dev. & B. L.) 569.

Where a debtor is entitled to the conveyance of the legal title to land, but abstains from receiving it, under an agreement with the person in possession of it that it shall remain in him in order that it may not be made subject to the payment of existing debts of the debtor, the land may be regarded as conveyed with intent to defraud, and be subject to execution, under the statute providing that "lands fraudulently conveyed with intent to de-

lay or defraud creditors" shall be so subject. *Pennington v. Clifton*, 11 Ind. 162.

By a statute of Missouri it is provided that all real estate whereof the defendant, or any person for his use, was seized at law or in equity, may be subjected to sale on execution, and under this provision the supreme court of that state has held that where a debtor purchased land with his own money, and took the paper title thereto in the name of another in order to defraud his creditors, there was a resulting trust to the debtor in favor of the creditors, which was subject to sale under execution. *Rankin v. Harper*, 23 Mo. 579; *Dunnic v. Coy*, 24 Mo. 167, 69 Am. Dec. 420, 28 Mo. 525, 75 Am. Dec. 133.

In the last case the court said that in *Rankin v. Harper*, 23 Mo. 579, the creditor "obtained a judgment vesting the legal title in him." See also *Eddy v. Baldwin*, 23 Mo. 588; *Herrington v. Herrington*, 27 Mo. 560; *Bobb v. Woodward*, 50 Mo. 95.

Previous to the Revised Statutes, if a person purchased real estate and paid for it with his own means, and took a conveyance of the legal title in the name of another, there was in equity a resulting trust in favor of the one who paid the money, except where it satisfactorily appeared that the purchase was intended as a gift or advancement to the person in whose name the conveyance of the legal title was taken. But such an equitable interest in land, where the legal title was in the person in whose name the conveyance was taken, could not be sold by the sheriff, upon execution against the *cestui que trust*, previous to the statute, 29 Car. II., chap. 2, § 10, which statute was adopted as a part of the law of New York, and continued in force there until the Revised Statutes went into effect, January 1, 1830. By that statute, where the judgment debtor took the whole beneficial interest in the land by virtue of a resulting trust, a sale by virtue of an execution against such debtor operated to vest the legal title in the purchaser, under the sheriff's deed. *Brewster v. Power*, 10 Paige, 562.

Where a judgment debtor pays the purchase

and that, as purchaser at the execution sale, he acquired only an equitable title to the land, the legal title remaining in the fraudulent grantee, which gave him the right to control the legal title by having the transfer set aside by bringing an action to be relieved from the fraud by canceling the fraudulent transfer and vesting the legal title in him. If the premises are correct, it is plain sailing to the conclusion reached. But, unless I have misconceived the decisions of this court, the premises are not correct, for, if the conveyance was fraudulent as against the creditor, the judgment was a lien, and the legal title passed to the plaintiff on the execution sale. The cases cited in the opinion to support the proposition that the creditor must, by a proper judicial proceeding, effect a cancellation of the fraudulent transfer before he can acquire the legal title, are not, if I have read them correctly, in point. All of them, save one, were actions in equity to cancel such a transfer, or

to charge the fraudulent grantee as a trustee; and it was correctly held that such actions were for relief on the ground of fraud, and must be brought within the time limited after discovering the fraud. The excepted case was an action of ejectment, and it was rightly held that the creditor's title was barred by adverse possession of the land by the fraudulent grantee. The case of *McMillan v. Cheeney*, 30 Minn. 519, 16 N. W. 404, cited by defendants' counsel, is clearly not in point, for that was a case where the legal title to real property was obtained by the alleged fraud of the grantee, and the grantor had no remedy except an action for relief on account of the fraud. Such is not this case. It may be that the rule adopted by the majority of the court is wiser, more logical and just, than the old rule established by this court; but, if a change is to be made, it ought not to be by a retroactive decision which may cloud, if not unsettle, titles to real estate.

money for land, and has the title thereto taken in the name of a third person to whom it is claimed he is indebted, the question of the validity of the transaction depends upon that fact. If the relation of debtor and creditor in fact exists the conveyance will be good, but if it does not then the deed will be considered to have been made in fraud and hindrance of creditors, and such an interest will result to a judgment creditor as may be seized and sold on execution within the statute. *Arnot v. Beadle*, 111 & D. Supp. 181.

This would appear not to be in line with *Garfield v. Hatmaker*, 13 N. Y. 475, *supra*, and so must be overruled by that case.

By the Pennsylvania statute of fraudulent conveyances a purchase by one indebted, in the name of a natural child, being intended to hinder and delay creditors, the title is, as against the creditors, utterly void, and a purchaser at a sheriff's sale under a subsequent judgment and execution against the father will take a good title. *Kimmel v. McRight*, 2 Pa. St. 38.

An insolvent debtor having a bond for title of land surrendered it and procured the party from whom he was entitled to execute a deed to his children. Under the statutes existing at the time of the decision in *Russell v. Stinson*, 3 Hayw. 1, the insolvent debtor had such a use as was then liable to execution. *Shute v. Harder*, 1 Yerg. 3, 24 Am. Dec. 427; *Smith v. Gray*, 1 Humph. 401, 34 Am. Dec. 664; *Thomas v. Walker*, 6 Humph. 93.

Where a judgment creditor had levied, upon an entry of land made by the judgment debtor, who thereafter assigned the plat and certificate to his son, who assigned the same to his sisters, in whose name, before the levy a conveyance was taken, and after the levy and order of sale they sold to another defendant, all parties having notice of the facts in the case; and the land was thereafter sold by virtue of the execution,—in an action by the judgment creditor to have his title perfected, it was held that, by his purchase, he acquired an equitable title, and, he having thereafter died, the purchaser from the sisters holding the legal

title held the same as trustee to the successors of the judgment creditor. *Burrow v. Smith*, 2 Sneed, 566.

It would seem as though the rule in Tennessee was changed by the act of 1847, § 191, which was substantially re-enacted in the Code, §§ 2990, 2996; and that, since the passage of that act, where lands are purchased by a debtor, and he procures the title to be taken in the name of his children with intent to defraud his creditors, he has no such title in the land as is subject to sale by execution at law. *Smith v. Hinson*, 4 Heisk. 250.

In *Dockray v. Mason*, 48 Me. 178, the court said that, under the Maine statute, a wife holding an estate conveyed to her by another, resulting from the payment of the consideration by her husband, held the same in trust, and the same was to be taken as his property in payment of his debts contracted before the purchase; and that, when a creditor cannot effectually reach real estate which is equitably that of the debtor, by reason of a fraud committed by the debtor and those who may hold the legal title, courts of equity will aid the creditor to enable him to obtain payment when the legal remedies have proved inadequate.

Where the owner of land previous to contracting a debt, and when, so far as appeared, he was free from debt, conveyed the land to another, and at an agreed price which was its full value, the purchaser giving his promissory note for the agreed price, the wife of the grantor joining in the conveyance; and thereafter, after the creditor's debt had been contracted and he had commenced an action against the husband and attached the real estate on mesne process, the transferee of the husband conveyed the land to the wife and received from her his note, upon which nothing had been paid, it was held that, though there was no evidence that the husband had given the purchaser of his land the note taken by him on the conveyance to the wife before the debt on which the levy was made was contracted, and therefore payment for the conveyance to the wife must be deemed to have been made with the husband's funds, still the creditor could not

acquire title by his levy so as to enable him to maintain an action for the possession of the property, because neither the legal title, nor any remains of it, were in his debtor when the debt was contracted or when the attachment and levy was made; as it had passed from him by a bona fide conveyance before the debt to the plaintiff was contracted, and he had no more interest or estate in it than as if he had never owned it. And if the plaintiff desired to hold it in the hands of the wife, as having been paid for out of the husband's property, he must pursue his remedy in equity. *Webster v. Folsom*, 58 Me. 230.

Where a debtor purchases and pays for land, and procures the conveyance to be taken for his benefit in the name of another, while such a transaction is void as to creditors and may be declared so, it can only be done in equity, and is founded on a different principle from that which arises where the estate was once in the debtor, which is the right in equity to follow the funds of the debtor. Simply to set aside the conveyance in the last instance would leave the title in the original vendor, which would not serve the creditor's purpose at all; and so, after such fraudulent conveyance, the judgment debtor has no such title or interest in the land as can be sold on execution. *Gowing v. Rich*, 23 N. C. (1 Ired. L.) 553. To the same effect, *Rhem v. Tull*, 35 N. C. (13 Ired. L.) 57; *Page v. Goodman*, 43 N. C. (8 Ired. Eq.) 16; *Parris v. Thompson*, 46 N. C. (1 Jones, L.) 57; *Jimmerson v. Duncan*, 45 N. C. (3 Jones, L.) 537; *Gentry v. Harper*, 55 N. C. (2 Jones, Eq.) 177; *Wall v. Fairley*, 73 N. C. 464.

And in *Harrison v. Hollis*, 2 Nott & M'C. 578, it was held that where one purchased and paid for the land in question, but procured the title to be made to his son; and thereafter a creditor of the father obtained a judgment against him, and had the lands sold as his property, and purchased and took the sheriff's title for the same, and permitted his judgment debtor to live on the land as his tenant; and thereafter the son died, but previous to his death a judgment was recovered against him, and after his death the land was sold as his property to satisfy that judgment,—in an action by the purchaser at the last sale of trespass to try the title to the land it was held that the plaintiff should recover, as, it being an action at law, the defense of a resulting trust could not be interposed, as such a question belongs exclusively to a court of equity. To the same effect, *Bauskett v. Holsonback*, 2 Rich. L. 624.

Where a debtor in insolvent circumstances purchases real property, and procures the title to be taken in his minor son's name, there is no such legal title in such debtor as that a judgment creditor can levy upon the land and sell the same, and, if the same is attempted, the purchaser at such a sale will take no title to the land. *Smith v. Ingles*, 2 Or. 43.

In Mississippi the statute includes only those conveyances made by the debtor in fraud of his creditors, and where the land is purchased by and with the funds of the debtor, and the title is taken in the name of another, the debtor has no title which can be sold under execution, and a purchaser at such sale cannot maintain ejectment of a bill to cancel the outstanding fraudulent legal title. *Carllie v. Tindall*, 49 Miss. 229; *Ferguson v. Bobo*, 54 Miss. 121.
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Where a debtor purchased land, and took the deed in the name of his wife to prevent his creditors from subjecting the property to the payment of their claims against him, the legal title is not in him, and a sale of the land under an execution issued upon a judgment against such debtor will pass no title. *Haggerty v. Nixon*, 26 N. J. Eq. 42.

Where a debtor purchased and paid for land, and, for the purpose of defrauding his creditors, procured the title to be made to his father; and judgments were afterwards obtained against the debtor, and under them executions issued and levied upon the land, a purchaser at a sale upon such executions took no title to the land, as the only remedy of the judgment creditors in such case is an action in the nature of a bill in equity to subject the land to the payment of their debts. *Everett v. Raby*, 104 N. C. 479, 17 Am. St. Rep. 685, 10 S. E. 526.

Where a debtor purchased and paid for land, and caused it to be conveyed to his wife for the purpose of defrauding his creditors, he had no interest therein to which the lien of a judgment could attach, or which could be sold under an execution, the reason being that where land is purchased and paid for by one person, but conveyed to another, a trust results in favor of the person who paid the price; but it is a mere equitable interest, and cannot be seized or sold on execution. *Silver v. Lee*, 38 Or. 508, 63 Pac. 882.

In *Buck v. Gilson*, 37 Vt. 653, although the action was for a quantity of hay, yet the court, after saying that, in order to enable the plaintiff to maintain the action, he must have a title to the premises upon which the alleged trespass was committed, and that his title to the hay sued for depended upon his title to the land, said further, that in this case the land had been purchased and conveyed solely to the wife, so that the legal title was in her and not in the husband; but it was claimed that a part of the purchase money was paid in a note given by the husband. The court, after holding that this fact did not constitute in him an interest, continued: "But, if this were otherwise, and it were shown that he paid the whole consideration, and the deed was taken to his wife for the purpose of keeping it out of the reach of his creditors, the plaintiff did not, by his levy, acquire the legal title so that he could maintain either ejectment or trespass *quare clausum* upon it. If the defendant was the real owner of the land, and the title held by his wife was merely in trust for him, his interest was liable to be taken by his creditors by levy. But a levy and set-off of his equitable estate would convey to the creditor only the equitable estate, and the proper course must be taken to obtain the legal title, before an action at law can be supported upon the title."

A father had paid for a parcel of government land, and, being indebted, had taken the patent in the name of his infant son. The court said: "Here the infant, though the legal title was cast upon him by the fraudulent conduct of his father, had no right to the land against a creditor, or purchaser" from his father. *Elhott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488.

Where one made a purchase of land, advanced the purchase money, and caused the conveyance to be made to his minor sons with intent to place the land beyond the reach of

his creditors, the legal title is in the sons, and, while it is so, the equitable title of the father cannot be conveyed by a sale by virtue of an execution issued upon a judgment against him; as the statute of Oregon, which provides "that a judgment shall be a lien on real property of the judgment debtor . . . owned by him," intended to make a judgment a lien on the legal title of real property, and not on some hidden title, which could only be brought to light and made available by the extraordinary powers and proceedings of a court of equity. *Smith v. Ingles*, 2 Or. 43.

In an action to set aside as fraudulent a conveyance of land purchased by two debtors, but conveyed, at their suggestion, to their sons, who took and received the conveyance, and took possession of the property as trustees of their fathers, and for their sole interest, benefit, and behoof, the grantees in the conveyance paying nothing, where it was claimed that the conveyance so made and received was with the intent to cheat and defraud the creditors of the fathers, the court, in stating the case, said that the plaintiff had levied his execution upon the lands as their property, and thus become vested with all their equitable rights; "and that he comes into this court in order to obtain the legal title." The action was sustained, and the view of the court—or, at least, of the judge writing the opinion—was, that the whole transaction up to that point left in the plaintiff only an equitable title, and that the effect of the action would be to secure in him the legal title. *Botsford v. Beers*, 11 Conn. 369.

Where a person conveyed to a wife premises the consideration of which was paid by the husband, and the wife mortgaged the premises to another to secure the payment of a sum of money, a judgment previously recovered against the husband is not a lien upon the premises prior to the mortgage, as the title to those premises was not in the husband at any time, and the mortgage therefore became a valid lien on that property before the commencement of a creditor's suit to satisfy such judgment out of such property because of the fact that, the consideration of the land having been paid by the husband, the transaction was in fraud of his creditors. *Reynolds v. Park*, 5 Lans. 149.

Where a debtor having an equitable title to real estate procures the legal title to be transferred to another, judgment creditors of the debtor cannot levy upon the property as a legal estate in their debtor. All that they could do in such case would be to sue out their execution; and, upon its being returned *nulla bona*, on the institution of an equitable suit, an equitable lien in preference to other creditors would be created in favor of the plaintiff's right on any fund which might be found to arise from the fraudulent purchase. *Hartshorn v. Eames*, 31 Me. 93.

Where one who was insolvent and indebted furnished the consideration for the purchase of land, and procured the deed to be made to his wife with a fraudulent intent as to his creditors, and thereafter the wife in making a loan from a building and loan association mortgaged the land to the latter, the association having no notice of the fraud or indebtedness of the insolvent husband, but advancing its money in good faith to the wife upon the mortgage, such mortgage will not be held invalid at the suit of the creditors of the husband, as the title to the land embraced in the mortgage

to the association was in the wife, and it did not appear that the name of the husband appeared anywhere in the chain of title. *Allen v. Riddle* (Ala.) 37 So. 680.

In *Jefferson v. Morton*, 2 Wms.' Saund. 11, a note states: "At the common law, if one man was seised of the legal estate . . . in trust for another, . . . against whom a judgment had been obtained these lands were not liable to execution upon the judgment;" citing *Co. Litt. 374b*. But the same was changed by the statute of frauds, 29 Car. II., chap. 3, § 10.

III. Title of fraudulent grantee as to parties not creditors.

The general rule is that a conveyance made for the purpose of defrauding the creditors of the grantor is good, not only as between the parties thereto and their privies, but as to everyone, except the creditors defrauded thereby; and that, except as to them, the legal title in the grantee is perfect.

Where a husband had made a conveyance of his real estate to his wife, which was afterwards adjudged to be fraudulent; and thereafter in a local court she had obtained a decree against him that he execute to her a mortgage on the same real estate, which he did, and she procured the same to be recorded, and by the local law the mortgage took effect from the date of the recordation of the same; and thereafter the conveyance by the husband to the wife was adjudicated to be fraudulent,—the wife took no title or lien by virtue of her mortgage, as, from the date of the fraudulent deed from her husband to her until the decree setting the same aside as fraudulent, the property stood in her name, and was hers to all the world except the creditors of her husband. *Clafin v. Lisso*, 27 Fed. 420.

A conveyance from a husband to his wife, without consideration and in fraud of creditors, is not absolutely void, but only voidable as to creditors. As between the parties, the conveyance is absolute and good as against the grantor, and no interest, legal or equitable, remains in the grantor upon which a lien of the judgment subsequently rendered can attach. *Sawtelle v. Weymouth*, 14 Wash. 21, 43 Pac. 1101.

The decision in *Sawtelle v. Weymouth*, 14 Wash. 21, 43 Pac. 1101, was afterwards accepted by the Federal district court as conclusive in a suit instituted by the United States against the owners of a tract of land for its condemnation for government uses, where a party had intervened claiming to be a judgment creditor of the former owner, who had conveyed the lands, as the intervener claimed, fraudulently, to those claiming the present title, the court saying that, the question being whether, under the laws of Washington, a mere equitable interest in real estate becomes impressed with the lien of the judgment against the owner of such equitable interests, that being concluded by the decision of the supreme court of the state in *Sawtelle v. Weymouth*, they must hold that it does not. *United States v. Eisenbeis*, 88 Fed. 4.

In *Bell v. Wilson*, 52 Ark. 171, 5 L. R. A. 370, 12 S. W. 328, which was an action of ejectment to recover land, plaintiff claiming under a sheriff's deed given upon a sale of the land upon execution under a judgment against the

person who was the common source of title, it appeared that the judgment defendant had conveyed the lands described in the sheriff's deed, eleven years prior to the rendition of the judgment, to her grandson, under whom the defendant claimed. It also appeared that, in a suit by another person, a creditor of the person who was the common source of title, the conveyance aforesaid was a fraud upon the rights of such creditor, and the deed was in that action set aside and the lands ordered to be sold to pay his debt. It was held that the plaintiff in this case, being a stranger to that suit, took nothing by the decree, and could build no estoppel against the title of the grantee in the conveyance from the common source of title or his grantee, upon it. That the conveyance was good between the parties and against all the world except the creditors of the person who was the common source of title, who were in position to attack it for fraud. And that the decree showing that the deed had been adjudged a fraud upon the rights of another creditor in a suit in which the plaintiff in this action was not a party, did not prove that the conveyance was a fraud on his rights.

In *Harris v. Taylor*, 15 Cal. 348, the court, after deciding that the allegations of a petition which sought to reach certain funds, the proceeds of real property which had been sold in partition, claiming that the petitioner was a creditor of plaintiff's vendor, and seeking to defeat the conveyance to the plaintiff on the ground of fraud, were insufficient, said, as a reason therefor, that the conveyance, however fraudulent as to creditors, was valid as between the parties, and that no one could impeach it without showing that he had been injured by it.

In elucidating the rule in regard to a fraudulent transfer of personal property, the court, in *Lowry v. Orr*, 6 Ill. 70, made the statement that a deed made to defraud creditors will be binding between the parties, and yet liable to be avoided, so far as it may be intended to defeat the just demands of others.

And in *Ward v. Enders*, 29 Ill. 519, the court, in modifying a decree declaring the conveyance in that case to be void generally, said that the judgment should be confined to the parties to the bill, and the decree was therefore erroneous, as such conveyances were not utterly void; and that such was the true construction of the Illinois statute on the subject, which declared that such conveyances should be deemed and taken only as against the persons, their heirs, etc., or assigns, whose debts, etc., should, by such devices, be in any wise disturbed, hindered, delayed, or defrauded, as clearly and utterly void.

The statute 13 Eliz. chap. 5, is not in derogation of the common law. On the contrary, it is either declaratory of the common law, or an enlargement of its principles; and the statute of Indiana has not changed the law upon the subject, and contains nothing inconsistent with the principle of the common law,—that a conveyance, void as to creditors, may be binding on the parties. *Findley v. Cooley*, 1 Blackf. 262.

The court, in *Edwards v. Haverstick*, 53 Ind. 348, said: "It is firmly settled by repeated decisions in this state that a contract for the sale or conveyance of property, to hinder or delay creditors, is illegal as to creditors only. 67 L. R. A.

As between the parties, and as to all others than creditors, it is legal and valid, and can be enforced in all of its terms as any other contract." The foregoing language was quoted and approved in *Etter v. Anderson*, 84 Ind. 333.

A conveyance fraudulent as to creditors is valid as between grantor and grantee. *Trent v. Edmonds*, 32 Ind. App. 432, 70 N. E. 169.

Where one conveys land to his wife in fraud of creditors, and the wife afterwards dies, the husband cannot, in an action by him against the heir of the wife to quiet what he claims as his title, set up the claim that his wife holds the title to the land in trust for him, and that he is entitled as beneficial owner,—particularly where the deed recites a valuable consideration. *Hays v. Marsh*, 123 Iowa, 81, 98 N. W. 604.

The provision of § 1, art. 1, chap. 44, Ky. Gen. Stat., that "every gift, conveyance, . . . or transfer of . . . any estate, real or personal, . . . made with the intent to delay, hinder, or defraud creditors, purchasers, or other persons, . . . shall be void as against such creditors, purchasers, and other persons," does not declare such gifts, conveyances, etc., void for any and all purposes, but only as against creditors, purchasers, or other persons, who may be delayed, hindered, or defrauded. As between the grantor and grantee, such gifts or conveyances are valid. Also, such gifts or conveyances are valid as against all persons who do not come within the category mentioned in that section of the statute. *Dorsey v. Phillips*, 84 Ky. 420, 1 S. W. 687.

The general rule is, that all executed contracts tainted with fraud are binding upon the immediate parties, for, after the contract is executed, it is blinding, as the law will not relieve either party, no matter how great may be the hardship to which he shall have submitted himself; and this rule, in *Noble v. Noble*, 28 Ark. 317, was applied to a conveyance of lands in fraud of the rights of creditors.

A conveyance of real estate, fraudulent as to creditors, is nevertheless valid against the grantor and his heirs, and the land will constitute no part of his estate at his death, and his representatives cannot have it set aside; and a conveyance under an order of the county court to sell the land for the debts of the fraudulent deceased grantor will convey no title. *George v. Williamson*, 26 Mo. 190, 72 Am. Dec. 203.

Where the wife joins with her husband in a fraudulent conveyance to delay and hinder creditors from collecting their debts, her right to dower in the property is extinguished, although the conveyance is declared void as to creditors. *Manhattan Co. v. Evertson*, 6 Paige, 465.

In an action by a judgment creditor against a vendor and vendee in a conveyance for a valuable consideration, where a fraudulent intent is established, all the judgment that the plaintiff is entitled to is a sale of the lot and the payment to him of the amount of his judgment, interest, and costs, as, if the conveyance between the vendor and vendee is valid, there is nothing to warrant a judgment declaring the same null and void as to everyone. *Orr v. Gilmore*, 7 Lans. 345.

A deed from a judgment debtor to another,

if fraudulent, is not void, but voidable only, at the election of creditors, and is valid between the parties to it. *Van Wyck v. Baker*, 10 Hun, 39.

A conveyance of land, made with intent to hinder, delay, or defraud creditors, is good against every interest except that intended to be hindered, delayed, or defrauded. *Drum v. Painter*, 27 Pa. 148.

It is well settled that a fraudulent conveyance is good between the parties; only persons whom the transaction tended to defraud have standing in court to avoid it; as against all other persons, the deed vests a good title in the grantee. Prior lien creditors, or prior creditors assenting thereto, and subsequent creditors whom the debtor did not intend to defraud, are not defrauded by such a deed, and have no standing to impeach it. *Henderson v. Henderson*, 133 Pa. 399, 19 Am. St. Rep. 650, 19 Atl. 424.

In *Irwin v. Hess*, 12 Pa. Super. Ct. 163, the court, in holding that the heirs of one who in his lifetime had conveyed land in fraud of his creditors were not necessary parties to an action to set aside the conveyance, said the conveyance of the decedent to his son was good as against himself and his heirs, and bad only as against creditors.

In *Pratt v. Cox*, 22 Gratt. 330, the court said that, though the deeds from the debtor to another, and from him to the children of his grantor, may have been designed to hinder and delay the creditors of the latter; and though the latter deed was wholly voluntary as to the grantees therein,—yet that, as between the parties, it must be held that both were valid, and that the deed from the first grantee to the children vests in them the legal title to and absolute property in the lands therein, subject, only, to the claims of the prior creditors of the original grantor.

In *Hopkins v. Webb*, 9 Humph. 519, the court, in holding that the defendant was not in condition to question the plaintiff's title as being by the conveyance fraudulent as to creditors, said that, under the statute of Tennessee, as well as under 13 Eliz., which contains the same provisions, conveyances in fraud of creditors were utterly void only as against the person or persons injured by them,—that is, only as against the creditor or subsequent purchaser; and that as to all other persons they are good and valid conveyances.

A conveyance fraudulent as to creditors is good as between the fraudulent grantor and grantee, and all the creditors can claim is that the hindrance of that conveyance shall be removed out of their way, and that the property of their debtor, thereby conveyed, to the extent of their claims against him, shall be applied to the payment of those claims. *Ellington v. Moore*, 4 Va. Law Reg. 608.

Where a father conveyed land to his son, an infant, for the purpose of defrauding his creditors, and thereafter the son, being still a minor, reconveyed to his father, a purchaser and grantee of the father, in an action against him by the son to recover the possession of the land, claiming that his conveyance to his father was void on account of his infancy, may show, in defense of his title, that the original deed from the father to the son was made in fraud of the former's creditors. *Starr v. Wright*, 20 Ohio St. 97.

A conveyance of lands, made in fraud of

creditors, will convey all of the interests and title of the grantor, and is good against the grantor and everyone holding under or in privity with him; and a subsequent conveyance of the land by such fraudulent grantor will not convey to the subsequent grantee any right or interest, legal or equitable, in the land as against the original fraudulent grantee, or his transferee. *Poling v. Williams* (W. Va.) 46 S. E. 704.

Inasmuch as the grantor in a conveyance made by him in fraud of creditors cannot complain of the same, or have it set aside for that reason, neither can his heirs at law, as they stand in his shoes, and have no rights which he did not have. When he died, such rights as he then had, and no more, passed to them. *Neal v. Neal*, 28 Ky. L. Rep. 962, 82 S. W. 981.

While, as a general rule, courts of equity will not decree a specific performance of a promise made by a fraudulent grantee to reconvey property to a grantor who has conveyed it to such grantee to cheat, hinder, and delay his creditors, and will not interpose for the relief of a party who is engaged in a fraudulent transaction, yet, there are exceptions to this rule, one of which is that when a party suing, though *particeps criminis*, is not *in pari delicto* with the adverse party. *Hutchinson v. Park* (Ark.) 82 S. W. 843.

And so where a merchant advised and procured an illiterate negro to convey his land to him, the merchant, in order to defeat a claim then in suit against the grantor, promising to reconvey after the creditor had been disposed of, such a state of affairs would furnish the fraudulent grantor a perfect defense to an action of ejectment brought by the fraudulent grantee. *Ibid.*

See *Splindler v. Atkinson*, 3 Md. 409, 56 Am. Dec. 755, *supra*, II., a; *Doster v. Manistee Nat. Bank*, 67 Ark. 323, 48 L. R. A. 334, 77 Am. St. Rep. 116, 55 S. W. 137, and *Neal v. Gregory*, 19 Fla. 356, *infra*, IV.

IV. Title of bona fide purchaser, from fraudulent grantee.

The question as to the validity of a transfer by the fraudulent grantee of a conveyance made in fraud of the creditors of his grantor to an innocent and bona fide purchaser for value, and the character of the title which the latter would take by such a transfer under the statute of Elizabeth, chap. 5, while hardly the subject of consideration in England, in this country early became the subject of a discussion as animated as able, and participated in by some of the most noted judicial minds of the period. Its result and the subsequent confirmation of it by later decisions appear from the following cases.

In *Wilson's Case*, Godb. 161, it is stated that it was admitted without contradiction that, if judgment in an action of debt be given against a lessee for years, and he afterwards aliens his term, and after the year the plaintiff sues forth a scire facias and has execution, the term is not liable to the execution, if the assignment was made bona fide. It is also stated that the chief justice said that, if a lessee for years assigns his term by fraud to defeat the execution, and his assignee assigns the same over unto another bona fide, in the hands of the second assignee it is not liable to execution.

In *Prodgers v. Langham*, *Sid. pt. 1, p. 133*, it is stated that it was agreed by the court that, "if one made feoffment fraudulently, whose feoffee made feoffment for a valuable consideration, and then the first feoffer entered and made feoffment for a valuable consideration, the feoffee of the first feoffee would hold the land, and not the feoffee of the first feoffer for, as the estate of the first feoffee was fraudulent in its creation and voidable, still, as he enfeoffed another for a valuable consideration, that one would be preferred before the latter;" and that this was adjudged latterly upon argument in that court.

In *Hallfax Joint Stock Bkg. Co. v. Gledhill* [1891] 1 Ch. 31, 60 L. J. Ch. N. S. 181, 63 L. T. N. S. 623, 39 Week. Rep. 104, Kay, J., after stating what was said in May's Treatise on the statute of Elizabeth, to the effect that the fraudulent deed, being good against the grantor, and only void against creditors, is practically not void, but voidable, at their suit; and that, consequently, a purchaser for value of an interest under the deed can successfully resist any attempt to avoid it,—further said: "It seems to me impossible to say that the right of creditors under the statute of 13 Eliz., chap. 5, is an equity, if that is the learned author's meaning. A court of equity does not avoid the deed in a suit by such creditors, but merely declares, if it is proved fraudulent, that it is void against them by the statute. The real question is, whether a subsequent purchaser for value of an interest under the settlement without notice has his purchase protected by § 5. If he has, it does not matter whether it was a legal, or merely an equitable, interest. If he has not, then, as the creditors' rights are under a positive enactment that the deed is void against them, their claim is not equitable, but legal." The judge proceeded to say, further, that it seemed strange that there should be no direct decision to the effect, and that he had not been able to find a case in which creditors have prevailed against such a purchaser.

There is no doubt of the dearth of English cases on the subject, but the judge in the last case either overlooked the two immediately preceding ones, or deemed them not decisions, but only an admission or concession.

This rule was approved and followed, and the very language used, in *Prodgers v. Langham*, adopted in *Price v. Junkin*, 4 Watts, 85, 28 Am. Dec. 685, in which case the court further said: "This doctrine is elucidated and confirmed in the case of *Anderson v. Roberts*, 18 Johns. 515, 9 Am. Dec. 235, in which it is shown that the statutory enactments (generally more unyielding in their construction than the common law) fully protect such purchasers, as well against creditors as subsequent purchasers."

In the first decision in this country upon the question as to whether the grantee in a conveyance of land which was fraudulent as to the creditors of the grantor, such grantee having notice, took title to such land under the statute 13 Eliz., chap. 5,—that is to say, such a title as he could convey to a bona fide purchaser thereof for value,—the majority of the court held that he obtained no such title by the fraudulent conveyance, and that, as to the creditors of the grantor therein, the title still remained in the latter, and that even a bona fide purchaser for value from the fraudulent transferee would get no title. The fraudulent title in the case was based upon a fraudulent judgment and execution, but it seemed to be conceded that it could make no difference in principle whether the title of the bona fide purchaser was through a fraudulent judgment, or a fraudulent grant, and the judge writing the principal opinion for the majority said that he should, as more simple, consider the case as resting upon a fraudulent grant. The reasoning of the judge who delivered the principal opinion was that, under the statutes of Connecticut declaring all fraudulent conveyances or judgments designed to defeat the recovery of debts utterly void as to creditors, and inflicting heavy penalties on the parties to such fraudulent conveyances, etc., who claimed them to be fair, or alien, with an exception of the purchaser who bought bona fide, on good consideration, and without design of fraud, the bona fide purchaser there mentioned referred only to the purchaser from a fraudulent grantor, and in no way applied to a bona fide purchaser from a fraudulent grantee. And he further stated that the object of 13 Elizabeth, and also of the statute of Connecticut, was solely the protection of the creditor; and that, to effect this, all fraudulent conveyances to defeat recovery of his debts were, as to him, utterly void, and to all other purposes good; that nothing was left in the grantor, except the power to convey to a creditor; that he could make no other second conveyance, even to a bona fide purchaser. The fraudulent purchaser received the estate subject to the lien of the creditor, and, having no title as against him, had no power to do any act that would defeat the lien; and likened the statute provision as to any fraudulent attempt to defeat a recovery, to an attachment of the land which could not be affected by any subsequent bona fide transfers. In comparing the proviso of 13 Elizabeth, "that the act shall not extend to lands conveyed on good consideration and bona fide to a purchaser without notice or knowledge of the fraud," with the exception in the Connecticut statute, "except the purchaser made it appear that the contract was made bona fide, and on good consideration, before seizure by the creditor, and that it was without design of fraud to defeat creditors," he said: "Both the proviso and the exception are, from their nature, limited to the first conveyance. That, being fraudulent, will, of course, be void, unless saved by these conditions, viz., that it was on good consideration, bona fide, and to a purchaser ignorant of the fraud intended. A failure in either of these conditions would still leave the conveyance void." He further stated that the decisions under the statute 27 Eliz., chap. 4, were inapplicable to this case. That the object of that statute was to protect a bona fide purchaser, making, as it did, void, in favor of such purchaser, all prior fraudulent grants intended to defeat his title, and that, therefore, the grantor had still the power to alienate again to a bona fide purchaser, notwithstanding his fraudulent grant, a power which the fraudulent grantor under 13 Elizabeth had not. Another judge, who united in the judgment, agreed that no argument could be drawn from the cases under 27 Elizabeth, saying that "a careful attention to the different objects of the two statutes must afford the most satisfactory conviction to the mind that, because the voluntary grantee under 27

Elizabeth would get no title. The fraudulent title in the case was based upon a fraudulent judgment and execution, but it seemed to be conceded that it could make no difference in principle whether the title of the bona fide purchaser was through a fraudulent judgment, or a fraudulent grant, and the judge writing the principal opinion for the majority said that he should, as more simple, consider the case as resting upon a fraudulent grant. The reasoning of the judge who delivered the principal opinion was that, under the statutes of Connecticut declaring all fraudulent conveyances or judgments designed to defeat the recovery of debts utterly void as to creditors, and inflicting heavy penalties on the parties to such fraudulent conveyances, etc., who claimed them to be fair, or alien, with an exception of the purchaser who bought bona fide, on good consideration, and without design of fraud, the bona fide purchaser there mentioned referred only to the purchaser from a fraudulent grantor, and in no way applied to a bona fide purchaser from a fraudulent grantee. And he further stated that the object of 13 Elizabeth, and also of the statute of Connecticut, was solely the protection of the creditor; and that, to effect this, all fraudulent conveyances to defeat recovery of his debts were, as to him, utterly void, and to all other purposes good; that nothing was left in the grantor, except the power to convey to a creditor; that he could make no other second conveyance, even to a bona fide purchaser. The fraudulent purchaser received the estate subject to the lien of the creditor, and, having no title as against him, had no power to do any act that would defeat the lien; and likened the statute provision as to any fraudulent attempt to defeat a recovery, to an attachment of the land which could not be affected by any subsequent bona fide transfers. In comparing the proviso of 13 Elizabeth, "that the act shall not extend to lands conveyed on good consideration and bona fide to a purchaser without notice or knowledge of the fraud," with the exception in the Connecticut statute, "except the purchaser made it appear that the contract was made bona fide, and on good consideration, before seizure by the creditor, and that it was without design of fraud to defeat creditors," he said: "Both the proviso and the exception are, from their nature, limited to the first conveyance. That, being fraudulent, will, of course, be void, unless saved by these conditions, viz., that it was on good consideration, bona fide, and to a purchaser ignorant of the fraud intended. A failure in either of these conditions would still leave the conveyance void." He further stated that the decisions under the statute 27 Eliz., chap. 4, were inapplicable to this case. That the object of that statute was to protect a bona fide purchaser, making, as it did, void, in favor of such purchaser, all prior fraudulent grants intended to defeat his title, and that, therefore, the grantor had still the power to alienate again to a bona fide purchaser, notwithstanding his fraudulent grant, a power which the fraudulent grantor under 13 Elizabeth had not. Another judge, who united in the judgment, agreed that no argument could be drawn from the cases under 27 Elizabeth, saying that "a careful attention to the different objects of the two statutes must afford the most satisfactory conviction to the mind that, because the voluntary grantee under 27

Elizabeth can convey to his grantee for a valuable consideration a perfect title, which cannot be defeated by any subsequent grant of the voluntary grantor to another for a valuable consideration, this furnishes no authority to conclude that the fraudulent grantee under 13 Elizabeth can, for a valuable consideration, convey a perfect title to his grantee; . . . and here we must keep in view that, where there is a voluntary grant, and the grantor has creditors, it is fraudulent, and within the purview of 13 Elizabeth; and where there is a voluntary conveyance, and there are no creditors, it is within the purview of 27 Elizabeth." He further said that, if one, with a view to defeat his creditors, sold his property to a bona fide purchaser and absconded with the money, the conveyance would be good in the hands of such purchaser; that the precise danger intended to be guarded against was the grantor's fraudulently conveying to the grantee, who was consant of the fraud, and who accepted the conveyance to give aid to his fraudulent views; and that the object of the statute would be defeated by validating the conveyance of the fraudulent grantee to a bona fide purchaser. He gave, as another reason why the decision as to the effect of one statute would not apply to the other, that, under the statute 27 Elizabeth, the object of the legislature was to give a preference to the purchaser with consideration over the volunteer, which object was as effectually attained by a conveyance by the voluntary transferee as by a conveyance by the grantor in the voluntary deed; and so the rule that what the grantor could do the voluntary grantee could do accomplished the intent of that statute. But that the rule that what the fraudulent grantor could do the fraudulent grantee could do defeated the object of 13 Elizabeth. He then proceeded to make the broad statement that "the obvious meaning of the words of the statute, which declares all such conveyances to be utterly void against creditors, is that, as against creditors, the grantee has no title, but the estate remains in the grantor, liable to his debts; and so has ever been the understanding of all men." He further proceeded to reason that, if the grantee has no title against creditors, it would be natural to conclude that he could convey none against creditors. Two of the nine judges dissented, and in the dissenting opinion it was claimed that the object of the statute in rendering the conveyance void as to creditors was to remove the conveyance out of the way, and place the creditors in the same situation as though it had not been made; and that the effect of that part of the statute rendering the conveyance valid between the parties was to give the grantee all the rights of the grantor, subject to such rights as the creditors had before the conveyance was made, and such as they would have continued to have had the conveyance not been made. That the creditors lose none of their rights by the fraudulent conveyance; neither do they acquire any new ones. Their condition is the same regarding the land as before. And that so, on the other hand, the fraudulent grantee steps into the shoes of the grantor, and takes all his rights, subject to the same rights of the creditors as his were, and no other. He further stated that the creditors might levy on the land at any time, and thereby secure an interest in it; but that their debtor had an equal

right, at any time, to convey the land to a bona fide purchaser, who would thereby secure a good and complete title in opposition to all their claim; and that after a fraudulent conveyance the same thing was true. The creditors had the same right to levy as they had before; and the grantee had the same right to convey that the grantor had. Neither could make a fraudulent conveyance to affect creditors; both could make a bona fide one. But the strongest reason that he seemed to give, and one which, as will be seen, was afterwards confirmed by high authority, was that, unless the grantee under a fraudulent conveyance can transmit the title to a bona fide purchaser, there is no person whatever who can; and the estate becomes completely locked up in his hands. That the creditors certainly cannot; for they have strictly no interest in the land, until they have proceeded agreeably to law in making an application of it to discharge their debts. That the fraudulent grantor, who has made a conveyance to defeat the claims of the creditors, cannot afterwards convey to a bona fide purchaser. *Preston v. Crofut*, 1 Conn. 527, note.

The principle of *Preston v. Crofut*, 1 Conn. 527, note, was substantially approved in *Merrill v. Meachum*, 5 Day, 341.

Following this case comes that of *Roberts v. Anderson*, 3 Johns. Ch. 371, in which Chancellor Kent took substantially the same ground as the majority of the court in *Preston v. Crofut*, 1 Conn. 527, note, stating that he had availed himself freely of the argument in that case, in which it was decided, upon their statute of frauds, which was substantially the same as the statutes of Elizabeth, that a bona fide purchaser, without notice and for a valuable consideration, from a fraudulent grantee, had no title against the creditors of the fraudulent grantor, and that that case might be considered as a decision under 13 Elizabeth, and that it was eminently distinguished for accuracy of research and closeness of reasoning. He further stated that the case was discussed at the bar and upon the bench in an elaborate manner and with very great ability; and admitted that, though he entirely subscribed to the opinions of the majority of the court, it was not without the highest respect for the talent with which the opposite opinion was supported.

The case was afterwards removed to the court for the correction of errors (18 Johns. 515, 9 Am. Dec. 235), and the decision of the chancellor and the decree entered thereon unanimously reversed by that court. Mr. Chief Justice Spencer, delivering the principal opinion, and taking substantially the same ground taken by Smith, J., in his dissenting opinion in *Preston v. Crofut*, said, among other things: "The 13th of Elizabeth declares a conveyance to be void only as against creditors, etc., attempted to be defrauded, whilst the 27th of Elizabeth declares the conveyance to be void only as against those who have purchased, or may purchase; but, as against the fraudulent grantors, in both cases the conveyances are valid and effectual and wholly unaffected by the provisions of either statute. What becomes, then, of the estate, and in whom is it vested, after a conveyance made to deceive existing creditors, or those who become creditors subsequent to the fraudulent conveyance? As against the grantors, the conveyance is

effectual. Subsequent creditors have no debt due at the time; the possibility of their having debts cannot prevent the conveyance from taking effect. Those creditors whose debts are due, even if they have obtained judgments and acquired a lien, have gained no vested interest in the lands, and they may be paid without resort to the land fraudulently conveyed. The fee is not in abeyance, and the inevitable conclusion is that the legal title has vested in the fraudulent grantee, subject to be divested, if the creditors see fit to call in question the fraudulent conveyance, and after the creditor has proceeded to sell, on execution, the lands thus fraudulently conveyed." He further stated that the error of those who asserted that a fraudulent grantee under 13 Elizabeth takes no estate, because the deed is declared to be utterly void, consists in not correctly discriminating between a deed which is an absolute nullity, and one which is voidable only, and said that no deed can be pronounced, in a legal sense, utterly void, which is valid as to some persons, but may be avoided at the election of others.

In the same case *Platt, J.*, recognizing what was said by Lord Mansfield in *Cadogan v. Kennett*, 2 Cowp. 432, that the statute 13 Eliz., chap. 5, is declaratory of the common law, and has done nothing which the common law would not have done without it, and which declaration has been repeated by numerous courts and judges since (*Sharswood, J.*, in *Clark v. Douglass*, 62 Pa. 408, 416; *Swayne, J.*, in *Moore v. Clements* (*Clements v. Nicholson*) 6 Wall. 299, 18 L. ed. 786; *Hamilton v. Russell*, 1 Cranch, 309, 2 L. ed. 118; and *Meeker v. Wilson*, 1 Gall. 418. *Fed. Cas. No. 9,392*), said that if the statute (of New York) is the mere declaration or development of the principles of the common law, the decision of the court in *Preston v. Crofut*, 1 Conn. 527, note, was perfectly reconcilable with his construction of them, *viz.*, that a bona fide purchaser for value from a fraudulent grantee would take a good title as against the creditors of the original fraudulent grantor; and said further that it better accorded with the letter and spirit of the statute to say that a general creditor must assert his claim before the fraudulent grantee of his debtor has deceived an honest purchaser, or that such creditor will lose his right; and that a contrary doctrine would often enable the creditor to "convert his shield into a sword." The reason why the two were so reconcilable, he stated to be that the common law, the statute of 13 Eliz., chap. 5, and the New York statute for the prevention of frauds all agreed in the rule that a conveyance in which the grantor and grantee conspire to defraud creditors is void as against creditors; provided, however, that this rule shall not extend to defeat the title of any bona fide purchaser for good consideration, without notice of the fraud. That the statute of Connecticut, on which the decision in *Preston v. Crofut* was founded, contained no such proviso; and by such omission the legislature of that state had chosen to alter and modify the rule of the common law so as to make no saving or exception in favor of subsequent bona fide purchasers. That he understood all the judges in *Preston v. Crofut* to agree that, under their statute, without such proviso, the first grantee, as well as the grantor, must participate in the fraud, in order to render the deed void as to creditors; and that,

if that be the true exposition of the statutes, there was no use or effect in the proviso, unless it be construed to extend to subsequent purchasers. That, if it was unnecessary in order to protect the first bona fide grantee of a fraudulent debtor, and was not to be extended to a subsequent purchaser, then it followed that the proviso in the New York statute should be rejected as surplusage. And that in his judgment the 6th section of the latter, containing the proviso of 13 Eliz., chap. 5, was designed, not merely to explain, but to limit and qualify, the 1st section, and should not be rejected as inoperative. That the universal silence in Westminster Hall upon the precise point then under discussion (whether a conveyance made in fraud of creditors was so absolutely void as to them as that the fraudulent grantee could not convey a title to the land to one who was a bona fide purchaser for value) afforded strong ground to infer that the construction that it was, and that the bona fide grantee of the fraudulent grantee would not take a good title free from the lien or claim of the original grantor, was never sanctioned by the courts in England, as, if such had been the doctrine in that country, the cases demanding an application of it must have been of very frequent occurrence; and yet there was no case to be found where a creditor in England ever attempted to impeach a conveyance on the ground of fraud, except where the purchaser, whose title was sought to be defeated, was either a party to, or was presumed consensual of, such fraud.

In *Bean v. Smith*, 2 Mason, 252, *Fed. Cas. No. 1,174*, previous to the reversal of the decree in the last case, a case which had arisen in the circuit court of the United States for the district of Rhode Island, Mr. Justice Story, who delivered the opinion, in commenting upon the two statutes mentioned said, among other things, referring to the doctrine that a bona fide purchaser for a valuable consideration, without notice, cannot protect the estate in his own hands against creditors where he derives his title to the estate through a grantee to whom it was originally conveyed for the purpose of defrauding the creditors of the first grantor, that it was certainly supported by high authority of a recent date, and the cases that had been cited were fully in point; but that, until he had perused these cases, he was not aware that there was in this respect any difference between the operation of the statute of 13 Eliz., chap. 5, which avoids conveyances made in fraud of creditors, and that of 27 Eliz., chap. 4, which avoids conveyances made in fraud of subsequent purchasers. That an unbroken current of authorities establishes beyond question that a bona fide purchaser for a valuable consideration, without notice, shall hold the estate, notwithstanding he claims through a grantee to whom it had been conveyed in fraud of purchasers. He referred to the fact that Chancellor Kent had held, in *Roberts v. Anderson*, 3 Johns. Ch. 371, that the same doctrine does not apply where there has been a conveyance to defraud creditors, and said that, if this were so, it was certainly a departure from the general doctrine of courts of equity on the subject of bona fide purchasers without notice, and proceeded to reason and give instances as to the solicitous regard which courts of equity have to preserve the rights of such purchasers.

In *Dugan v. Vattler*, 3 Blackf. 245, 25 Am. Dec. 105, the court considered all of the foregoing cases, and approved and followed the doctrine laid down in *Anderson v. Roberts*, 18 Johns. 515, 9 Am. Dec. 235, and *Bean v. Smith*, 2 Mason, 252, Fed. Cas. No. 1,174.

In *Neal v. Williams*, 18 Me. 391, the supreme court of Maine considered *Preston v. Crofut*, 1 Conn. 527, note, saying that it was approved and strengthened by the decision of Chancellor Kent in *Roberts v. Anderson*, 3 Johns. Ch. 371, and that the last decision was reversed in the court of errors, and the contrary doctrine established in 18 Johns. 515, 9 Am. Dec. 235, and that Chancellor Kent had stated in his Commentaries that such is now the settled doctrine (4 Com. 464), and that the question was very elaborately examined in the case of *Somes v. Brewer*, 2 Pick. 184, 13 Am. Dec. 406; and the court came to that conclusion.

In *Andrews v. Marshall*, 43 Me. 272, the property involved was personal, but the court, in approving the general rule applicable to both real and personal property, quoted what was said by Spencer, Ch. J. in *Anderson v. Roberts*, 18 Johns. 515, 9 Am. Dec. 235, that "the error of those who assert that a fraudulent grantee under 13 Elizabeth takes no estate, because the deed is declared to be utterly void, consists in not correctly discriminating between a deed which is an absolute nullity and one which is voidable only," etc.

In *Martin v. Cowles*, 18 N. C. (1 Dev. & B. L.) 29, a debtor had conveyed to another land for the purpose of defrauding his creditors. The fraudulent transferee became indebted to one who, without any knowledge of the fraud, had the land sold to satisfy his debt, became the purchaser himself, and afterwards conveyed the same to the plaintiff. At the time of the fraudulent conveyance the original grantor was indebted to another person, who, after the sale to the plaintiff mentioned, had an execution levied on the same land, became the purchaser, and took a deed from the sheriff. He then brought an action of ejectment against the tenant of the plaintiff, recovered a judgment against him and evicted him by a writ of possession. The action was upon the covenant for quiet enjoyment by the plaintiff against his grantor, who had sold the land for his debt against the fraudulent grantee; but it was held that the action could not be maintained, for the reason that, even if there was any question whether the defendant could be considered a bona fide purchaser, none existed that the plaintiff who purchased from him was, and, if he negligently permitted a recovery in ejectment to be effected, it did not entitle him to maintain this action. The court referred to the decision of Chancellor Kent in *Roberts v. Anderson*, 3 Johns. Ch. 371, and to the reversal thereof in 18 Johns. 515, 9 Am. Dec. 235, and approved and followed both that decision and the reasoning of Judges Spencer and Platt therein, to the effect that a bona fide purchaser from a fraudulent grantee has a good title as against any claim of a creditor of the fraudulent vendor, and that, the deed being good as between the parties, and effectual as against the grantor, the fraudulent grantee has a title and a right to alienate; and, although the estate is voidable, and may be avoided and divested while in the hands of the first grantee, by action of the creditors of the first grantor, still, if the grantee conveyed the estate to a
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bona fide purchaser, his title is protected by the proviso. The court further said that the question had been ably examined by Judge Story in *Bean v. Smith*, 2 Mason, 272, Fed. Cas. No. 1,174, and that his opinion contained much learning and solid reasoning, and satisfactorily established the principle that the bona fide purchaser from the fraudulent grantee is protected by the proviso in 13 Elizabeth against the creditors of the fraudulent grantor.

In *Oriental Bank v. Haskins*, 3 Met. 332, 37 Am. Dec. 140, the supreme court of Massachusetts said that the proposition that the original fraudulent conveyance was absolutely void as against creditors, and not merely voidable, and that no subsequent transaction could purge the fraud, had been sustained in the cases of *Preston v. Crofut*, 1 Conn. 527, note, and *Merrill v. Meachum*, 5 Day, 341. That the latter case was decided upon a supposed distinction between the effects on a conveyance by statute 13 Eliz., chap. 5, and statute 27 Eliz., chap. 4. That two of the judges dissented from the opinion of the majority of the judges, and for reasons very forcible and convincing. The court did not mention the fact that there had also been a dissenting opinion in *Preston v. Crofut*, concurred in by another judge, the reasoning in which was fully as, if not more, forceful, as that in the dissenting opinions in *Merrill v. Meachum*. Referring to the fact that the distinction mentioned had been maintained by Chancellor Kent in *Roberts v. Anderson*, 3 Johns. Ch. 371, the court said further, that the question had been very fully discussed by Judge Story in *Bean v. Smith*, 2 Mason, 252, Fed. Cas. No. 1,174, who concurred in the opinion expressed by the dissenting judges in Connecticut, and that the same opinion was expressed in *Somes v. Brewer*, 2 Pick. 184, 13 Am. Dec. 406, and that Chancellor Kent's decree in *Roberts v. Anderson* had been reversed by the court of errors; and further said that they were of the opinion that the rule laid down would not be adopted beyond the jurisdiction of Connecticut, and concluded by holding that there was no such distinction between the statutes as was maintained by the majority of the court in Connecticut, but that conveyances, fraudulent as against creditors or against subsequent purchasers, are voidable only and not absolutely void.

In Pennsylvania, if land be sold which is bound by a judgment, and that judgment is not discharged, it may be levied on in the hands of the vendee; but a judgment obtained afterwards against the grantor cannot generally be levied on lands in the hands of him who bought it and got his deed before judgment obtained. And it can only be levied in such case when the land was conveyed in fraud of the creditors of the grantor, and when the purchaser, as well as the seller, knew of and joined in the fraud; the reason being that, if it were otherwise, the most honest vendee, who bought and paid a full price, would lose his land or goods, because the vendor instantly absconded and took the purchase money out of the reach of his creditors. The court said that it had lately been decided in Connecticut, and by Chancellor Kent in New York, that, although a fair purchaser from a fraudulent debtor is protected, yet a fair purchaser from the fraudulent grantee of a fraudulent debtor is not; and proceeded to dissent from the

latter proposition. *Mateer v. Hissim*, 3 Penr. & W. 160.

The statute of 13 Elizabeth is a legislative recognition of the common law. The provision of the statute declaring conveyances in fraud of creditors "utterly void" does not mean to declare that such conveyances are mere nullities,—void to all intents and purposes,—but simply voidable; as no act can be regarded as absolutely void, and of consequence a mere nullity, which takes effect as to some purpose. In *Fox v. Willis*, 1 Mich. 321, the court said, further, that Chief Justice Spencer, in the case of *Anderson v. Roberts*, 18 Johns. 515, 9 Am. Dec. 235, gives a true interpretation of the words "utterly void" as used in the statute of 13 Elizabeth, when he says that, "whenever the act done takes effect as to some purposes, and is void as to persons who have an interest in impeaching it, the act is not a nullity, and therefore, in a legal sense, is not utterly void, but merely voidable." And also that Mr. Justice Story, in the case of *Bean v. Smith*, 2 Mason, 252, Fed. Cas. No. 1,174, says: "A conveyance to defraud purchasers, or to defraud creditors, is not 'utterly void,' as has been sometimes supposed; it conveys the estate effectually as between the parties and their representatives, and the estate may be maintained against all persons but those whom it was intended to defraud." The court further said that, although a voluntary assignment to defraud creditors is not "utterly void," yet courts, in administering remedies, treated the instrument as void in respect to those who are "hindered, delayed, or defrauded," in their "actions, suits," etc. In other words, for the purpose of satisfying the claims of creditors the courts will treat the property conveyed as though it still remained in the hands of the fraudulent grantor. The court proceeded further to say that assignments, though fraudulent under 13 Elizabeth, were nevertheless to be considered valid until a judgment creditor appeared, seeking in the ordinary way to enforce his legal remedy against the deed, and approved the language of the judge delivering the opinion in *Anderson v. Roberts*, that in such case "the fee is not in abeyance, and the inevitable conclusion is that the legal title has vested in the fraudulent grantee, subject to be divested if the creditors see fit to call in question the fraudulent conveyance, and after the creditor has proceeded to sell, on execution, the lands thus fraudulently conveyed."

The principle has long been established at common law, and repeatedly sanctioned in equity, that, though a deed be fraudulent in its creation, and voidable by a purchaser (that is, would become void by a person's purchasing the estate), yet it may become good by matter *ex post facto*. *Price v. Junkin*, 4 Watts, 85, 28 Am. Dec. 685. The court said that this doctrine was elucidated and confirmed in the case of *Anderson v. Roberts*, 18 Johns. 515, 9 Am. Dec. 235, in which it was shown that the statutory enactments (generally more unyielding in their construction than the common law) fully protect such purchasers, as well against creditors as against subsequent purchasers.

It is the settled doctrine in the United States that a bona fide purchaser for a valuable consideration, and without notice, either from a fraudulent grantor or grantee, shall be protected, as he takes the estate discharged of the 67 L. R. A.

fraud that previously infected the title. *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460; *Bean v. Smith*, 2 Mason, 252, Fed. Cas. No. 1,174; *Anderson v. Roberts*, 18 Johns. 515, 9 Am. Dec. 235; *Oriental Bank v. Haskins*, 3 Met. 332, 37 Am. Dec. 140.

The lien of a judgment at law upon lands will not prevail against the equity of the purchaser, who, before rendition of such a judgment, has, in good faith and without notice of a previous fraudulent conveyance to his grantor, paid his money, as the equitable will overcome the legal right. The reason of this rule is that there is a higher equity in favor of one who advances his money, by way of purchase or mortgage, in reliance on a specific piece of property, than there is on the part of a general creditor who looks for his security to the entire estate of his debtor, without having in his eye, when the debt is incurred, any specific part of it. In reference to this reason, the court said: "Whatever may be thought of the validity of the reason thus announced, it is certain that the doctrine founded upon it is established by a long line of decisions of such weight and authority that no court would deem it open to discussion." *Phelps v. Morrison*, 25 N. J. Eq. 538.

In *Garland v. Rives*, 4 Rand. (Va.) 282, 15 Am. Dec. 756, it was said that under the statute 13 Elizabeth fraudulent conveyances, to the prejudice of creditors, were immediately void as to such creditors; and but for the proviso that the act should not extend to make void any estate or conveyance, etc., which should be upon a good consideration and bona fide, etc., the enacting clause might have avoided the deed made with intent to defraud creditors, although that intent was confined to the grantor only; and was not known to the grantee; but the judge delivering the opinion said further that he did not, however, think that this would have been the effect, even of the enacting clause alone, his theory being that the word "collusive" can only apply to cases in which both parties concurred in the fraudulent intent; but that, however that might be, if the grantor and grantee colluded to defraud creditors, the conveyance would be absolutely void as to the latter; and the fraudulent grantee could not, but for the proviso, have transferred any title to the bona fide purchaser from him.

In *Re Estes*, 6 Sawy. 459, 3 Fed. 134, 5 Fed. 60, the court said that a conveyance in fraud of creditors, although declared by the statute to be void as to them, is nevertheless valid as between the parties and their representatives, and passes all of the estate of the grantor to the grantee; and that a bona fide purchaser from such grantee takes the estate purged of the anterior fraud that affected the title, even against the creditors of the fraudulent grantor.

Under the statute of fraudulent conveyances of Ohio, which provides that "every gift, grant, or conveyance of lands, tenements, hereditaments, etc., made or obtained with intent to defraud creditors of their just and lawful debts or damages, or to defraud or deceive the person or persons who shall purchase such lands, etc., shall be deemed utterly void and of no effect," a bona fide purchaser, without notice, cannot be affected by the intent of the grantor to defraud creditors. *Astor v. Wells*, 4 Wheat. 487, 4 L. ed. 622.

A conveyance in fraud of creditors, although declared by the statute to be void as to them.

is, nevertheless, valid as between the parties and their representatives, and passes all the estate of the grantor to the grantee; and a bona fide purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title. *Doster v. Manistee Nat. Bank*, 67 Ark. 325, 48 L. R. A. 334, 77 Am. St. Rep. 116, 55 S. W. 137.

Under the statute of Kentucky, a fair and bona fide purchaser from a grantor who makes the conveyance with intent to defraud his creditors takes a good title to the real estate conveyed, free from any claim of the creditors. *Violett v. Violett*, 2 Dana, 324.

Where an assignee for the benefit of creditors has, by virtue of the assignment, conveyed land of the assignor, the grantee in that conveyance, being a purchaser in good faith, will take a good title, although the assignment is thereafter decreed to be fraudulent as against creditors. *Wilson v. Marlon*, 25 N. Y. Supp. 1066.

In *Neal v. Gregory*, 19 Fla. 356, the supreme court of that state, in considering the question as to whether or not a certain transfer of real property was in fraud of the creditors of the grantor, stated that the rule in regard to the question under consideration is that a bona fide purchaser for value, from a fraudulent grantee, without notice, gets a good title, and approved the following statement from *Bump on Fraudulent Conveyances*, 2d ed. 482, that, "as against the debtor, the fraudulent deed is effectual, and the fraudulent grantee has a title and right to alienate. The only infirmity in his title is its liability to be impeached by creditors. As to all others it is perfect, and, when it has passed into the hands of a bona fide purchaser for value without notice, even this infirmity is cured, and the title becomes sound and indefeasible."

Where a debtor conveyed his real estate to his wife in fraud of the rights of his creditors, and thereafter the wife conveyed a portion of the same to her daughter, who was a bona fide purchaser for value and without notice of the fraud, the conveyance of that portion to the daughter gave her a good title thereto. *Leich v. Dee*, 86 Iowa, 711, 47 N. W. 881, 52 N. W. 209.

Bona fide purchasers from a fraudulent transferee of a conveyance made to defraud creditors will take a good title to the lands, and the creditor will be remitted to the purchase money for satisfaction. *Gordon v. Lowell*, 21 Me. 257.

Under Me. Rev. Stat., chap. 76, § 13, where a levy is made upon land fraudulently conveyed by a debtor the officer shall deliver to the creditor a momentary seisin, which shall be sufficient to enable him to maintain an action for its recovery in his own name; and, where land has been fraudulently conveyed by a debtor, a further conveyance by the fraudulent grantee will not so completely purge the fraud as to prevent the levying creditor from acquiring the momentary seisin necessary to enable him to try the title with the party in possession. *Morse v. Sleeper*, 58 Me. 329. But the court further stated that by this it did not say that a conveyance by the fraudulent grantee to a bona fide purchaser for value without notice of the fraud would not give the latter a better title than the creditor would derive from a subsequent levy, but only that 67 L. R. A.

the momentary seisin which the officer gives the creditor will enable him to maintain his action, unless the party in possession shows a better title in himself.

In *Young v. Lathrop*, 67 N. C. 63, 12 Am. Rep. 603, the court stated that it was settled, after some conflict of the authorities, that a purchaser of a fraudulent donee, bona fide, and for a valuable consideration at a full price, without notice of the fraud, acquires a good title under 13 Elizabeth against creditors and purchasers under their executions for a debt existing at the time of the fraudulent conveyance, at a sale subsequent to the sale of the fraudulent donee, as, both of the purchasers being bona fide for a valuable consideration, the one to whom the first sale was made is preferred.

But purchasers at an execution sale of the lands of the judgment debtor will take a good legal title as against the transferee of a fraudulent grantee of the judgment debtor, where there is no evidence that the transferee from the fraudulent grantee was a purchaser for valuable consideration and without notice of the fraud. *Wade v. Saunders*, 70 N. C. 270.

"Where a debtor made a conveyance of his land to another without consideration, and with the intention on the part of both grantor and grantee to defeat the creditors of the former, a conveyance by the fraudulent grantee to a third party for a valuable consideration, although it may have been with notice that the original conveyance was in order to defeat creditors, and although it may have been in aid of that design, is not impeachable under the statute of Elizabeth. *Daiglish v. McCarthy*, 19 Grant, Ch. (U. C.) 578.

A bona fide purchaser for a full consideration from the grantee in a conveyance of land made for the purpose of defrauding the creditors of the original grantor takes a good title to the land as against such creditors, and the fact that the title from the fraudulent grantee was by a quitclaim deed does not change the effect. It was urged that by the quitclaim deed he took no better title than his grantor had by virtue of the fraudulent conveyance; but this was held not to be so. *Mansfield v. Dyer*, 131 Mass. 200.

A judgment rendered after the execution and delivery of deeds of real property made for the purpose of covering up the property of the grantors, and fraudulent and voidable as against their creditors, constitutes no lien upon the real property thus fraudulently conveyed, and a bona fide creditor of the grantors, who, with their consent and without fraud on his part, procures a mortgage for the amount of his debt from the fraudulent transferee, but honestly to secure his own indebtedness, will be protected in his lien against the other creditors of the grantors, and the fact that he had notice or knowledge that the deeds to the fraudulent grantee, his mortgagor, were made to defraud the creditors of the grantors will not deprive him of the right to secure the just claim which they owed him; because if those deeds were fraudulent as to creditors, they were not void; they were merely voidable; and, until some creditor attacked them, the title to the property stood unchallenged in the grantee. *Johnson v. Trust Co.* 43 C. C. A. 458, 104 Fed. 174.

In *Brooks v. Wilson*, 53 Hun, 176, 6 N. Y. Supp. 116, it was claimed that the statute

which avoids conveyances made with intent to defraud creditors rendered the conveyance of the judgment debtor a nullity as respects his creditors; and, therefore, that judgments against him became liens upon the property conveyed, as if no conveyance had been made. The court said that the answer to this argument was, that the fraudulent conveyance was not void, but voidable only, at the election of creditors defrauded, as the fraudulent grantee can transfer the title to the property conveyed to a bona fide purchaser notwithstanding outstanding judgments against the fraudulent grantor, docketed after the fraudulent transfer, but before the transfer by the fraudulent grantee to a bona fide purchaser. The court claimed to approve and follow the decision of the Supreme Court of the United States in *Miller v. Sherry*, 2 Wall. 249, 17 L. ed. 830, *supra*, II., a. The judgment in this case was reversed in 125 N. Y. 256, 26 N. E. 258, upon another question.

But where the fraud in the original conveyance appears upon its face the purchaser from the fraudulent grantee will not take title free from the claims of the creditor of the original grantor, as, where a father conveyed to his sons, the consideration of the deed being that they should pay all judgments "now entered" against a certain tract of land, a purchaser from the sons will not take the title free from the taint of fraud, as it appeared upon the face of the deed that the object of the conveyance was, manifestly, to put the estate into the hands of the sons with no other burden than what the law had already imposed on it, and that it then appeared that there were debts unprovided for, and that fact was enough to put a cautious and conscientious man on inquiry. *Johnston v. Harvy*, 2 Penn. & W. 82, 21 Am. Dec. 426.

A creditor recovered a judgment against his debtor, who had previously fraudulently conveyed his land to another. The debtor appealed from the judgment, and gave his fraudulent transferee for his security, and the appellate court gave judgment against both, and on the execution the sheriff sold the land as the land of the fraudulent grantee to the creditor, and it was held that the latter was a bona fide purchaser under the provisions of the statute, which provides that the act in relation to fraudulent conveyances shall not extend to any estate or interest in land bona fide and lawfully conveyed, nor to any person or persons, etc., who may be subsequent purchasers for valuable considerations without notice. *Wineland v. Conce*, 5 Mo. 296, 32 Am. Dec. 320.

Where the title to lands had been taken in the wife, but paid for out of assets belonging to the husband, which should properly have been devoted to the payment of his debts, the title to the lands in the wife is constructively fraudulent as against the creditors of the husband; but a bona fide purchaser for value from the wife before any proceedings on the part of the creditors of the husband to subject the land to the payment of their debts will take a good title free from the claims of the husband's creditors. *Freeman v. Pullen*, 130 Ala. 653, 31 So. 451.

Where a debtor paid the consideration for the purchase of a piece of real property, and had the title taken in the name of his wife with intent to hinder and delay his creditors, a 67 L. R. A.

deed from the wife to a subsequent purchaser who had no notice of the fraud, and who paid a valuable consideration, will be held valid, and his title cannot be disturbed. *Carnahan v. McCord*, 116 Ind. 67, 18 N. E. 177.

Where a mother conveyed lands to her daughters without consideration, and the daughters thereafter executed a mortgage upon the same, and thereafter a judgment creditor of the mother brought an action to subject the mortgage to his claim, a plea on the part of the mortgagee that at the time of the making of the mortgage the daughters were in the actual or constructive possession of the lands described in the bill, and were seised, or claimed to be seised, in the transaction with the legal title to said lands; and that on that day he made a loan of money to the daughters, and contemporaneously therewith he took from them a mortgage to secure the repayment of said sum of money and the interest thereon; that, before the making said loan, he required an examination of the records by an attorney, who reported that the titles of said lands were in the daughters; that, relying on these facts, he made the loan and took the mortgage to secure the sum; that at the time he made such loan and took said mortgage the execution on the judgment of the plaintiff against the mother had not been received by the sheriff; and that he had no notice of the plaintiff's equity, and knew of no fact calculated to put him on inquiry, either at or before the time he parted with the money loaned, or at or before the time he took the mortgage on the lands to secure the loan,—is good, and sets up a perfect defense in the mortgagee as a bona fide purchaser. *McKee v. West* (Ala.) 37 So. 740.

The following cases are also authorities to the effect that a bona fide purchaser from the fraudulent grantee in a conveyance made to defraud the creditors of the grantor will take a valid legal title to the land as against such creditors: *Mathews v. Mobile Mut. Ins. Co.* 75 Ala. 85, *supra*, II. a; *Lyon v. Robbins*, 46 Ill. 277; *Harmon v. Harmon*, 63 Ill. 512; *Campbell v. Whitson*, 68 Ill. 240, 18 Am. Rep. 553; *Rappleye v. International Bank*, 93 Ill. 396; *Scott v. Purcell*, 7 Blackf. 66, 39 Am. Dec. 453; *Gordon v. Ritenour*, 87 Mo. 54; *Lewis v. Dudley*, 70 N. H. 594, 49 Atl. 572; *Smith v. Vreeland*, 16 N. J. Eq. 198; *Jackson ex dem. Bartlett v. Henry*, 10 Johns. 185, 6 Am. Dec. 328; *Detwiler v. Louison*, 10 Ohio C. D. 95; *Thompson v. McKean*, 1 Ashm. (Pa.) 129; *Hood v. Fahnestock*, 8 Watts, 489, 34 Am. Dec. 489.

V. Title conveyed by bona fide purchaser to one having knowledge of the fraud.

And so jealous are both law and equity of the rights of one who has in good faith purchased, and paid for with his own funds, land which had previously been conveyed in fraud of the creditors of the original grantor, that any transfer he may make of the land will be valid, even to one who has notice of the original fraudulent conveyance; and the legal title of the latter will be impervious to assaults upon it by such creditors.

In *Casey v. Leggett*, 125 Cal. 664, 58 Pac. 264, the court approved the doctrine that a bona fide purchaser for a valuable consideration from a fraudulent transferee of land could afterwards transfer the title acquired by the deed to anyone and the title would be good in his grantee, whether the latter was a purchaser

in good faith or not; as a purchaser without notice of the fraud may sell the property to a person who has notice, for the law does not know of an unencumbered estate which is forfeited by alienation, or for which the owner cannot pass a good title to the purchaser.

A bona fide purchaser, without notice is not affected by the fraud of his grantor; and a conveyance by such purchaser to a person who may have knowledge of the fraud would be valid. *Swayze v. Burke*, 12 Pet. 11, 9 L. ed. 980.

In *Brandlyn v. Ord*, 1 Atk. 571, Lord Chancellor Hardwicke said that a man who purchased for a valuable consideration, with notice of a voluntary settlement from a person who bought without notice, shall shelter himself under the first purchaser; yet it must be the very same interest in every respect.

And he afterwards repeated the observation in *Lowther v. Carlton*, 2 Atk. 242.

VI. When title is in fraudulent grantee as to his creditors.

In *Edwards v. Haverstick*, 53 Ind. 348, it was held that a fraudulent conveyance vests the title in the transferee, subject to the right of the creditors of the grantor to have it divested and the property subjected to sale for the payment of their debts; and, where no complaint is made by the creditors of the fraudulent grantor of such illegal and fraudulent conveyance, the same vests a fee simple in the fraudulent grantee, and subjects the land to levy and sale for the payment of his debts.

Where one transfers land in fraud of his creditors the title vests in the grantee as against all persons, except the creditors of the grantor or purchasers bona fide for value; and it follows that, subject to the rights of such persons, it becomes liable for the debts of such grantee, and a judgment against him is a lien from the time of its rendition, not only upon all property at the time owned by the judgment defendant, but also upon all which he subsequently acquires, and so upon the fraudulent conveyance of the land the lien of a judgment against him at once attaches to it. *Wright v. Howell*, 35 Iowa, 288.

A fraudulent conveyance of land is good as between the parties and all other persons except the creditors of the grantor; and so, where creditors of the grantor did not attempt to set aside such conveyance, a voluntary reconveyance by the fraudulent grantee to his grantor will be fraudulent and void against the creditors of the original grantee as the estate in the fraudulent grantee is complete and fully vested, so that it is subjected to a sale and conveyance, or to descent, no persons being entitled to impugn the same for the covin and collusion, in which it was contrived and transferred, other than the creditors of the original grantor. *Walton v. Tusten*, 49 Miss. 569.

A judgment creditor of a fraudulent grantee in a conveyance made in fraud of the rights of the creditors of the grantor does not stand in the light or place of a bona fide purchaser from such grantee, and the creditors of the original grantor, as to him, are entitled to have the conveyance set aside for the fraud. *Couse v. Columbia Powder Mfg. Co.* (N. J. Eq.) 33 Atl. 297.
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But where one with an express intent to defraud his creditors executed a mortgage to his son, the mortgage being purely voluntary, and thereafter the son reconveyed the land to his father, creditors of the son, who had not obtained judgment liens until after such reconveyance, cannot subject the lands to the payment of their debts; and, to the claim that the reconveyance was a fraud upon them, the court said the answer was that the land did not belong to the son, so that he could render it liable to his creditor; that the restoration to the owner before the liens attached was the execution of an act of moral duty, which a court of equity will not compel or even assist in, when both participate in the illegal transaction; yet the voluntary reconveyance could not be a fraud upon the creditors of the fraudulent alienee, and they could not assail the validity of the return of the property. *Powell v. Ivey*, 88 N. C. 258.

And where a creditor of a fraudulent grantee of real estate takes from him a mortgage on such estate as a further security on the previous debt, but without notice of the fraud, such creditor is not protected against the prior equity and legal liens of judgment creditors of the fraudulent grantor whose judgments were recovered subsequent to the fraudulent conveyance but prior to the mortgage. *Manhattan Co. v. Everson*, 6 Paige, 465.

Where a father, without the knowledge of his son and while the latter was a minor, conveyed land to him with the object to hinder, delay, and defraud the creditors of the father; and thereafter the son was made acquainted with the fact, and told that the land must be deeded back whenever the father desired it, to which the son assented; and thereafter the father purchased other land, paying the full purchase price himself, but had the title transferred to the son for the same fraudulent purpose that induced the first transaction, which the son well understood, and promised to convey it to the father whenever by him requested; and thereafter, and previous to the rendition of the judgment in an action for a breach of promise against the son, but after a verdict had been recovered in the action, the son carried out his moral obligation to reconvey to his father.—it was held that the judgment creditor in such action could not maintain a suit to set aside the reconveyance to the father. In so holding the court said the creditors of the father never at any time sought to disturb the title of the son. The land in the hands of the son was subject to his debts. Had a creditor of his obtained judgment against him while the title stood in his name the judgment would have been a lien upon the land, and no transfer to the father could have affected the lien. *Lockren v. Rustan*, 9 N. D. 43, 81 N. W. 60.

A son conveyed land to his father, and thereafter a creditor of the son obtained a judgment against him, and later a creditor of both the son and the father obtained judgments against both. The land was levied upon and sold upon an execution issued upon the latter judgment. In an action to try the right to the money received on the sale, and trial court, after permitting the creditor, who had obtained judgment against the son alone, to prove that the deed from the son to the father was made to defraud creditors, instructed the jury that, as

the legal title to the land at the time it was taken in execution and sold by the sheriff was vested in the father by the deed of conveyance from the son, against both of whom was the judgment and execution under which the sale was made, that judgment creditor ought to be preferred. The supreme court held that this was error, because, if the deed of conveyance, from the son to his father was made covinously with intent to hinder, delay, and defraud the creditors of the son, it was absolutely void under the statute 13 Eliz., chap. 5, and vested no interest or estate whatever, either legal or equitable, in the father as against the creditors of the son. *M'Kee v. Gilchrist*, 3 Watts, 230.

VII. *Rights of purchaser other than judgment creditor at execution sale.*

A judgment creditor who is in a position to have a conveyance made by his judgment debtor set aside because fraudulent as to him may cause an execution to issue on his judgment, and be levied on the land as the land of his debtor, and may bring it to sale, and the purchaser may go into possession and defend his title thus acquired, in ejectment brought by such fraudulent grantee, by showing the fraudulent character of the conveyance, or he may maintain an action to quiet title, or forcible detainer to recover possession from such fraudulent grantee; or he may bring ejectment against the fraudulent grantee and obtain possession; and whether he will recover or not in any of these cases will depend upon whether he establishes and the court determines judicially that the conveyance was fraudulent. *Detwiler v. Louison*, 10 Ohio C. D. 95.

A purchaser at an execution sale upon a judgment rendered after a conveyance of land by a judgment debtor has the same right to attack the conveyance as being in fraud of creditors as appertains to the judgment creditor himself, and the interest of such a creditor in the land of his debtor, fraudulently conveyed, is a legal, and not an equitable, asset under the statutes of Michigan. *Orendorf v. Budlong*, 12 Fed. 24.

A purchaser on executions under a judgment and decree of a debt subsequent to the date of a conveyance made by the judgment debtor in fraud of creditors is entitled to all the relief that the creditor himself would have been entitled to, for he stands in his place, and is armed with his rights; and such purchaser may maintain a bill to set aside such deed as fraudulent and void as against him. *Hildreth v. Sands*, 2 Johns. Ch. 35.

A memorandum to the report states that this decree was, on appeal, unanimously affirmed in the court of errors April 4, 1817.

As against a creditor, a deed executed with a view to defeat, delay, or hinder him, is void. He is therefore at liberty to treat the estate of his debtor, thus conveyed, as if no such conveyance existed, and to sell it in satisfaction of his debt. The purchaser buying at such sale must be permitted to show all the facts which make a title good, or else the sale by the creditor would be of no importance; and to do this he must stand in the place of the creditor, as the judgment is a part of his title, and for that reason, if there were no other, he must be allowed to show the same facts which the creditor could in order to give it effect. This was the 67 L. R. A.

answer of the court in *Jones v. Crawford*, Mc-Mull. L. 373, to the second ground of appeal, which said that the judge below was in error in saying that the purchaser at the execution sale occupied the position of the creditor under whose judgment he bought.

The law is well settled in Missouri that where a debtor conveys his land with a design to defraud his creditors a resulting trust is thereby created in favor of his creditors, and is the subject of an execution sale, and a purchaser at such sale will occupy as advantageous a position as though he were a creditor, when proceeding to set aside the debtor's conveyance on the ground of fraud. *Ryland v. Callison*, 54 Mo. 513.

A purchaser at a sheriff's sale stands in the place of the creditor upon whose judgment the land was sold, and as such may avoid a deed fraudulently made by the debtor for the purpose of defrauding creditors, in an action of ejectment, by proof of the fraud. *Mulford v. Peterson*, 35 N. J. L. 127.

In an action at law to recover land it was held that a purchaser at a sheriff's sale under a judgment stands, in reference to the land sold, precisely in the place of the judgment creditor; and if for any reason, as, for instance, fraud in the conveyance, the judgment creditor could reach the property, and subject it to the payment of his judgment, then, clearly the purchaser could assail the conveyance for a like reason, as he represents the judgment creditor, and is clothed with his right by virtue of his rights at the sheriff's sale; and, if he establishes the fact that the previous conveyance was made with intent to hinder and delay creditors, and shows that the conveyance was fraudulent and void as to creditors, then the judgment under which he purchased becomes a lien, and his title is perfect. *Eastman v. Schettler*, 13 Wis. 324.

A purchaser at a sheriff's sale under a judgment, of land which had previously been conveyed by the judgment debtor in fraud of his creditors, acquires all the right, title, and interest in the land which the debtor had at the commencement of the judgment lien, which is that which he would have had had the fraudulent conveyance not been made; and is vested with the rights of the creditor, entitled to the same relief, and can protect his title against the frauds of the judgment debtor in the same manner, and to the same extent, that the judgment creditor might have done had he purchased. *Barr v. Hatch*, 3 Ohio, 527; *Girard Nat. Bank v. Maguire*, 15 Phila. 313.

See *Hager v. Shindler*, 29 Cal. 47; *Spindler v. Atkinson*, 3 Md. 409, 56 Am. Dec. 755,—*supra*, II., a.

VIII. *Conclusion.*

The result of the foregoing would appear to be that what the effect on the legal title a conveyance of land in fraud of creditors, is, depends: 1st, largely upon the nature and character of the conveyance,—that is to say, whether it is a conveyance made by a debtor in fraud of his creditors to another of land of which he is at the time owner, or whether it is a conveyance made by a third person to another, at the instance of a debtor for a valuable consideration which is paid by him. Where the conveyance is made by the debtor it would

seem that, as to his creditors, so much of a legal title remains in him as that it may be levied upon and sold under an execution issued upon a judgment rendered against him subsequent to such conveyance, in the same manner as though the judgment had been rendered before the making thereof, and, as this cannot be done where the judgment debtor possesses a mere equitable interest, it would further seem that the legal title, so far as the judgment creditor is concerned, still remains in the debtor notwithstanding the fraudulent conveyance. Where, however, the legal title to the land never was in the fraudulent debtor, there never was, and is not, in him anything of a leviable nature, and so,—except in states where it is specially provided by statute that the interest which he has in the land into which his money has gone as a consideration for it may be levied upon the same as though he did possess the legal title—all that the creditor can do is to subject the land to the payment of his debt in equity, upon the theory that the money which should have gone to such payment was paid out for the land. What effect on the legal title such a conveyance has depends, secondly, largely upon the construction given by the courts to the various statutes on the subject in the different jurisdictions. The effect of such a conveyance upon the legal title as to parties who are not creditors is, by an almost general acquiescence of judicial decision, the same as though it were not fraudulent; and so much is this so that the legal title of a bona fide purchaser from the fraudulent grantee in such a conveyance will always be upheld, and not only as regards himself and persons who have purchased from him in good faith, but even as to those to whom he has conveyed, and who had knowledge of the original fraud. As to the effect of such a conveyance, where the same is not questioned by the creditors of the fraudulent grantor, upon the title of the fraudulent grantee as regards his creditors, and when they may levy and collect their judgments against him out of such lands, there seems to be something of a variety of opinion, with the logical deduction and reasoning in favor of the theory that, so long as the creditors of the fraudulent grantor make no complaint, and take no steps to subject the land to the payment of their debts, no one else can complain, and the legal title, so far as to subject the land to the debts of the fraudulent grantee, must be considered in him. From the fact that the subject has been up for decision in several instances, it would appear that the question has been raised as to whether a purchaser at the sale of the fraudulent grantor's interest on execution when he is not a judgment creditor himself, has the same rights, and the legal title passes to him in the same manner, as though the judgment creditor were the purchaser; and the courts are unanimous in saying that he is entitled to all the relief that the creditor himself would have been entitled to, for he stands in his place, and is armed with his rights, and he must be permitted, therefore, to show all the facts which make his title good; and, as the creditor is at liberty to treat the estate of the debtor thus conveyed as if no such conveyance existed, so is the purchaser at such sale, even though he be not a creditor.

P. H. V.

Town of GLENCOE, *Respt.*,

v.

A. H. REED, *Appt.*

(.....Minn.....)

***The fee owner of abutting property removed gravel from a gravel bed within the limits of a country highway, which did not cause any injury to the roadway, and the gravel was not required for the purposes of grading or improving the same.—*Held*, he was lawfully in the exercise of his rights as an abutting owner, within the rule that the only limitation upon the right of the owner of the fee to control and use the soil and other natural deposits within the limits of a highway is that such use shall be consistent with the full enjoyment of the public easement.**

(December 23, 1904.)

A PPEAL by defendant from a judgment of the District Court for McLeod County in favor of plaintiff in an action to enjoin defendant from removing gravel from within the limits of the highway. *Reversed*.

The facts are stated in the opinion.

Mr. F. R. Allen, for appellant:

Appellant was the owner of the gravel, and entitled to remove the same so long as he did not interfere with the public use of the highway.

15 Am. & Eng. Enc. Law, 2d ed. p. 418; *Rich v. Minneapolis*, 37 Minn. 424, 5 Am. St. Rep. 861, 35 N. W. 2; *Ellsworth v. Lord*, 40 Minn. 339, 42 N. W. 389; *Cater v. Northwestern Teleph. Exch. Co.* 60 Minn. 539, 28 L. R. A. 310, 51 Am. St. Rep. 543, 63 N. W. 111; *L. Realty Co. v. Johnson* (Minn.) 66 L. R. A. 439, 100 N. W. 94; *Watson v. Chicago, M. & St. P. R. Co.* 46 Minn. 321, 48 N. W. 1129; *Elliott, Roads & Streets*, p. 299; 2 Dill. Mun. Corp. § 688.

Mr. C. G. Odquist, for respondent:

The abutting landowner has no right to remove any earth or gravel from the public highway without the express consent of the town or highway authorities.

Viliski v. Minneapolis, 40 Minn. 304, 3 L. R. A. 831, 41 N. W. 1050; *Elliott, Roads & Streets*, p. 478; *Cullanan v. Gilman*, 107 N. Y. 360, 1 Am. St. Rep. 831, 14 N. E. 264; *Hunt v. Rich*, 38 Me. 195.

Lewis, J., delivered the opinion of the court:

Action to enjoin defendant from removing gravel from a gravel pit upon the highway, and for the recovery of \$200 damages, the

*Headnote by **Lewis, J.**

NOTE.—For some cases as to right of owner of fee of street to remove soil, sand, etc., therefrom, see note to *Viliski v. Minneapolis*, 3 L. R. A. 831.

expense of restoring the highway to its former condition. The trial court found the facts as follows: (1) That defendant was the owner of the fee upon which the highway was located. (2) That prior to the time of the acts complained of there existed on the west side of the traveled track in the highway an excavation 8 to 13 feet distant from the center of the traveled track, from 8 to 12 feet wide, and from 4 to 8 feet deep, which had been made by the public authorities in the construction of and for the purpose of improving the highway. (3) That at the place of the excavation, and west thereof, there was a gravel pit, suitable for the construction and repair of streets and highways; that in the fall of 1903, defendant sold to the village of Glencoe 162 loads of gravel for the use of its streets, which was removed from the west side of the excavation, and was worth 10 cents a load, amounting to \$16.20. (4) That the road was not injured by the removal of the gravel therefrom, and there was no evidence given at the trial that it was needed for the improvement or repair of the village roads. Judgment was ordered enjoining and restraining defendant from removing gravel from the highway, and for its disbursements, but the court allowed no damages.

The appeal is based upon the findings of the court, and presents the question whether the conclusion of law is justified by the findings of fact. It is the rule in general, and in this state, that the dedication of land for a public highway confers a mere easement for public use as a highway, and the landowner retains a right to use the land for any lawful purpose compatible with the full enjoyment of the public easement. In *Rich v. Minneapolis*, 37 Minn. 423, 5 Am. St. Rep. 861, 35 N. W. 2, the city entered into a contract with a certain party to grade one of its streets, which in part provided that, in consideration of the grading of the street, the contractor was to receive and be permitted to quarry and take away all the rock in that part of the street covered by their contract. It was held that the owner of the fee was entitled to recover the value of the rock so carried away, but the decision was based upon the fact that it was not necessary to remove the rock for the purpose of grading or improving the street, it being located below the grade line. To the same effect, see *Viliski v. Minneapolis*, 40 Minn. 304, 3 L. R. A. 831, 41 N. W. 1050, where it was held that the contractor for the construction of a sewer was liable to the owner of the fee for the value of the stone taken from a ledge in the street, not necessary to be removed for the construction of the sewer. *Ellsworth v. Lord*, 40 Minn. 337, 42 N. W. 389; *Cater v. Northwestern Teleph.* 67 L. R. A.

Each. Co. 60 Minn. 539, 28 L. R. A. 310, 51 Am. St. Rep. 543, 63 N. W. 111; and *L. Realty Co. v. Johnson* (Minn.) 66 L. R. A. 439, 100 N. W. 94, are cases illustrative of the doctrine that the owner of the fee retains the right to use the land for any lawful purpose compatible with the full enjoyment of the public easement, and that the private right cannot be disregarded by the authorities, but must be respected in so far as may be consistent with the public right to have a safe, unobstructed, and convenient right of way, taking into consideration the nature and the situation of the property and the circumstances of the case. In *Elliott on Roads & Streets*, 2d ed. § 411, the author thus sums up what he deems to be the rule as defined by the American and earlier English cases: "We believe that the right of the public is an easement, and that the owner of the fee remains the owner of the soil, springs, mines, quarries, timber, and the like, except in so far as the public officers may have a right to use suitable materials for improving or repairing the road." So far as we have been able to discover from examination of the authorities, the officers in charge of a public highway are authorized to use the material necessary to remove in the improvement of the highway, at least so far as necessary for the improvement of the road under construction across the premises involved. There are not many cases in the books where the particular question involved in this case has been decided. In *Old Town v. Dooley*, 81 Ill. 255, it was held that the right of way existing in the public over land as a highway is only a right of passage, and not a right to get water, either in streams or springs, on the soil of the landowner: that a spring in a public highway is not a part thereof, nor its use an incident to the use of the road; and the owner had a right to fence it off from the public, so long as the use of the highway was not interfered with. In *Williams v. Kenney*, 14 Barb. 629, the owner of the fee sold sand from a sand pit on one side of the traveled road in the highway, stipulating that no injury should be done to the highway, and it was held that the soil was his, with all the materials which nature had placed there; that he could dig, take, use, and sell to any extent compatible with the full and secure enjoyment of the easement by the public, and that he was not responsible to an adjacent owner, there being no interference with his land and access to the highway. In *Robert v. Sadler*, 104 N. Y. 220, 58 Am. Rep. 498, 10 N. E. 428, a contractor, by the terms of his contract, was required to grade a roadway, and cover it with gravel to a depth of 15 inches. The land within the road line across plaintiff's premises was above the grade, and required a re-

moval of the earth to the depth of the grade and 15 inches below it. The contractor not only removed this material above the grade, and used it upon the avenue for the purpose of filling and construction, but dug pits in the roadway to a depth of 6 feet below the grade, in order to get gravel with which to perform his contract without paying for it. The defendant attempted to justify upon the ground that his acts were embraced in the public easement, and were authorized by it. It was held that the contractor was liable, and the decision rests upon the ground that only superincumbent material, necessary to be removed, may be used upon other parts of the road and upon premises of other land-owners.

It is quite evident from the trend of American decisions that the only limitation upon the rights of the owner of the fee to control and use the soil and other natural deposits within the limits of the highway is that such use shall be consistent with the full enjoyment of the public easement. It was found by the trial court that at some prior time the public authorities had made an excavation in this gravel bed, and used the material for the construction of the road, and it is fairly inferable from the findings that such excavation was made below the grade of the road, and that it was not necessary to remove the material in the process of grading in front of plaintiff's premises. According to the findings, defendant continued the excavation, and removed his own gravel from a point not only below the grade of the roadway, but gravel not necessary for its construction or repair, and which did not injure the road. As we understand the decision of the learned trial court, it was based upon the ground that in no event will the owner of the fee be permitted to enter upon a public highway, and remove therefrom soil or gravel, without permission of the public authorities. The

author of Elliott on Roads and Streets, § 399, says: "Whatever is necessary to be done in order to make a safe, convenient public country road, the highway officers may lawfully do, and there may be cases where the necessity will be such as to exclude the owner from using any part of the surface of the way for any permanent private purpose." Section 400: "While the control of the highway officers over a rural road is, as is evident from what we have said, by no means so extensive as that of municipal officers over a city street; still it is extensive enough to authorize the rural highway officers to make it safe and convenient for passage, and to effect this object they may not only pave or gravel the entire width of the way, but they may also use it for incidental highway purposes." *Palatine v. Kreuger*, 121 Ill. 72, 12 N. E. 75, is a case wherein the distinction is pointed out between the authority conferred with respect to city and rural highways. In short, it may be said that in the case of country roads the public authorities have jurisdiction to do all that is necessary to meet the public necessities, and make the highway efficient and safe in every respect; but this is the extent of their authority. Under the findings of this case, it not appearing that it was necessary to use that part of the highway where the excavation was extended for the purpose of making a roadway, and it not appearing that the material taken therefrom was necessary for the construction or repair of such roadway, and the roadway not having been injured, it follows that the public authorities have no power to prevent the entrance upon the highway by the owner of the fee for the purpose of enjoying the property rights incident to his ownership, and consequently their consent was not necessary.

Judgment reversed.

KANSAS SUPREME COURT.

STATE of Kansas

v.

E. J. SMILEY, *Appt.*

(65 Kan. 240.)

***1. The general language of statutes will be limited to such persons and subjects as it is reasonable to presume the legislature intended it should apply.**

*Headnotes by DOSTER, Ch. J.

NOTE.—As to illegal trusts under modern anti-trust laws, see also, in this series, *Whitwell v. Continental Tobacco Co.* 64 L. R. A. 689, and *note*.
67 L. R. A.

2. Objections to the constitutional validity of statutes can be made only by those to whom the enactment applies, and against whom attempts to enforce it are made.

3. The making of anti-competitive trade agreements as to products and merchandise bought or sold on the general market is contrary to public policy, and it is competent for the legislature to enact penal measures to prevent the making and carrying out of such agreements.

4. Chapter 265, Laws 1897 (Gen. Stat. 1901, §§ 7864-7874), known as the "anti-trust law," does not conflict with the guaranty of right to acquire property by

lawful contract secured by the Federal Constitution, and is a valid exercise of legislative power.

5. An agreement entered into by all the dealers on a certain market, limiting their right, severally, under stipulated forfeitures or penalties, to buy all the grain they otherwise might on such market, is an agreement in restraint of trade, and falls within the penal terms of the anti-trust act of 1897.
6. An instruction to the jury, possibly erroneous, but, if so, harmless, discussed, and the lack of error in giving it pointed out.

(Pollock, J., dissents.)

(June 7, 1902.)

APPEAL by defendant from a judgment of the District Court for Rush County convicting him of violating the anti-trust law. *Affirmed.*

The facts are stated in the opinions.

Mr. H. Whiteside, for appellant:

Where the statute makes the intent an element of the crime the intent must be alleged and proved.

Wharton, Crim. Pl. & Pr. 9th ed. § 163a; *State v. Child*, 42 Kan. 611, 22 Pac. 721; *State v. Burns*, 35 Kan. 387, 11 Pac. 161; *State v. Bush*, 45 Kan. 141, 25 Pac. 614; *State v. Lawrence*, 43 Kan. 125, 23 Pac. 157.

A combination of two or more persons cannot be in and of itself illegal, unless it amounts to a civil or criminal conspiracy.

Eddy, Combinations, § 170.

The law encourages and provides for combination, and recognizes the economical truth that the co-operation of individuals is essential to the well-being and the progress of society.

Jones v. Fell, 5 Fla. 510; Eddy, Combinations, § 262; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, 9 N. E. 629; *Herriman v. Menzies*, 115 Cal. 16, 35 L. R. A. 318, 56 Am. St. Rep. 82, 46 Pac. 730, 44 Pac. 660.

Where it is claimed that a combination is inimical to public interest, the apprehension of danger should rest on evident grounds.

Leslie v. Lorillard, 110 N. Y. 519, 1 L. R. A. 456, 18 N. E. 363.

All combinations or contracts that tend to suppress competition or fix prices are not illegal.

Eddy, Combinations, §§ 288-332; *Macaulay Bros. v. Tierney*, 19 R. I. 255, 37 L. R. A. 455, 61 Am. St. Rep. 770, 33 Atl. 1; *Bohn Mfg. Co. v. Hollis* (*Bohn Mfg. Co. v. Northwestern Lumbermen's Asso.*) 54 Minn. 223, 21 L. R. A. 337, 40 Am. St. Rep. 319, 55 N. W. 1119; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 67 L. R. A.

N. E. 454; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50.

Less than two cannot possibly be joined in an indictment for conspiracy.

Wharton, Crim. Pl. & Pr. 9th ed. § 305; *State v. Bailey*, 3 Blackf. 209; *State v. Jackson*, 7 S. C. N. S. 283, 24 Am. Rep. 476; *Turpin v. State*, 4 Blackf. 72; *State v. Tom*, 13 N. C. (2 Dev. L.) 569; *Delany v. People*, 10 Mich. 241; *State v. Allison*, 3 Yerg. 428; *State v. Byron*, 20 Mo. 210; *State v. Covington*, 4 Ala. 603; *United States v. Cole*, 5 McLean, 513, Fed. Cas. No. 14,832; 1 Wharton, Crim. Law, 6th ed. 1870, § 431; 3 Wharton, Crim. Law, § 2339; *People v. Howell*, 4 Johns. 296; *State v. Mainor*, 28 N. C. (6 Ired. L.) 340; *Martin v. Leslie*, 93 Ill. App. 44; *Jones v. Baker*, 7 Cow. 445; *Com. v. Edwards*, 135 Pa. 474, 19 Atl. 1064; 6 Am. & Eng. Enc. Law, 2d ed. p. 846; *People v. Olcott*, 2 Johns. Cas. 301, 1 Am. Dec. 168; *State v. Egan*, 10 La. Ann. 698; *State v. O'Donald*, 1 McCord, L. 532, 10 Am. Dec. 691; *State v. Foster*, 21 W. Va. 769.

Chapter 265, Laws 1897, is unconstitutional and void.

The liberty to contract is as much protected by the constitutional provision as the liberty of person, and any attempt to abridge or limit that right will be held void, unless such abridgment or limitation is necessary as a police measure to preserve the peace and order of the community, or the life, liberty, and morals of individuals.

2 Eddy, Combinations, § 679. *Niagara F. Ins. Co. v. Cornell*, 110 Fed. 816; *Re Grice*, 79 Fed. 627.

Messrs. Keeler & Hite and **Allen & Allen**, with **Messrs. A. A. Godard**, Attorney General, and **J. W. McCormick**, for appellee:

The commission of the offense charged in the information is made a crime under the law of 1897, without any express reference to any intent. Therefore, all that was necessary was simply to allege the commission of the act.

State v. Bush, 45 Kan. 138, 25 Pac. 614; 1 Bishop, Crim. Proc. § 521; 4 Am. & Eng. Enc. Law, p. 681; *State v. Hurds*, 19 Neb. 316, 27 N. W. 139; *State v. Smith*, 93 N. C. 516; *Parker v. State*, 20 Tex. App. 451; *United States v. Leathers*, 8 Sawy. 17, Fed. Cas. No. 15,581.

The constituent elements of the offense are alleged in the information, which is sufficient in this case.

State v. Beverlin, 30 Kan. 612, 2 Pac. 630; *State v. Gavigan*, 36 Kan. 327, 13 Pac. 554; *State v. Barnett*, 3 Kan. 250, 87 Am. Dec. 471; *State v. Blakesley*, 39 Kan. 153,

18 Pac. 170; *State v. Watson*, 30 Kan. 281, 1 Pac. 770.

The unlawful conspiracy is the gist of the offense, and therefore it is not necessary to allege or prove the execution of the agreement.

3 Greenl. Ev. 15th ed. §§ 91-95; *State v. Noyes*, 25 Vt. 415; Wharton, *Crim. Law*, §§ 2293-2295.

The offense is complete if the defendant entered into an agreement with another for the purpose of fixing the price of any merchandise.

Com. v. Grinstead, 108 Ky. 59, 55 S. W. 720, 57 S. W. 471.

One of two or more conspirators may be separately indicted, tried, and convicted.

People v. Richards, 67 Cal. 412, 56 Am. Rep. 716, 7 Pac. 828; *Heine v. Com.* 91 Pa. 145; *People v. Mather*, 4 Wend. 230, 21 Am. Dec. 122; *United States v. Miller*, 3 Hughes, 553, Fed. Cas. No. 15,774; *Reg. v. Ahearne*, 6 Cox, C. C. 6; *King v. Oxford County*, 13 East, 413, note; 1 Bishop, *Crim. Proc.* § 463; 4 Am. & Eng. Enc. Law, p. 637, ¶ vii; 1 Archbold, *Crim. Pr. & Pl.* 301, and note; 2 Bishop, *Crim. Proc.* § 186; 3 Wharton, *Crim. Law*, 6th ed. §§ 2340, 2344, 2346; *Com. v. Demain*, 3 Clark (Pa.) 487.

The statute is constitutional.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *State ex rel. Crow v. Firemen's Fund Ins. Co.* 152 Mo. 1, 45 L. R. A. 363, 52 S. W. 595; *Houck v. Anheuser-Busch Brewing Asso.* 88 Tex. 184, 30 S. W. 869; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *State ex rel. Astor v. Schlitz Brewing Co.* 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033; *State ex rel. Monnett v. Buckeye Pipe Line Co.* 61 Ohio St. 520, 56 N. E. 464.

Doster, Ch. J., delivered the opinion of the court:

This is an appeal from a judgment of conviction of a violation of the anti-trust law. The information on which the conviction was based reads as follows: "I, the undersigned county attorney of said county, in the name and by authority and on behalf of the state of Kansas, give information that on the 20th day of November, A. D. 1900, in said county of Rush and state of Kansas, one E. J. Smiley, secretary and representative of the Kansas State Grain Dealers' Association, did then and there unlawfully enter into an agreement, contract, and combination in the county of Rush and the state of Kansas with divers and sundry persons, partners, companies, and corporations, or grain dealers and grain buyers in the town of Bison, in said county and state aforesaid, 67 L. R. A.

to wit, Humburg & Ahrens, the LaCrosse Lumber & Grain Company, the Bison Milling Company, and George E. Weicken, who were at the same time and place competitive grain dealers and buyers, to pool and fix the price the said grain dealers and buyers should pay at the said place, and to divide between them the net earnings of said grain dealers and buyers, and to prevent competition in the purchase and sale of grain among the said dealers and buyers; contrary to the form of statute in such case made and provided, and against the peace and dignity of the state." The proceeding was instituted and conviction had under chapter 265, Laws 1897 (Gen. Stat. 1901, §§ 7864-7874). A question is raised as to whether the charge was made and judgment pronounced under that or certain other statutes. This will be noticed hereafter. The parts of the act of 1897 which apply to the case read as follows:

"Sec. 1. A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any, or all of the following purposes: First. To create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state. Second. To increase or reduce the price of merchandise, produce, or commodities, or to control the cost of rates of insurance. Third. To prevent competition in the manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities, or to prevent competition in aids to commerce. Fourth. To fix any standard or figure, whereby its price to the public shall be, in any manner, controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, use, or consumption in this state. Fifth. To make or enter into, or execute or carry out, any contract, obligation, or agreement of any kind or description by which they shall bind or have to bind themselves not to sell, manufacture, dispose of, or transport any article or commodity, or article of trade, use, merchandise, commerce, or consumption, below a common standard figure; or by which they shall agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graded figure; or by which they shall in any manner establish or settle the price of any article or commodity, or transportation, between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in transportation, sale, or manufacture of any such article or commodity; or by which they shall agree to pool, combine, or

unite any interest they may have in connection with the manufacture, sale, or transportation of any such article or commodity, that its price may in any manner be affected. And any such combinations are hereby declared to be against public policy, unlawful, and void.

"Sec. 2. All persons, companies, or corporations within this state are hereby denied the right to form or to be in any manner interested, either directly or indirectly, as principal, agent, representative, consignee, or otherwise, in any trust as defined in § 1 of this act."

Subsequent sections of the act contain penal provisions, under which appellant was fined, and ordered committed to jail. The above statute is assailed with great vehemence by counsel for appellant. Their contention is that it imposes such limitations upon freedom of contract as to constitute a deprivation of the right of property contrary to the guaranty of the 14th Amendment to the Federal Constitution. They say that, instead of being what it purports,—an act to prevent unreasonable restrictions upon trade,—it is itself such restriction, and is therefore violative of the fundamental right to acquire property by lawful contract. To enforce these contentions many generalities of language culled out of the reported decisions and the writings of the commentators have been quoted, but no concrete instances of holdings, by courts of last resort, adverse to enactments of the character of the one in question, have been cited. Two recent decisions by subordinate Federal judges, ruling against the validity of statutes of a similar kind, have been called to our attention. *Re Grice*, 79 Fed. 627; *Niagara F. Ins. Co. v. Cornell*, 110 Fed. 816. The opinions in both these cases, so far as they discuss the subject of the repugnancy of the acts under consideration to the constitutional guaranty of freedom of contract, are open to the criticism of being without the bonds of the meritorious question at issue. This is perceivable at once. The first-mentioned case involved the anti-trust statute of Texas. That statute exempted from its terms the original producer or raiser of agricultural products of live stock. The other case involved the anti-trust statute of Nebraska. That statute exempted from its provisions assemblies or associations of laboring men. The making of these exceptions was class legislation, and constituted a denial of the equal protection of the law,—so the judges ruled. That ruling was all-sufficient for the purpose of the cases. Not only that, it was on the only necessary question in the cases. Hence the disposition made of them on the one special feature forbade an opinion on the abstract general

question, and rendered all that was said upon it *dictum* of the baldest kind. The Supreme Court of the United States recently had a like occasion to declare the law in advance of the presentation of a necessary issue concerning it. It was in the case of *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431. That case involved the validity of the anti-trust law of Illinois, an enactment similar to the statutes of Texas and Nebraska, and, like them, containing an exception in favor of a certain class. The court held the statute invalid because of the exception, but very properly refrained from making pronouncement of what the law would be if it had not contained the exception. The opinions of the judges in the cases of *Re Grice*, 79 Fed. 627, and *Niagara F. Ins. Co. v. Cornell*, 110 Fed. 816, are not regarded by us as authority. They are, however, adopted as arguments by counsel for appellant, and as such are entitled to consideration. Nevertheless, as arguments, they are barren of reference to adjudged cases, except in the form of quotations of abstract and general statement. The burden of their reasoning is that the statutes under consideration were so broad and comprehensive in their terms as to be inclusive of classes of persons and kinds of business that it would be unreasonable and tyrannical to regulate in the mode attempted. In the case first cited it is said among other things of like kind: "Two village grocers doing business at a loss to both could not form a partnership in order to save both from bankruptcy. Neither could they form a partnership in order that they might lessen their expenses, and thus reduce the price of their commodities to the public. Still more, if A and B, each owing half a car load of potatoes, should agree to ship together in order to obtain carload rates, thus enabling them to sell lower in the markets, they would violate this act." In the other case the assumed unreasonableness and tyranny of the statute is illustrated by the following, among others, as typical instances: "If this law is valid, two or more farmers cannot agree that they will not sell their wheat to a neighboring mill for less than so much per bushel. Two or more farmers cannot agree that the live-stock feeder shall not have their corn except at a certain price. . . . Nothing can be agreed to by the manufacturer, the farmer, gardener, the contractor, consumer, or laborer to prevent the reduction of price." If the statutes of Texas and Nebraska were really to be enforced against the class of persons mentioned and to the utter length stated by the judges in the two cases cited, they well deserved the condemnation they received; and, if our statute is

to be held to apply in the like way, we should not hesitate to declare it to be violative of the most fundamental principles of constitutional right,—that is, we should not hesitate to do so when the question of its invalidity should be presented by someone entitled to complain, to wit, one of the proscribed and oppressed classes: nor shall we hesitate to do so in behalf of appellant in this case if, upon examination, we find him to belong to one of such classes. However, it was not charged against him, or claimed by him, that he belonged in any such category. It was neither charged nor claimed that his confederacy with the other persons named in the information was for purposes of a business partnership, or that he was one of two shippers of produce seeking to lighten freight charges by joining with the other, or that he was a farmer agreeing with his neighbors to hold his grain for an advance in the market; nor was it charged or claimed that the acts performed by him were, as to the examples enumerated, of a like limited scope and a like presumptively harmless and reasonable nature. It was charged and proved against him that he was a buyer of grain on the general open market; that he was an intermediary between the public who produced and sold and the public who bought and consumed, and as such that he conspired with others of like business to prevent competition among themselves, and to pool and fix the price of grain bought and sold on such market. Now, whether this fact takes him out of the list of those innocent instances cited in the cases we are discussing we will presently inquire. Suffice it to say for the moment that, unless he does belong in such list, he cannot be heard to complain. He cannot be heard to object to the statute merely because it operates oppressively upon others. The hurt must be to himself. The case, under appellant's contention as to this point, is not a case of favoritism in the law. It is not a case of exclusion of classes who ought to have been included, the leaving out of which constitutes a denial of the equal protection of the law, but it is the opposite of that. It is a case of the inclusion of those who ought to have been excluded. Hence, unless appellant can show that he himself has been wrongfully included in the terms of the law, he can have no just ground of complaint. This is fundamental, and decisively settled. *Kansas City v. Union P. R. Co.* (*Kansas City v. Clark*) 59 Kan. 427, 52 L. R. A. 321, 53 Pac. 468. Affirmed under the title, "*Clark v. Kansas City*," 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; *Albany County v. Stanley*, 105 U. S. 305-311, 26 L. ed. 1044-1049; *Pittsburgh, C. C. & St. L. R.* 67 L. R. A.

Co. v. Montgomery, 152 Ind. 1, 71 Am. St. Rep. 302-311, 49 N. E. 582.

In immediate connection with the subject just discussed the question arises whether, assuming the general phraseology of the statute to be comprehensive of classes of persons who cannot be rightfully included therein, the whole enactment becomes nullified thereby. The general doctrine is that only the invalid parts of a statute are without legal efficacy. This is qualified by the further rule that, if the void and valid parts of the statute are so connected with each other in the general scheme of the act that they cannot be separated without violence to the evident intent of the legislature, the whole must fail. These rules are of everyday enforcement in the courts. The latest case in which they were adverted to by us is *Hardy v. Kingman County*, 65 Kan. 111, 68 Pac. 1078. The instances in which the application of the rule first mentioned most usually occurs are those where separable words, clauses, sentences, or sections of the statute are stricken out, as it were, because constitutionally objectionable. However, the rule is not limited to such instances. It applies as well to exclude from the operation of the statute subjects and classes of things lying without the legislative intent, although comprehended within the general terms of the act, as it does to exclude parts of the verbal phraseology. Two cases strikingly illustrative of this rule are *Albany County v. Stanley*, 105 U. S. 305, 26 L. ed. 1044, and *Com. v. Gagne*, 153 Mass. 205, 10 L. R. A. 442, 26 N. E. 449. See also, to the same effect, *McKee v. United States*, 164 U. S. 287-293, 41 L. ed. 437-439, 17 Sup. Ct. Rep. 92; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 377. In the first-mentioned case it was held that a state-taxing statute, general in its terms, applying alike to all taxpayers, which did not recognize a certain exception allowed by act of Congress in favor of stockholders in national banks, was not, for that reason, void as a whole, but, limited by the controlling Federal law, was valid as to all the persons embraced within the general language employed. In the other case it was held that a state prohibitory liquor law which did not except from its operation liquors in original packages, but by the generality of its terms included them, which, under the commerce clause of the Federal Constitution as construed in *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681, could not be done, was not, for that reason, void as to liquors in broken packages, but as to them was valid and enforceable. This ruling, in necessary effect, was approved by the Supreme Court of the United States in

the case *Re Rahrer* (*Wilkerson v. Rahrer*) 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865. In that case Rahrer contended that after the decision of *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 10 Sup. Ct. Rep. 681, there was no law in Kansas prohibiting the sale of liquor in original packages; that the effect of the subsequent act of Congress popularly called the "Wilson bill," being an act to subject interstate importations of liquor in original packages to the operation of the local law, could not have the effect to give vitality to that which as a statute had existence in form only, and not in fact, but that a new state enactment was required. The soundness of this contention was denied, and in denying it the court, after restating the ground of the decision in *Leisy v. Hardin*, said: "This was far from holding that the statutes in question were absolutely void, in whole or in part, and as if they had never been enacted. On the contrary, the decision did not annul the law, but limited its operation to property strictly within the jurisdiction of the state." When the court did that it only did what courts are in the daily habit of doing,—limited the language of the statute to the subjects in respect of which it was competent and proper for the legislature to dispense. Throughout the entire history of English and American law the courts have been ruling that the general words of statutes were to be restrained in import and application whenever the taking of them in literal sense would lead to absurd or hurtful consequences, and the same is true under the American system of written constitutions whenever the taking of general words in their full signification would expose them to conflict with the organic law. It is but an affectation of sensitiveness of regard for the Constitution which often leads courts to beat down the whole of a legislative enactment because of its opposition to the fundamental ordinance in some minor particular, instead of adjusting it to harmonize with the controlling provision. It is not a matter of concern to us that the general language of the statute under consideration may apply to classes of persons who should not have been comprehended therein, and who may have a standing in court to claim exception therefrom. Their cases can be attended to when presented in due form. It is not they, but the appellant, who is before us. Does he state a case entitling him to exemption from the operative scope of the statute? One of the cases most strikingly illustrative of the rule of interpretation in question is *Opinion of the Justices*, 41 N. H. 553. It was claimed that certain sections of the statutes of New Hampshire were so broad and general as to be in opposition to what was called the 67 L. R. A.

"fugitive slave law" of Congress, and the constitutional provision in pursuance of which it was enacted. Replying to this claim, the justices said: "But, if these sections could not be applied in the cases supposed, they are not, therefore, necessarily void. If the intention of any part of the act, determined upon settled principles of legal interpretation, were to obstruct or impede the exercise or enjoyment of any right secured by the Constitution of the United States, or by any constitutional law of the United States, that part would be unconstitutional. But if the intention thus determined were merely to establish, regulate, or guarantee rights or privileges consistent with the Constitution and laws of the United States in a mode not in conflict with either, and if the act would constitutionally apply to a large class of cases that do and will exist, it would not be rendered unconstitutional by the fact that, literally construed, its language might be broad enough to extend to a few exceptional cases where it could not constitutionally apply; since, upon settled principles of construction, the latter are as fully and effectually excepted by necessary implication as if the statute had contained an express proviso that it should not extend or apply to such cases. The rule of construction universally adopted is that, when a statute may constitutionally operate upon certain persons, or in certain cases, and was not evidently intended to conflict with the Constitution, it is not to be held unconstitutional merely because there may be persons to whom, or cases in which, it cannot constitutionally apply; but it is to be deemed constitutional, and to be construed not to apply to the latter persons or cases, on the ground that courts are bound to presume that the legislature did not intend to violate the Constitution." There are some decisions of the Supreme Court of the United States said to be in opposition to the above-stated theory of construction of statutes. In our judgment, they are not, although the language of some of the opinions confuses the subject. They were cases in which the court, while admitting the existence of the rule, held it inapplicable to the particular statutes under consideration. The principal ones are *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *Trade-Mark Cases*, 100 U. S. 82, 25 L. ed. 550; *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601, and *Baldwin v. Franks*, 120 U. S. 678, 32 L. ed. 766, 7 Sup. Ct. Rep. 656, 763. All of these cases raised questions as to the validity of legislation enacted under the special and limited powers of Congress. The one first cited involved certain of the provisions of what is known as the "enforcement act" of May 31.

1870, which act sought to give effect to the 15th Amendment of the Constitution, prohibiting discriminations in the matter of suffrage between citizens on account of race, color, etc. The act, however, was directed in general terms against discriminations for any and all reasons, not for the particular reason of race or color. Inasmuch as the sole power conferred on Congress by the 15th Amendment was one to effectuate by appropriate legislation the prohibition against discriminations between citizens on account of the specific characteristics named, it was held that an act which undertook to prohibit discriminations generally could not be narrowed by construction into a prohibition of discriminations practised because of race or color. In the *Trade-Mark Cases* the statute under consideration was one which made punishable those who sold or had in their possession, counterfeits or colorable imitations of the trademarks of other persons. Inasmuch as trademarks are not the subjects of congressional legislation, except as they may be used on articles of interstate commerce or commerce with foreign nations and the Indian tribes, it was decided that a statute relating to their use on articles of commerce generally could not be upheld as applicable to the one specific subject in respect to which Congress might legislate, there being no hint or intimation in the act of a purpose to have it so confined. The cases of *United States v. Harris* and *Baldwin v. Franks* involved the question of the validity of § 5519, U. S. Rev. Stat. (U. S. Comp. Stat. 1901, p. 3714). That section, in general terms, sought to make punishable those who conspired to deprive other persons of the equal protection of the laws, or of equal privileges and immunities under the laws. Inasmuch as Congress can interfere to secure equality of legal protection and equality of privileges and immunities only as specifically authorized,—as, for instance, under the 15th Amendment, to prevent discriminations in suffrage on account of race, color, etc., or in execution of the treaty power to prevent the deprivation of treaty rights accorded to citizens or subjects of foreign nations,—it was held that the section of the statute cited was too general in its terms to be narrowed by construction into one in execution of any of the specific powers.

The decisions we have thus distinguished from the one we make are philosophic and reasonable. They are bottomed upon the fact of the special and limited powers of Congress; and this fact, though not commented on at length as the basis of the judgments rendered, is nevertheless adverted to in all of them, and obviously constitutes the *ratio decidendi* of the cases. It was
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plainly expressed by Mr. Justice Woods in *United States v. Harris*, who said in one part of the opinion, "It must, nevertheless, be stated that the government of the United States is one of delegated, limited, and enumerated powers," and who then, in another part, tersely remarked: "Those provisions of the law which are broader than is warranted by the article of the Constitution by which they are supposed to be authorized cannot be sustained." If we might be allowed to undertake the statement of a rule of interpretation applicable to the class of Federal statutes considered in the above cited cases, it would be that a power which is specifically limited cannot be allowed to express itself in general terms, and a limitation of the general language to the specific power will not be implied. On the other hand, however, a power which is unlimited, except as specifically prohibited, may express itself in general terms, and the specific instances of limitation will be implied as provisos. This furnishes a rational basis of discrimination between rules of interpretation applicable in the respect under consideration to Federal and state legislation. Congress cannot legislate on all subjects, as can a state legislature. Therefore its enactments must show on their face their application to that to which, as matter of constitutional limitation, they should be confined. For example, a state legislature is empowered to legislate generally in respect to all trusts and conspiracies in restraint of trade, except as limited by the commerce clause of the Federal Constitution; but, on the other hand, Congress is not empowered to legislate generally with respect to trusts and trade conspiracies. It can legislate against them only under the commerce clause of the Constitution. Therefore a state enactment, though broad enough in terms to apply to trusts engaged in interstate commerce, or conspiracies in restraint of interstate trade, will be limited by construction to that to which it can alone legally apply; but a congressional act, being of necessity limited to the one particular class of trusts or trade conspiracies, viz., those engaged in interstate or international trade, must express that limitation on its face. Nevertheless, we do not doubt that if a congressional enactment, general in terms, could be given specific application to subjects lying within its rightful sphere, without the aid of other and qualifying or explanatory words, but which general terms were also inclusive of subjects lying without such sphere, it would be restrained by construction of those matters in respect of which Congress is qualified to dispense, and not be nullified as a whole.

In considering the possible view of the Su-

preme Court of the United States of the rule of interpretation of the general language of statutes, it is important to observe that that court does not apply the rule of the *Trade-Mark* and other like cases to state legislation supposed to be in conflict with the Federal Constitution or laws, but, on the contrary applies the one we invoke in this case. It did so in *Albany County v. Stanley*, 105 U. S. 305, 26 L. ed. 1044; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 377; *Re Rahrer* (*Wilkerson v. Rahrer*) 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865, and lately did so in *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28-42, 44 L. ed. 657, 663, 20 Sup. Ct. Rep. 518. In that case the contention was made that a statute of Texas was so broad in its terms as to prohibit foreign corporations from engaging in interstate as well as domestic commerce, and hence was unconstitutional. This claim, and the disposition made of it, were stated as follows: "The claim is, if we understand it, that the statute prohibits all business of foreign corporations, and hence is unconstitutional as including interstate business, and cannot be limited by judicial construction to local business, and the unconstitutional taint thereby removed. To sustain the contention, *United States v. Reese*, 92 U. S. 214, 221, 23 L. ed. 563, 565; *Trade-Mark Cases*, 100 U. S. 82, 25 L. ed. 550; *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; *Baldwin v. Franks*, 120 U. S. 678, 32 L. ed. 766, 7 Sup. Ct. Rep. 656, 763, and some other cases,—are cited. They do not sustain the contention. The interpretation of certain statutes of the United States was involved, and the court, finding the meaning of the statutes plain, decided that it could not be changed by construction, even to save the statutes from unconstitutionality." It may be said that the judgment from which the above quotation is made, so far as concerned the point noticed, was rested upon the rule that the Federal courts will adopt the construction which the state tribunals place upon their own statutes. Be it so, if that is a sufficient reason. We construe the general words of our statute to be comprehensive only of those cases which are the rightful subjects of legislation of the kind in question. However, we disavow doing so merely in order to shelter the statute under the rule mentioned, but because the ancient, established and wise canon of interpretation requires it to be done. Sporadic and anomalous cases indicating to the contrary may be found, as they may be found to the contrary of every settled accepted doctrine of the law; but the rule that the general words of statutes will be restricted in application to cases pre-

sumptively within the legislative intent has been so long accepted as a cardinal principle that its occasional denial, even by the most learned of courts, fails utterly of adverse impression. "It happens in two sorts of cases that it is necessary to interpret the laws. One is when we find in a law some obscurity, ambiguity, or other defect of expression; for in this case it is necessary to interpret the law in order to discover its true meaning. And this kind of interpretation is limited to the expression, that it may be known what the law says. The other is when it happens that the sense of a law, however, clear it may appear in the words, would lead us to false consequences, and to decisions that would be unjust, if the laws were indifferently applied to everything that is contained within the expression; for in this case the palpable injustice that would follow from this apparent sense obliges us to discover by some kind of interpretation, not what the law says, but what it means, and to judge by its meaning how far it ought to be extended, and what are the bounds that ought to be set to its sense." *Domat's Rules*; *Potter's Dwarr. Stat.* 138.

It must not be understood from anything we have said that we assume that any of the cases instanced by the judges in *Re Grice*, 79 Fed. 627, and *Niagara F. Ins. Co. v. Cornell*, 110 Fed. 816, were really within the legislative thought when our statute of 1897 was enacted, and therefore that the general words of the act must be restrained to less than the intent they outwardly manifest. Such legislation must be viewed in the light of the fact that the industrial and commercial classes of the country are menaced, or supposed to be menaced, as never before, by gigantic combinations of capitalistic interests, having for their object the suppression of competition, the control of prices, and the monopolization of markets; that this fact, more than any other topic, constitutes the theme of public discussion and the occasion of public alarm; that legislators in both state and national assemblies are earnestly besought by their constituents to devise measures to avert what either rightly or unduly is conjectured to portend a direful subversion of our entire economic system, and that the enactments of the kind in question are the responses of the lawmaking bodies to the demands of the immediate time. These are the facts of the current period, known and read of all men, and discovering to the courts as well as everybody else the intent of the legislature. How vain, then, to affect to find the small personal affairs of obscure and irresponsible individuals totally lacking all the elements of public concern embraced within the legis-

lative cognizance, and made the subjects of hostile legislative fiat.

From very early times it was the policy of the common law to encourage competitive trade, and to discourage contract restraints upon it. The courts refused to enforce stipulations between parties looking to the imposition of such restraints. That rule of policy remains to this day, and to this day the courts continue their refusal to countenance contracts of the character mentioned. To this there has been and is but one exception or class of exceptions, and it more seeming than real. It is the case of the sale of a merchandise, mechanical, or other like business, or the sale of property for a specific use, or the contract of an apprentice, agent, clerk, or servant. In these and kindred cases it has been held lawful to insert a stipulation that the seller shall not engage in competitive business with the buyer of his property; or that the apprentice, agent, clerk, or servant, after learning the master's or employer's business, shall not set up in opposition to him. The reason for these exceptions is that in such cases the buyer bargains for more than physical property. He bargains for the good will of his vendor's business, or other like valuable advantage, and the master or employer parts with something more than the wages he pays. He parts with instruction in the business learned; parts not only with the secrets of the general trade or calling, but with the secrets of his own particular business, and parts with the favorable acquaintance of his own customers or clients. The fact of these and the like constituting the only exceptions to the general rule, and the grounds upon which the exceptions rest, are elaborately set forth in the opinion of Judge Taft in the case of *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271. In that case the validity of legislation of the character now in question was upheld in an opinion of great strength and cogency, and with citations to a great list of supporting authorities. The case was appealed to the Supreme Court, which affirmed the decree rendered so far as it sought to enforce the provisions of the act of Congress of July 2, 1890, known as the "Sherman anti-trust act," modifying it only to the extent of excluding from its terms the operations of the appellant company in matters of domestic commerce over which the Federal law could not be extended. 175 U. S. 211, 248, 44 L. ed. 136, 150, 20 Sup. Ct. Rep. 96. A great array of decisions, English and American, will be found cited in the first-mentioned case, all tending to the establishment of the proposition that combinations having for their object the re-

straint of trade by the prevention of competition are inimical to public policy, their contracts in furtherance of their object non-enforceable, and their agreements of confederacy followed by acts in prosecution of their purpose, rightful subjects of restrictive and penal legislation. Two of these decisions were made in *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, and *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25. In those cases it was held that agreements between competing railroad companies to fix and maintain noncompetitive traffic rates were in violation of the anti-trust act of Congress, and were subject to be annulled, and the associations formed thereby dissolved, at the suit of the government. Counsel for appellant denies the applicability of these cases and that of the *Addyston Pipe & Steel Co.* 175 U. S. 211, 248, 44 L. ed. 136, 150, 20 Sup. Ct. Rep. 96, on the grounds: First, that the statute which the decisions enforced was enacted under the authority of Congress to regulate commerce between the states; second, that such statute is not directed against agreements or combinations restrictive of competitive trade, but has for its object the suppression of monopolies. The first of these distinctions is founded on the dictum of the judge in *Niagara F. Ins. Co. v. Cornell*, 110 Fed. 816. He said: "The *Railroad Traffic Asso. Case*, 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, has been strongly urged by the attorney general as upholding the doctrine of this statute. But it does not, for the reason that the statute under consideration in that case was upheld by reason of the commerce clause of the Constitution, and to that extent the commerce clause controlled the other clauses of the Constitution; and I repeat that the statute with which I am dealing is a state statute." There is one plainly expressed and one possible thought in this excerpt: First (the possible one), the authority can be exercised in pursuance only of express constitutional grant. That is not true of a state enactment, because the legislature of a state possesses all power not expressly withheld. It is true of a congressional enactment, because Congress possesses only such power as is expressly conferred. The express grant of power to Congress conferred by the commerce clause of the Constitution only put that body on the footing as to interstate commerce that the local legislature has as to domestic commerce without an express grant and in virtue of its general authority. The grant to Congress was not of anything different in nature from what the states possessed. It was a grant of the same thing; no more; only to be exercised in a different

sphere. As to the other thought,—the one plainly expressed by the judge in the above quotation, to wit, that the commerce clause of the Constitution controlled the other clauses of that instrument,—we trust we will not be taken to mean disrespect, or to impugn motives, when we say it is a thought which can be entertained only by one fatally bent on finding pretexts to justify his own mischievous rulings. The plain import of the language used is that the commerce clause is stronger than the other clauses, stronger than the guaranties of liberty, property, and process of law contained in the 14th Amendment. In other words, the claim is that the commerce clause gives Congress the authority to override and set at naught the guaranties of popular right contained in the Constitution whenever and wherever necessary to effectuate the power to regulate interstate and international trade. This is the very madness of unreason. The proposition needs but to be stated in the ultimate terms to which we have deduced it,—and they are the terms to which of necessity it must be finally reduced,—to show its utter unsoundness. The second distinction which counsel for appellant seek to draw between the Federal cases cited and this case, to wit, the difference between legislation restrictive of noncompetitive agreements and restrictive of monopolies, has no more basis upon which to rest than has the first one. The power to regulate is the same in both cases, and may be exercised to the same extent. However, the statute enforced in the *Freight Association Cases* and the *Addyston Pipe & Steel Company Case* was a statute in prohibition of contracts restrictive of competitive trade as well as in prohibition of monopolies. That statute (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200) differs in verbal phraseology, but not in essential particular or effect, from ours. It reads:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal," etc.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor," etc.

The Federal-court decisions cited were more particularly in assertion of the authority of Congress to enact measures in suppression of anti-competitive trade combinations than they were in assertion of its right to prohibit trade monopolies. In the case of *United States v. Joint Traffic Asso.* one of 67 L. R. A.

the headnotes reads: "Congress, with regard to interstate commerce, and in the course of regulating it in the case of railroad corporations, has the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition." If counsel mean to say that agreements restrictive of trade competition may not be prohibited until they eventuate in monopolies, we reply, without pausing to reason the contrary of the proposition, that the rationale of all the cases, and particularly those of the Federal courts commented on above, is opposed to the claim; and in *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, it was expressly ruled that, "in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition." That ruling was on a substantive issue involved in the case, and as made is a quotation from the opinion *arguendo* of Chief Justice Fuller in *United States v. E. C. Knight Co.* 158 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249. If counsel mean to say that acts prohibitive of anti-competitive combinations must express on their face a limitation to combinations constituting or tending to monopoly, a sufficient reply is that the anti-trust act of Congress, above partially quoted, and which has been repeatedly upheld as a valid exercise of legislative authority, does not express any such limitation. Whether an agreement restrictive of trade combinations tends to monopoly is probably a question determinable by the courts as well as by the legislature, but, primarily at least, it is a question in economic science, addressed to the business judgment and experience of the members of the law-making body. However, if the legislature should condemn a particular engagement between men on the score of its tendency to monopoly which the general sense of mankind perceived could not have that effect, we doubt not the courts would be competent to so declare, and, so declaring, disapprove the act on the constitutional ground of its interference with the freedom of the citizen; but beyond such instances we apprehend the judicial tribunals are not authorized to go. The courts may determine without previous legislative declaration that a particular agreement is contrary to public policy, and therefore nonenforceable; but they cannot adjudge, in opposition to a legislative declaration that a general class of agreements is opposed to the rules of public policy, that such is not the case.

One other topic included in the general subject remains to be discussed. It will be done briefly. It will be observed by an examination of the cases,—both those on the subject of anti-competitive trade agreements and those on the subject of monopolies,—that most of them relate to the acts or agreements of vendors (sellers on the market), and not to the acts or agreements of vendees (buyers on the market). This has not been because different principles of law apply to the two classes of persons in their trade relations and dealings, but because the oldest and favorite form of forestalling and engrossing markets has been to monopolize the supply of trade products, and hold them for extortionate prices. The rules of public policy forbid the making of agreements not to buy on the market as well as agreements not to sell. This is well illustrated by two cases. In *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171, it appeared that the grain dealers of a town had made a compact not to compete with one another in the purchase of grain, but collectively to control the market at fixed prices. One of them sued in execution of the agreement, but the court denied relief on the ground that it was a contract in restraint of trade, and contrary to public policy. In *Chapin v. Brown Bros.* 83 Iowa, 156, 12 L. R. A. 428, 32 Am. St. Rep. 297, 48 N. W. 1074, it appeared that the grocery men of a town, in order to throw the trade in butter entirely in the hands of one of their number, entered into an agreement with one another not to buy butter or take it in exchange for other goods. Suit was brought on the agreement against one of the grocery men to enjoin him from dealing in butter. The court refused the injunction, because the contract entered into was restrictive of trade competition, and tended to monopoly, and was, therefore, opposed to public policy. See also *Hilton v. Eckersley*, 6 El. & Bl. 47. Now, the agreement entered into by appellant and others named in the information in this case did not differ in any essential particular from the agreements condemned in the cases above cited. In this case it was shown that the parties named embraced all of the grain buyers at the town of Bison; that they agreed among themselves to divide the grain trade at that place; that, although the agreement was that anyone was at liberty to buy as much grain as he chose, and to pay for it such price as he chose, nevertheless, if he purchased more than his allotted share, he should pay to the others three cents per bushel for the excess bought; that this agreement was entered into for the express purpose of preventing competition among the buyers, and that it had that effect; that it was entered into for the purpose of pool-

ing the profits of the grain trade and the formation of a grain trust among the buyers, and that it had those effects. Such an agreement would have been void and non-enforceable at common law. It would have been void and nonenforceable because restrictive of trade competition, and because of its tendency to monopoly, and for these reasons it would have been declared opposed to the rules of public policy. It is certainly competent for the legislature to make penal the doing of that which the courts themselves recognize as hurtful to the body politic, and for that reason refuse to countenance. The legislature of 1897 did that; nor did it do anything more. It is no argument to launch the platitudes of personal liberty, and freedom of contract, and due process of law, etc., against this statute. What specific prohibition does it contain that the common law has not contained for ages past? Absolutely none.

We come now to a final question. The first statute for the suppression of unlawful trade combinations enacted in this state was chapter 175 of the Laws of 1887 (Gen. Stat. 1901, §§ 2427-2429). That statute was directed against grain dealers alone. Section 1 reads as follows: "That it shall be unlawful for any grain dealer, or grain dealers, partnership, company, corporation, or association of grain dealers, or any other person, or persons, partnership, company, corporation, or association, to enter into any agreement, contract, or combination with any other grain dealer, or grain dealers, partnership, company, corporation, or association of grain dealers, or any other person or persons, partnership, company, corporation, or association, for the pooling of prices of different and competing dealers and buyers, or to divide between them the aggregate or net proceeds of the earnings of such dealers and buyers, or any portion thereof, or for fixing the price which any grain dealer, or grain dealers, partnerships, company, corporation, or association of grain dealers, or any other person, or persons, partnership, company, corporation, or association, shall pay for grain, hogs, cattle, or stock of any kind or nature whatever; and in case of any agreement, contract, or combination for such pooling of prices of different and competing dealers and buyers, or to divide between them the aggregate or net proceeds of the earnings of such dealers and buyers, or any portion thereof, or for fixing the price which any grain dealer, or grain dealers, partnership, company, corporation, or association of grain dealers, or any other person, or persons, partnership, company, corporation, or association, shall pay for grain, hogs, cattle, or stock of any kind or nature whatever, each day of its continuance

shall be deemed a separate offense." The above-quoted section was followed by another prescribing a penalty. The court, in the instructions to the jury in this case, quoted the act of 1887, and likewise quoted the one of 1897, above discussed. The jury were not told which of the acts was applicable to defendant's case. The claim is made that the act of 1887 was repealed by the later one, and hence that the defendant may have been convicted under a statute which had ceased of existence. It will be observed that the act of 1897 covers an entire field of which the one of 1887 covered only a part, but the one of 1897 covers, though in general terms, the specific matter embraced in the earlier act. The character of punishment and maximum penalty is the same in the case of both acts, and the appellant's sentence of conviction was within the terms of either one. Assuming that the act of 1887 was repealed by implication by that of 1897, what, if any, effect to produce the appellant's conviction is to be attributed to the court's reference to the earlier enactment. We think none whatever. The statute of 1887 did not define the offense charged in any other terms than does the later act; nor did it define it in any other terms than the court was required to define it, and did define it, in the charge to the jury. The facts to be proved under the statute of 1887 were no different from the facts which, by the act of 1897, were required to be proved against the defendant, and it is impossible to see in what way he could have been prejudiced by the mistake of the court, if mistake it was. However, it is said that, if the statute of 1887 was not repealed by that of 1897, but is still to be classed among the existing enactments, it is unconstitutional, because it is class legislation. It is said that it singles out grain dealers from among all the different classes of persons engaged in domestic commerce, and subjects them to penalties for doing that which the other classes are allowed to do without let or hindrance. Grant it (which, however, we do not, except hypothetically, and for reply to the proposition). An unconstitutional statute is no different from a repealed statute. Like a statute repealed, it is no statute at all. Hence, if the appellant could not be harmed by the court's quotation of a repealed statute, he could not be harmed by the quotation of an unconstitutional statute. The general rule in criminal as in civil cases is that errors harmless in their nature—nominal errors, but not errors in fact—shall not be ground of reversal. It is expressed in Crim. Code, § 293 (Gen. Stat. 1901, § 5731): "On an appeal the court must give judgment without regard to technical errors or defects, or to exceptions 67 L. R. A.

which do not prejudice the substantial rights of the parties." The above provision of the Code has been often interposed against technical and unsubstantial claims of error in criminal cases, and especially in cases where immaterial, but unprejudicial, evidence has been admitted, and mistaken, but harmless, instructions have been given. *State v. Hilton*, 35 Kan. 338-349, 11 Pac. 164; *State v. Baldwin*, 36 Kan. 1-14, 12 Pac. 318.

Some minor claims of error are made. They do not involve anything fundamental, but relate to unimportant matters of practice. However, we have examined them, and perceive that none of them is well founded. *The judgment of the court below is affirmed.*

Johnston, Smith, Cunningham, Greene, and Ellis, JJ., concur.

Pollock, J., dissenting:

Believing, as I do, that no recent decision of this court is comparable in its consequences to the public at large, especially the business and commercial world, with that just announced in this case; convinced beyond all reasonable doubt that legislation so drastic in terms, tending in such large measure to make criminal the otherwise innocent, every-day affairs of life, should not be upheld by this court; and fully satisfied beyond all escape from the conviction that the act itself in express terms involves more of personal liberty and the rights of private property, in turpitude, and crime than has any prior act ever upheld by this court; and also convinced that the process of reasoning employed in the opinion for the purpose of upholding the act is inherently and radically false in principle, and dangerous in conclusion,—I refuse to concur therein, and respectfully state my reasons therefor.

A careful reading of the opinion will disclose the fact that the validity of the act in question is first attempted to be maintained by tacitly admitting the language of the act to be in violation of the 14th Amendment to the Federal Constitution, but upholding its validity by exclusion from its condemnation those cases which the court may deem to have been in excess of the legislative power, upon the theory that the legislature did not intend to include such cases as would impair the validity of the act; and by denying appellant the right to question the validity of the act under which he has been tried, convicted, and sentenced, upon the ground that, under the facts charged against him, he does not belong in the category of cases which the court should exclude by construction, and there-

fore he cannot be heard to complain of his punishment, or challenge the validity of the act under which he is punished. That this is a fair construction of the language employed, and the true ground upon which the opinion is based, will appear from the first and second points of the syllabus and the corresponding portions of the opinion, and from the further fact that the law as stated in the syllabus and the argument employed in the opinion can have no place in this case if it is not admitted that the act in certain respects is unconstitutional and void. If it is within the province of the courts to thus separate the valid from the void provisions of a statute by construction, and give force to the valid, so ascertained, and reject the void, it is difficult to comprehend why any legislative act should be declared void *in toto*. What the legislature creates void, the courts, the final arbiters of the power of the legislature to create, can reconstruct, separate, and make good. It is a settled rule that courts shall resolve all doubts in favor of the constitutionality of the statute challenged, and in all cases where possible, consistently with the rules of law, uphold the validity of the statute. Hence, if the doctrine announced in this case is sound, in no case should an entire act be overthrown by the courts. On the contrary, it would become the duty of the court to reject those provisions beyond the constitutional power of the legislature to include in an act as not intended by the legislature to be included, because beyond its power to do so, and enforce the remainder. Is this doctrine sound in principle, and fortified by authority? It is the settled rule of interpretation of statutes that the words employed by the lawmaking power are to be first consulted. When their meaning is clear, plain, and unambiguous, there is no room left for interpretation. Mr. Black, in his work on Interpretation of Laws (§ 43), says: "But it must be observed that the presumption of constitutionality, like all the other presumptions of this class, is available only in case of doubt or ambiguity. The courts cannot revise or correct an act of the legislature in order to make it conform to the Constitution. If it is plainly and palpably invalid, it is their duty to so declare it. Where the language is not ambiguous, and the meaning is clear and obvious, an unconstitutional consequence cannot be avoided by forcing upon the language of the act a meaning which, upon a fair test, is repugnant to its terms." The 1st section of the act in question creates and defines the offense. The parts are interdependent and inseparable, constituting one general scheme. All acts therein prohibited are made alike criminal. There is

no attempt at classification. All acts inhibited are alike criminal; all persons violating the act alike criminals. In such case the entire section must stand or fall together. Separation is impossible. Either all is good, or all bad. Mr. Justice Field, in *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121, says: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." I have no desire to dispute the familiar and well-recognized rule of law, when part of a statute is constitutional and part is unconstitutional, that which is constitutional will, if capable of separation and independent enforcement, be separated and enforced, and that which is unconstitutional be rejected. This is a principle so well recognized and of such every-day application in courts of justice that a citation of authorities in its support is unnecessary and ill-appropriate. I dispute neither the existence nor the soundness of this rule in cases where applicable. What I do deny is its application to this case, and the manner in which it is applied to the case. The writer of the opinion, after stating the rule and its exception, states the extension of the rule applied in this case as follows: "However, the rule is not limited to such instances. It applies as well to exclude from the operation of the statute subjects and classes of things lying without the legislative intent, although comprehended within the general terms of the act, as it does to exclude parts of the verbal phraseology," and makes application of the extension of the rule in the following manner: "He cannot be heard to object to the statute merely because it operates oppressively upon others. The hurt must be to himself. The case, under appellant's contention as to this point, is not a case of favoritism in the law. It is not a case of exclusion of classes who ought to have been included, the leaving out of which constitutes a denial of the equal protection of the law; but it is the opposite of that. It is a case of the inclusion of those who ought to have been excluded. Hence, unless appellant can show that he himself has been wrongly included in the terms of the law, he can have no just ground of complaint. This is fundamental and decisively settled." This is not the first instance in which it has been attempted to uphold the validity of an enactment beyond the constitutional power by limiting the scope of the act by construction, and thus eliminating the provisions in conflict with the organic law. But limitation by construction is not separation. It is merely an attempt on the part of the

court to both make and enforce laws without the aid of the legislative branch of the government. Mr. Justice Waite, in *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563, said of this doctrine: "There is no attempt in the sections now under consideration to provide specifically for such an offense. If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are therefore directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute, so as to make it specific, when, as expressed, it is general only. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserve power of the states and the people. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." Mr. Justice Matthews, in delivering the opinion in *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962, says: "It is undoubtedly true that there may be cases where one part of a statute may be en-

forced as constitutional and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact. An illustration of this principle is found in the *Trade-Mark Cases*, 100 U. S. 82, 25 L. ed. 550, where an act of Congress, which, it was claimed, would have been valid as a regulation of commerce with foreign nations and among the states, was held to be void altogether, because it embraced all commerce, including that between the citizens of the same state, which was not within the jurisdiction of Congress, and its language could not be restrained to that which was subject to the control of Congress. 'If we should,' said the court in that case (p. 99, L. ed. p. 554), 'in the case before us, undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do.'" In the case of *Baldwin v. Franks*, 120 U. S. 678, 32 L. ed. 766, 7 Sup. Ct. Rep. 656, 763, Mr. Chief Justice Waite, in delivering the opinion, said: "It is now said, however, that in that case the conspiracy charged was by persons in a state against a citizen of the United States and of the state to deprive him of the protection he was entitled to under the laws of that state, no special rights or privileges arising under the Constitution, laws, or treaties of the United States being involved; and it is argued that, although the section be invalid so far as such an offense is concerned, it is good for the punishment of those who conspire to deprive aliens of the rights guaranteed to them in a state by the treaties of the United States. In support of this argument, reliance is had on the well-settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation, so that each may be read by itself. This statute, considered as a statute punishing conspiracies in a state, is not of that character, for in that connection it has no parts within the meaning of the rule. Whether it is separable, so that it can be enforced in a territory, though not in a state, is quite an-

other question, and one we are not now called on to decide. It provides in general terms for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens as well as those who conspire against aliens,—those who conspire to deprive one of his rights under the laws of a state, and those who conspire to deprive him of his rights under the Constitution, laws, or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough." See also *Sutherland*, Stat. Constr. § 173; *Trade-Mark Cases*, 100 U. S. 82, 25 L. ed. 550; *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; *Wynehamer v. People*, 13 N. Y. 378; *Mesmeier v. State*, 11 Ind. 482. Nor are the cases cited and relied upon by the writer of the opinion to support the doctrine announced in conflict with the views here expressed. The cases of *Albany County v. Stanley*, 105 U. S. 305, 26 L. ed. 1044, and *Com. v. Gagne*, 153 Mass. 205, 10 L. R. A. 442, 26 N. E. 449, arose upon a conflict between legislative acts, state and Federal, no question of conflict between a legislative act and the organic law being involved. And in none of the cases cited did the decision turn upon the power of the court to separate and eliminate from a legislative act by construction those cases provided for by the terms of the act which would render it in conflict with the organic law.

It certainly needs no argument to satisfy the mind, no citation of authorities to support the contention, that, if the act in question in express terms strikes down personal rights guaranteed to all by the Federal Constitution, in so doing the act is completely and utterly void, and that appellant, tried, convicted, and punished under this void act, can assert its invalidity, although it may appear from the charge contained in the information and the evidence at the trial that appellant might be convicted under a proper law. Mr. Justice Woods, delivering the opinion of the court in *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601, commenting upon and applying the decision in *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563, says: "The indictment in the case charged two inspectors of a municipal election in the state of Kentucky with refusing to receive and count at such election the vote of William Garner, a citizen of the United States of African descent. It was contended by the defend-

ants that it was not within the constitutional power of Congress to pass the section upon which the indictment was based. The attempt was made by the counsel for the United States to sustain the law as warranted by the 15th Amendment to the Constitution of the United States. But this court held it not to be appropriate legislation under that amendment. The ground of the decision was that the sections referred to were broad enough not only to punish those who hindered and delayed the enfranchised colored citizen from voting on account of his race, color, or previous condition of servitude, but also those who hindered or delayed the free white citizen. The court, speaking by the chief justice, said: 'It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will, when ascertained, if within the constitutional grant of power. But if Congress steps outside of its constitutional limitation, and attempts that which is beyond its reach, the courts are authorized to, and, when called upon, must, annul its encroachment upon the reserve rights of the states and the people.'" This precise question was considered also in *Wynehamer v. People*, 13 N. Y. 378, in which Johnson, J., says: "The prohibitions of the 1st section, taken together,—and they form but a single scheme, and are to be enforced by the same penalties,—cannot, therefore, in my judgment, be upheld,—at least in respect to property which had been acquired while there was no prohibition against the acquisition of such property. The future acquisition the legislature might, in my opinion, control; and I am not disposed to deny that they could have subjected such future acquisitions to the prohibitions this act imposes. But in this act they have made no discrimination. The provisions extend, and were clearly meant to extend, to all liquors. It is no part of the proof to make out the offense according to the statute to show that the liquors were acquired after the prohibitions became operative, nor is the fact that they were previously acquired any defense under the statute. The only way of defending against it on the ground in question is by asking to have it declared void. Laws in relation to civil rights are sometimes held to be unconstitutional in so far as they affect the rights of certain persons, and valid in respect to others. This is done mainly upon the ground that the courts will not construe them to relate to such cases as the

legislature had not power to act upon. To statutes creating criminal offenses such a rule of construction ought not to be applied, and I cannot find any trace of its ever having been applied. It is of the highest importance to the administration of criminal justice that acts creating crime should be certain in their terms and plain in their application; and it would be in no small degree unseemly that courts should be called upon, in administering the criminal law, to adjudge an act creating offenses at one time valid and at another time void. It must, I think, stand as it has been enacted, or not stand at all."

The statute under consideration is criminal. The acts condemned and punished thereby were neither criminal nor unlawful at common law. The rule of strict construction applies in this case with all its force. The cases cited in the opinion in support of the doctrine announced are civil cases. An examination will show their inapplicability in this case. That the rule of separation of valid from void, rejecting the void and upholding the good by construction, employed in this case, is wrong in principle, I have no doubt. That the appellant may be heard to question the power of the legislature to enact the law under which he stands convicted, I do not doubt. To hold that he may is sound in reason, and fully settled by the authorities above cited. But it is contended by the writer of the opinion that there is a distinction between Federal and state legislation; that Congress possesses only such legislative power as is expressly granted by the Federal Constitution; whereas the legislature of the state possesses all legislative power not expressly withheld by the Constitution of the state. Therefore the reasoning employed in the above cases construing Federal statutes as opposed to the Federal Constitution is inapplicable to the case at bar; and the case of *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28-42, 44 L. ed. 657-663, 20 Sup. Ct. Rep. 518, is relied upon to support the contention made. Such reasoning is more to be admired for its ingenuity than to be commended for its logic. While the rule governing the power of national and state legislatures to legislate is correctly stated, yet it does not follow that a different rule of construction is to be employed in arriving at a conclusion as to the validity of an act challenged as obnoxious to the Federal Constitution. That Constitution is the supreme law of the land, equally binding upon this court and the Federal Supreme Court. The 14th Amendment does not touch upon Federal legislation, but is an express limitation upon legislation by a state. If the act in question is violative of its prohibitive provi-

sions, it is void, and that is an end of it. The question before us, which should be squarely met, is, Does the act in question contravene the Federal Constitution? and not, How may this court attempt to hew round it by the process of specious reasoning employed? The case cited is not in point, and does not touch upon the question at issue here. The question involved in *Waters-Pierce Oil Co. Case*, and the only question, was the power of the state of Texas to impose conditions upon a foreign corporation desiring to transact business in that state. The question sought to be raised by counsel for plaintiff in error in that case is the one raised in the case at bar. The authorities relied upon here are the authorities cited there. It was ruled in that case, not that the contention here made is untenable, or the authorities cited are unsound, or inapplicable to the question, but that the question here at issue was not involved in that case. It is also worthy of remark here that the able counsel representing the state neither in their voluminous briefs nor at the oral argument made mention of the doctrine applied by the court; nor have counsel for appellant been heard upon this proposition.

Is the act of 1897 within the legislative power of the state, constitutional, and valid? Whatever may be the extent of power possessed by the state over quasi public corporations engaged in the performance of a public service, or whatever the power of Congress to control and regulate such servants of the public under the interstate commerce clause of the Federal Constitution, is not the question in controversy. The power of the state to prevent the formation of monopolies and combinations tending to monopoly, and exercising control over them to prevent public oppression, is not the subject under consideration. The power of the state to prohibit such combinations as may, to an unreasonable extent, restrain trade or commerce, or may unreasonably restrict competition in trade, commerce, manufacturing, or business, is not the question at issue. By the act in question the legislature has attempted to prohibit, by combinations of capital, skill, or acts, all restraint upon trade and commerce, and all restrictions upon trade, commerce, manufacturing, or transportation, whether such restriction is in its nature and extent such as may be reasonable and necessary to the self-preservation and protection of the parties engaged from financial ruin, or oppressive to the public. Unbridled competition, which is, in effect, a license to the strong to destroy and obliterate the weak, is commanded. With the public policy of this act, whether wise or unwise, we have no concern.

With the power of the legislature to enact this law and the duty of the courts to command its enforcement or deny its validity as opposed to the fundamental law of the land, we are concerned. The right of the legislature, in the exercise of what is called the police power of the state, to restrain and prohibit monopolies and combinations tending to monopoly, is freely granted. The power of the legislature to prohibit such restrictions upon trade and commerce as are in their nature unreasonable, and to condemn such restraints upon competition in trade and commerce as are unreasonable, oppressive, and injurious to the public, is also admitted. But that in a free government the right of two or more persons, firms, or corporations transacting commercial or other business, drawn into unreasonable and destructive competition, threatening financial ruin, to agree one with the other to restore and maintain the price of their goods at or above cost, having in view the laudable and reasonable purpose of averting financial self-destruction, every right-minded man must concede. A denial of such right is a denial of the right of self-defense; is oppression; is tyranny. Yet that such an agreement is clearly within the prohibition of the act in question is not open to dispute. The right of two or any number of persons engaged in agriculture to agree that they will combine and place their agricultural products in elevators and storehouses, and that they will not sell the same until a certain price is obtained, which price will net them a profit for their labor, is founded upon such natural justice as to be beyond the reach of legislative power to prohibit. Yet such right is by the act denied. Many of the states have exercised the power of fixing for those engaged in transportation such maximum and minimum rates of carriage as shall not be exceeded under penalty of the law. Yet any combination of those engaged in transportation to charge only the minimum rate so fixed is in terms prohibited by this act. Other examples may be given *ad libitum*. Upon an examination of the act others will occur to the mind *ad infinitum*. All combinations, justifiable or unjustifiable, reasonable or unreasonable, necessary or unnecessary, beneficial or oppressive, to the public, are alike prohibited and made criminal. Under this act the fact that the prohibited agreement was made for justifiable ends, or for self-preservation, is no defense. May such an act exist in a free country? Will such an act be enforced in a free government? Any student at all familiar with history will recall the baneful and disastrous effect of kindred legislation in England, Italy, and other European countries, where the legislative power oper-

ates untrammelled by a written constitution. It is useless in the consideration of this question to attempt a citation or review of the many authorities in this country making application of the provision found in the 14th Amendment to the Federal Constitution to such legislation. The English authorities have no application, because announced under no written constitution. The source of power relied upon to support this act and all others of kindred character is the police power of the state; but this power has, and of necessity must have, its limitations. That the police power, or any power of the state, authorizes the act in question, I deny. I deny it because it is an unwarranted abridgment of personal liberty; because it takes away private property without due process of law; because it denies equal protection under the law, without justifiable ends. A legislature may become as much a tyrant as a czar or a king. "By the term 'liberty,' as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment." Mr. Justice Field in *Granger Cases* (*Munn v. Illinois*) 94 U. S. 113, 24 L. ed. 77. The Federal Constitution (article 6) declares: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." The 14th Amendment to the Constitution is: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Guizot, in his *Lectures on Government*, says: "Liberties are nothing until they have become rights, positive rights, formally recognized and consecrated; rights, even when recognized, are nothing so long as they are not intrenched within guaranties; and, lastly, guaranties are nothing, so long as they are not maintained by forces independent of them in the limit of their rights. Surround rights by guaranties; intrust the keeping of those rights to forces independent of them;

such are the necessary steps in the progress towards a free government." Mr. Justice Field, in *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394, quoting from *Live Stock D. & B. Asso. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 398, Fed. Cas. No. 8,408, says: "It is one of the privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit, without unreasonable regulation or molestation." And again: "There is no more sacred right of citizenship than the right to pursue unmolested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor." Mr. Eddy, in his work on Combinations (§ 681), says: "Any extension of the police power beyond the preserving of peace and order in the community, and the protection of life, health, and morals of the individual, is a departure so radical as to be absolutely destructive of all limitations upon the exercise of the power. If the state can go beyond considerations affecting the peace and order of the community and the life, health, or morals of the individual, and intervene for reasons of a purely social or economic nature, then there are no limitations whatsoever upon the power of legislatures to intervene, and in their discretion dictate terms upon which various contracts shall be made and different occupations pursued." In *Frerer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395, it is said: "Other instances of statutory regulations of private rights are in lien laws in favor of homesteaders, mechanics, etc.; limitation laws; the statute of frauds, and other statutes relating to evidence; laws in regard to pleadings; exemption laws, and insolvent laws. But these all relate, not to the power to contract in regard to matters of general right, but to the remedy for the enforcing of contracts, as to which the legislature may make such regulations as the public welfare seems to demand, so long as under pretense of regulating the remedy it does not impair the right itself." In *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 37 Am. St. Rep. 206, 35 N. E. 62, it is held: "Constitutional liberty means not only freedom of the citizen from servitude and restraint, but includes the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare." In the opinion it is said: "The fundamental principle upon which liberty is based in free and enlightened government is equality under the law of the land. It has accordingly been everywhere held that 'liberty,' as that term is used in the Constitution, means, not

only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare. *Frerer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *Live Stock D. & B. Asso. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 398, Fed. Cas. No. 8,408; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, 10 S. E. 285. Property, in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession, and power of disposition which may be acquired over it; and the right of property preserved by the Constitution is the right, not only to possess and enjoy it, but also to acquire it in a lawful mode, or by following any lawful industrial pursuit, which the citizen in the exercise of the liberty guaranteed, may choose to adopt." In *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315, 40 N. E. 454, it is held: "Statutes passed in pursuance of the police power must have some relation to the end sought to be accomplished. Where the ostensible object is to secure the public comfort, welfare and safety, the statute must appear to be adapted to that end. It cannot invade the rights of persons and property under the guise of a mere police regulation when such is not the effect." In the opinion it is said: "But it is claimed on behalf of defendant in error that this section can be sustained as an exercise of the police power of the state. The police power of the state is that power which enables it to promote the health, comfort, safety, and welfare of society. It is very broad and far-reaching, but it is not without its limitations. Legislative acts passed in pursuance of it must not be in conflict with the Constitution, and must have some relation to the end sought to be accomplished; that is to say, to the comfort, welfare, or safety of society. Where the ostensible object of an enactment is to secure the public comfort, welfare, or safety, it must appear to be adapted to that end. It cannot invade the rights of person and property under the guise of a mere police regulation, when it is not such in fact; and where such an act takes away the property of a citizen, or interferes with his personal liberty, it is the province of the courts to determine whether it is really an appropriate measure for the promotion of the comfort, safety,

and welfare of society. *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343." Mr. Justice Harlan, in declaring the anti-trust act of the state of Illinois unconstitutional and void in the recent case of *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, said: "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the 'police powers' of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained. But, as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to the law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The state has undoubtedly the power by appropriate legislation to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void. *Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Sinnot v. Davenport*, 22 How. 227, 16 L. ed. 243; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488." True, in that case the act under consideration was declared void because denying equal protection under the law; but, if the police power of the state of Illinois was insufficient to uphold the act because that act contravened the 14th Amendment to the Federal Constitution, how may it be contended the same source of power relied upon here will uphold this act, which deprives the citizen of his property without due process of law,—that is, arbitrarily denies to those engaged in certain branches of trade and business the right to contract with relation to that business and their private property: arbitrarily denies the right to so conduct their business as they may choose without injury to others; arbitrarily and unreasonably interferes 67 L. R. A.

with the liberty of private contracts not injurious to the public morals, public health, or public safety. As was said by McPherson, J., in *Niagara F. Ins. Co. v. Cornell*, 110 Fed. 816, in declaring the anti-trust act of Nebraska unconstitutional and void upon this precise ground: "If we cannot acquire property, then we have a government of socialism. And how can we acquire property, or enjoy the property we do have, without the right of contract? If this law is valid, two or more farmers cannot agree that they will not sell their wheat to a neighboring mill for less than so much per bushel. Two or more farmers cannot agree that the live-stock feeder shall not have their corn only at a certain price. Blacksmiths cannot agree that they will charge so much for shoeing horses. Nothing can be agreed to by the manufacturer, the farmer, gardner, the contractor, consumer, or laborer to prevent the reduction of price. Can it be possible that such legislation is valid? If it is valid, then what becomes of the provision, 'No man shall be deprived of equal protection of the law,' or of that other provision, 'No man shall be deprived of life, liberty, or property without due process of law?' " As was said by Judge Catron in *Wally v. Kennedy*, 2 Yerg. 555, 24 Am. Dec. 511, and *Vanzant v. Waddel*, 2 Yerg. 270: "The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic or land under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law; the mass of the community, and those who made the law, by another; whereas a like general law, affecting the whole community equally, could not have been passed." "The idea of a people, through their representatives, making laws whereby are swept away the life, liberty, and property of one or a few citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name. Such abuses resulted in the adoption of the Magna Charta in England, . . . which is, and for centuries has been, the foundation of English liberty. Its infraction was a leading cause why we separated from that country, and its value as a fundamental rule for the protection of the citizen against legislative usurpation was the reason of its adoption as part of our Constitution."

The argument made that the colossal ag-

gregations of capital and rapid formation of gigantic industrial trusts of recent years have created public alarm and widespread apprehension of danger, calling forth public clamor for enactments of the character in question by the legislature, and their enforcement by the courts, if true, is without merit here. There is no safety to the citizen where the convictions of lawmakers, and the settled principles of the law as enunciated by the courts as well, melt away before the hot breath of public clamor.

Again, from the information it cannot be determined upon what act of the legislature the prosecution in this case is based. At the trial the court not only gave the jury in his charge the anti-trust act of 1897 above discussed, but also in his instructions gave to the jury the unlawful trust and combination act (Laws 1887, chap. 175), found in chapter 145, Gen. Stat. 1897 (Gen. Stat. 1901, §§ 2427-2429), quoted at length in the opinion. By instruction No. 4 the jury are directed as follows: "Gentlemen of the jury, you are instructed that if you find from the evidence that the defendant, E. J. Smiley, did, on or about the 20th day of November, 1900, unlawfully enter into an agreement, contract, and combination, in the county of Rush and state of Kansas, with certain partnerships, companies, corporations of grain dealers and grain buyers in the town of Bison, in the said county and state; and you further find that the said parties were competitive grain buyers, dealers, and buyers, to pool and fix the price the said grain dealers and buyers should pay for grain at the said place, and to divide between them the net earnings of the said grain dealers and grain buyers, and to prevent competition in the purchase and sale of grain among the said dealers and buyers,—that would be a violation of chapter 145, and you should so find, and find the defendant guilty." That this act of 1887 is clearly unconstitutional and void because denying equal protection under the law is scarcely a debatable question. It singles out one class of persons engaged in domestic trade and commerce from the general class, and makes acts by them done criminal, which, if done by other members of the general class, remain innocent. That such legislation cannot be upheld is not only, in effect, conceded in the opinion, but is conclusively settled by authority. In *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431, it is said: "We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the state for the purpose of protecting the pub-

lic against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill, or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary." *Re Grice*, 79 Fed. 627; *Niagara F. Ins. Co. v. Cornell*, 110 Fed. 816. The validity of this act of 1887 is directly and pointedly challenged by the record and urged upon this court by counsel in their briefs and at the oral argument; yet this question is disposed of as wholly immaterial and harmless error. By what means this court ascertained what influence the charge of the court upon the act of 1887 had upon the minds of the jury is not shown. How it determined the jury would have convicted had this portion of the charge been omitted, is not clear. The defendant is engaged in the grain business. The act of 1887 is directed against grain dealers. The conspiracy charged in the information is one with grain dealers. The unlawful acts charged therein relate solely to the grain trade. All the evidence found in the record pertains to the grain business, and yet escape is made from the consideration of the validity of the act of 1887 because in the judgment of the court the defendant might have been tried and convicted under the act of 1897. Section 236 of the Criminal Code (Gen. Stat. 1901, § 5681) provides: "The judge must charge the jury in writing, and the charge shall be filed away among the papers of the cause. In charging the jury he must state to them all matters of law which are necessary for their information in giving their verdict." This court has held that the failure of a trial court, although not requested to do so, to fully instruct the jury upon the law governing the case under the above section, is material error. *State v. Grubb*, 55 Kan. 678. 41 Pac. 951. By a parity of reasoning, and upon general principles, it must be true that the action of a trial court upon a criminal prosecution instructing the jury to ascertain and determine the guilt of the defendant by a statute which is not the law, but is unconstitutional and void, is equally erroneous, and reversible error.

The conviction in this case should be set aside.

Petition for rehearing denied.

Affirmed by Supreme Court of United States February 20, 1905.

MICHIGAN SUPREME COURT.

PEOPLE of the State of Michigan

v.

Charles H. PRATT, *Plff. in Err.*

(183 Mich. 125.)

The judge who convened a grand jury which is investigating a crime cannot be permitted to give in evidence a confession made to him by a witness called before such jury, who is subsequently indicted and placed on trial, where the witness, being unable to obtain advice from a lawyer in whom he had confidence, went to the judge, and, upon stating his difficulty, was told by the judge that he could give him no advice, but that he should tell the truth, whereupon the witness made the confession; such evidence is excluded upon the grounds that it is in the nature of a confidential communication from client to counsel, and that

it was received by the judge in his official capacity, as having charge of the grand jury and being required to determine what testimony the witnesses before it might be required to give.

(Grant, J., and Hooker, Ch. J., dissent.)

(May 12, 1903.)

ERROR to the Circuit Court for Ingham County to review a judgment convicting defendant of the unlawful use of money for the purpose of influencing the action of members of the legislature. *Reversed.*

The facts are stated in the opinion.

Mr. Alex. J. Groesbeck, for plaintiff in error:

Proof of the body of the crime, or, as it is termed, the *corpus delicti*, cannot be made

NOTE.—*Admissibility in evidence of communications made to persons serving in a judicial capacity.*

The question of privilege as applied to communications between an attorney and his client is treated generally in a note to *Dierstein v. Schubkagel*, 6 L. R. A. 481, where the authorities are collected. It is not proposed, therefore, to consider the general subject here, except to call attention to some constructions of the rule, which throw light upon the subject of this note. The principles enunciated in the following cases, as to which there is practically no conflict of authority, seem decisive of the main question.

The protection afforded communications made to attorneys from disclosure in court, it is said, is not based upon the ground that they are made confidentially. *Barnes v. Harris*, 7 Cush. 576, 54 Am. Dec. 734; *People v. Hess*, 8 App. Div. 143, 40 N. Y. Supp. 486. The principle of the rule, according to Chief Justice Shaw, is that, in view of the complexity of the laws by which the rights and duties of citizens are governed, and the importance that they be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and exponents, without publishing those facts which they have a right to keep secret, but which must be disclosed to a legal adviser, the law considers it good policy to encourage and sanction this confidence by requiring that on such facts the mouth of the attorney shall be forever sealed. *Hatton v. Robinson*, 14 Pick. 416, 422, 25 Am. Dec. 415.

And Lord Brougham said, in *Greenough v. Gaskell*, 1 Myl. & K. 103, that the rule is established "out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations, which form the subject of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources."

Substantially the same view is presented in the following cases: *Goddard v. Gardner*, 28 Conn. 172; *Connecticut Mut. L. Ins. Co. v. 67 L. R. A.*

Schaefer, 94 U. S. 457, 24 L. ed. 251; *Verdell v. Gray's Harbor Commercial Co.* 115 Cal. 517, 47 Pac. 364; *Crisler v. Garland*, 11 Smedes & M. 156, 49 Am. Dec. 49; *McMannus v. State*, 2 Head, 213; *Doheny v. Lacy*, 168 N. Y. 223, 61 N. E. 258.

Such being the reason for the rule, it is said, in *Barnes v. Harris*, 7 Cush. 578, 54 Am. Dec. 734, the rule should be applied to those cases only which fall within that reason. Therefore, the court refused to hold a communication to a student in an attorney's office as within the rule, where it did not appear that such person was the attorney's agent or clerk.

Likewise, in *Schubkagel v. Dierstein*, 131 Pa. 46, 6 L. R. A. 481, 18 Atl. 1059, it is said, that confidential communications to a law student, employed to advise and assist a plaintiff in a breach of promise suit, are no more privileged than communications made to a blacksmith retained in a like service. To the same effect are *Sample v. Frost*, 10 Iowa, 266, and *Hawes v. State*, 88 Ala. 37, 7 So. 302.

The ground upon which these decisions are based is that, the privilege being accorded in the interest of persons needing the advice and assistance of those learned in the law, and to advance the administration of justice, it is applicable only where the relation of attorney and client exists, or, at least, is believed to exist; and that even the belief of its existence cannot obtain where the person whose counsel is sought is not an attorney. *Peek v. Boone*, 90 Ga. 707, 17 S. E. 66; *Earle v. Grout*, 46 Vt. 113; *Theisen v. Dayton*, 82 Iowa, 74, 47 N. W. 801; *Sample v. Frost*, 10 Iowa, 266.

A communication to a magistrate, by one whose business he usually attended to, and to whom he frequently gave advice and counsel, is not privileged, since the rule is applicable only to "disclosures made to practising attorneys for the purpose of obtaining professional advice." *Pierson v. Steertz*, *Morris* (Iowa) 136.

Likewise, a communication made to one who was not known to be an attorney at the time, and by whom the advice was gratuitously given, has been held not privileged. *Union P. R. Co. v. Day*, 68 Kan. 726, 75 Pac. 1021; *Hawes v. State*, 88 Ala. 37, 7 So. 302.

by the introduction of respondent's admissions alone.

People v. Lambert, 5 Mich. 349, 72 Am. Dec. 49; *People v. Lane*, 49 Mich. 340, 13 N. W. 622; *People v. Parker*, 67 Mich. 222, 11 Am. St. Rep. 578, 34 N. W. 720; *People v. Hess*, 85 Mich. 132, 48 N. W. 181; *People v. Isham*, 109 Mich. 73, 67 N. W. 819; *Winslow v. State*, 76 Ala. 47; *Mose v. State*, 36 Ala. 211; *Matthews v. State*, 55 Ala. 187, 28 Am. Rep. 698; *Johnson v. State*, 59 Ala. 37; *Ryan v. State*, 100 Ala. 94, 14 So. 868; *Harden v. State*, 109 Ala. 51, 19 So. 494; *People v. Simonsen*, 107 Cal. 345, 40 Pac. 440; *People v. Tapia*, 131 Cal. 647, 63 Pac. 1001; *Gray v. Com.* 101 Pa. 380, 47 Am. Rep. 733; *Territory v. Farrell*, 6 Mont. 12, 9 Pac. 536; *Williams v. People*, 101 Ill. 382; *Campbell v. People*, 159 Ill. 24, 50 Am. St. Rep. 134, 42 N. E. 123; *Gore v. People*, 162 Ill. 265, 44 N. E. 500; *May v. People*, 92 Ill. 343; *People v. Hennessy*, 15 Wend. 147; *People v. Badgley*, 16 Wend. 53; *Ber-*

gen v. People, 17 Ill. 427, 65 Am. Dec. 672; *Yoe v. People*, 49 Ill. 410; *Anderson v. State*, 72 Ga. 98; *Andrews v. People*, 117 Ill. 195, 7 N. E. 265; *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410; *Brady v. State*, 32 Tex. Crim. Rep. 264, 22 S. W. 924; *People v. Thrall*, 50 Cal. 415; *Roberts v. People*, 11 Colo. 213, 17 Pac. 637; *United States v. Boese*, 46 Fed. 917; *People v. Jaehne*, 103 N. Y. 199, 8 N. E. 374; *People v. O'Neil*, 109 N. Y. 266, 16 N. E. 68; *Sullivan v. State*, 58 Neb. 796, 79 N. W. 721.

Messrs. Quincy A. Smith and O. J. Hood also for plaintiff in error.

Mr. Watts S. Humphrey, with *Messrs. Arthur J. Tuttle and Horace M. Oren*, Attorney General, for defendant in error:

Defendant's admissions are competent evidence of the *corpus delicti* when there is substantial and material corroboration of the confession by evidence outside of the respondent's confession or admissions.

People v. Jaehne, 103 N. Y. 199, 8 N. E.

It has been held, however, where one's regular employment for many years has been the practice of law before justices of the peace, although not admitted to practice in courts of record, that communications made by one who seeks his aid and counsel, in answer to inquiries as to the facts concerning his alleged offense, are privileged. *Benedict v. State*, 44 Ohio St. 679, 11 N. E. 125.

And where a detective represents to one accused of crime that he is a celebrated attorney, and, in the confidence of that supposed relation, procures from the accused a statement of his connection with the crime, the communication is privileged. *People v. Barker*, 60 Mich. 277, 1 Am. St. Rep. 501, 27 N. W. 539.

Since the rule is in contravention of the general rules of law, and has a tendency to prevent the full disclosure of the truth, it is generally held that it is to be construed strictly, and is not to be extended beyond the principle of public policy upon which it is founded. "The rule," says Mr. Starkie, "is strictly confined to counsel, solicitors, and attorneys." 2 Starkie, Ev. 229 To the same effect is *Foster v. Hall*, 12 Pick. 89, 22 Am. Dec. 400.

Not only must the person applied to for advice be in fact an attorney, but the relation of attorney and client must exist as to the subject of the communication. And it necessarily follows that the attorney must not be disqualified from serving as such. The communication, to be privileged, must be made by the client to his attorney, and for the purpose of obtaining legal advice. *Foster v. Hall*, 12 Pick. 89, 99, 22 Am. Dec. 400; *Hatton v. Robinson*, 14 Pick. 416, 423, 25 Am. Dec. 415; *Barnes v. Harris*, 7 Cush. 576, 54 Am. Dec. 734; *Satterlee v. Bliss*, 36 Cal. 489; *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *Ferguson v. McBean*, 91 Cal. 63, 14 L. R. A. 65, 27 Pac. 518; *Patten v. Glover*, 1 App. D. C. 466, Affirmed in 165 U. S. 394, 41 L. ed. 760, 17 Sup. Ct. Rep. 411; *Skelley v. James*, 81 Ga. 419, 8 S. E. 607; *Granger v. Warrington*, 8 Ill. 299; *Borum v. Fouts*, 15 Ind. 50; *Reinhart v. Johnson*, 62 Iowa, 155, 17 N. W. 452; *Wasson v. Millsap*, 77 Iowa, 762, 42 N. W. 528; *McLellan* 67 L. R. A.

v. Longfellow, 32 Me. 494, 54 Am. Dec. 599; *Riley v. Conner*, 79 Mich. 497, 44 N. W. 1040; *Alderman v. People*, 4 Mich. 414, 60 Am. Dec. 321; *House v. House*, 61 Mich. 69, 1 Am. St. Rep. 570, 27 N. W. 858; *Hanson v. Bean*, 51 Minn. 546, 38 Am. St. Rep. 516, 53 N. W. 871; *Costes v. Semper*, 82 Minn. 460, 85 N. W. 217; *Crisler v. Garland*, 11 Smedes & M. 136, 49 Am. Dec. 49; *Randel v. Yates*, 48 Miss. 685; *Farley v. Peebles*, 50 Neb. 723, 70 N. W. 231; *Heaton v. Findlay*, 12 Pa. 304; *Beeson v. Beeson*, 9 Pa. 279; *McMannus v. State*, 2 Head. 213; *Flack v. Neill*, 26 Tex. 275; *Henderson v. Terry*, 62 Tex. 285; *Coon v. Swan*, 30 Vt. 6; *Earle v. Grout*, 46 Vt. 113; *Brayton v. Chase*, 3 Wis. 456.

In *Calley v. Richards*, 19 Beav. 401, although a communication between a person and his legal adviser, who had been a solicitor, but who, unbeknown to the person seeking advice, had ceased to practice, is held to be privileged, yet the master of the rolls said: "If, indeed, a client knows that the person with whom he communicates is not and cannot act as solicitor, of course the communications do not fall within the reason of the rule, and are not privileged."

And where an attorney, at the request of a neighbor, gives him friendly advice, without charging or expecting compensation, a communication made to him under such circumstances is not privileged. *Coon v. Swan*, 30 Vt. 6; *Oliver v. Cameron*, MacArth. & M. 237; *Hoffman v. Smith*, 1 Calnes, 157; *Annesley v. Anglesey* cited in *MacNally*, Ev. 241.

To tax a lawyer's courtesy or liberality for advice or services is not to employ him. In such case he is "raided," not retained, and communications made to him under such circumstances are not privileged. *Brown v. Matthews*, 79 Ga. 1, 4 S. E. 13.

In *Hatton v. Robinson*, 14 Pick. 416, 423, 25 Am. Dec. 415, it is said, so strictly is this rule applied, that in a late case a communication made to obtain information as to a matter of fact, merely, was held not to be privileged, although the relation of attorney and client existed.

The foregoing case cites, in support of its

374; *People v. O'Neil*, 109 N. Y. 251, 16 N. E. 68; *Sullivan v. State*, 58 Neb. 796, 79 N. W. 721; *Flower v. United States*, 53 C. C. A. 271, 116 Fed. 241; 6 Am. & Eng. Enc. Law, 2d ed. p. 582; *State v. Hall*, 31 W. Va. 505, 7 S. E. 422.

Carpenter, J., delivered the opinion of the court:

Defendant was convicted under an indictment in which he was charged with unlawfully and corruptly promising the sum of \$20,000 to a member of the house of representatives of the state of Michigan, with intent to influence the act, vote, decision, and judgment of said member, in his legislative capacity, on a certain joint resolution then and there pending in the house of representatives, and with unlawfully and corruptly giving said sum to said member with said intent to influence his action on said resolution. Defendant assigns 116 errors. We deem it necessary, however, to discuss

but one of these assignments. That relates to the admission of the testimony of Honorable Rollin H. Person, the judge of the Ing-ham county circuit court at the time the defendant was indicted. Defendant was subpoenaed as a witness before the grand jury. Arthur J. Tuttle, the prosecuting attorney of said county, testified: "Mr. Pratt said to me: 'I would like to talk to some attorney before I go before the grand jury. I have been up to see Judge Cahill, and for some reason he could not talk to me about it. . . . I would like to see someone that I have confidence in, before I go before the grand jury and give my testimony. . . . Where is Judge Person? Couldn't I see him and talk to him?' I took him . . . to Judge Person's room, . . . and introduced him to Judge Person, and they were together for some time, and Mr. Pratt then went back before the grand jury." Before Judge Person testified, he said: "While it is immaterial to me personally, I think I

position, the case of *Bramwell v. Lucas*, 2 Barn. & C. 745, where it is said: "Whether the privilege extends to all confidential communications between attorney and client or not, there is no doubt that it is confined to communications, and to communications to the attorney in his character of attorney. A question for legal advice may come within the description of a confidential communication, because it is part of the attorney's duty, as attorney, to give advice; but a question for information as to matter of fact, as to a communication the attorney had made to others, where the communication might have been made by any other person as well as an attorney, and where the character or office of attorney has not been called into action, has never been held within the protection, and is not within the principle upon which the privilege is founded."

Nor can the relation of attorney and client be said to exist when the attorney whose advice is asked refuses to serve. A communication made to one after his declaration, that he cannot and will not act as the party's attorney, is not privileged. *Farley v. Peebles*, 50 Neb. 723, 70 N. W. 231; *Thelsen v. Dayton*, 82 Iowa, 74, 47 N. W. 891; *Ellis v. State*, 92 Tenn. 85, 105, 20 S. W. 500.

Of course, if the communication be made by reason of the anticipated employment of one as attorney, by a person seeking his aid and advice, it would be privileged whether the attorney is, or is not, employed. *Peek v. Boone*, 90 Ga. 767, 17 S. E. 66; *Cross v. Riggins*, 50 Mo. 335; *Denver Tramway Co. v. Owens*, 20 Colo. 107, 128, 38 Pac. 848, 855; *Sheehan v. Allen*, 67 Kan. 712, 74 Pac. 245; *Thorp v. Goewey*, 85 Ill. 611.

To recapitulate, the foregoing authorities establish the following principles of construction, for determining the applicability of the rule of privilege:

First. That it is the relation of attorney and client, rather than the repose of confidence in the person to whom the communication is made, that determines the question of privilege.

Second. That the relation of attorney and

client can be said to exist, within the rule of privilege, only when the person applied to for advice is qualified to serve in the capacity of counsel, solicitor, or attorney.

Third. That the rule is to be strictly construed, and should not be extended to communications which are not within the reason upon which the rule is based.

Applying these principles of construction to communications made to persons acting in a judicial capacity, it would seem that the preponderance of authority is on the side of the dissenting opinion in *PEOPLE v. PRATT*. A judge being disqualified from practicing either as barrister or counselor, the relation of attorney and client cannot exist as between him and a party coming to him for counsel. And if, as in *PEOPLE v. PRATT*, the judge informs the party seeking his advice, before any communication is made, that he cannot advise him, and that he "had better see an attorney," any communication thereafter made should be deemed outside the rule, under the authorities above cited.

The only case directly in point, which we have been able to find, is that of *People v. Hess*, 8 App. Div. 143, 40 N. Y. Supp. 486, 6 Misc. 246, 26 N. Y. Supp. 630. There a prisoner charged with homicide, being brought before a magistrate, who had acted as his attorney in other matters, requested him to take his case. This the magistrate refused to do because of his office. Subsequently the prisoner, when in jail, again sent for him, and, after being told by the magistrate that he could not and would not be his attorney or counsel in the matter, said that, because of his confidence in him, he wanted to send a communication to a person named. Thereupon the defendant related to the magistrate certain facts about the shooting, which he wished him to tell such person. The magistrate did the errand, and brought back a reply. The communication thus sent, and the interview which took place when the reply was reported to the defendant, constituted the evidence which it was claimed was privileged. The court says: "There is no doubt of the materiality of the evidence. Clearly, accord-

ought to raise the question whether I should state matters that came to me in that way, when I was on the bench; that is, whether it is against public policy for me to be required to state them. . . . Mr. Pratt said that he was before the grand jury, and wanted to get some advice. I said, 'Mr. Pratt, I cannot give you any advice.' He stood a moment, irresolute, and I said, 'I will say this to you,—that you are not obliged to say anything before the grand jury to criminate yourself.' He said he knew that, but he wanted advice as to what course he ought to pursue for his benefit. I said 'Mr. Pratt, you had better see an attorney.' He said: 'I have seen an attorney here, but got no advice from him. I am not acquainted with the attorneys here, and I don't know how much they may be employed in these matters by various parties against my interest,—where they would conflict our interests.' 'Well,' I said, 'I cannot give you any advice as to what you ought to do for your personal benefit, but you are not obliged to testify to anything that will incriminate yourself; but, if you do testify, I will say this much to you: Tell the truth, whatever it is.' He stood a moment, and burst into tears, like a baby, and said, 'That is the last thing my wife said to me before I left home,—was to tell the truth, whatever I told,' and he dropped into a chair and cried; and in a moment he straightened up and he said: 'I must tell. I won't stand this any longer.' And he went right on rapidly and told his story." At this point, defendant's counsel objected to Judge Person's testimony on the ground that the communication in question was confidential,

ing to the evidence of Hallenbeck [the magistrate], the relation of attorney and client did not exist between the defendant and Hallenbeck as to the affair then under consideration, and the defendant was distinctly so informed. The fact that, as to other matters, the relation may have existed, does not confer the privilege here,—especially when the relation here is distinctly repudiated to the party. . . . The fact simply that the communication is confidential is not enough."

The proposition that the rule of privilege is not applicable to communications made to a person who is disqualified, by reason of his official position, from serving as an attorney, is further supported by the case of *Wilson v. Rastall*, 4 T. R. 753. In that case the trial court refused to permit an attorney to produce in evidence certain letters, which had been communicated to him in consequence of the defendant's consulting him professionally; but he had declined employment, because he was under-sheriff, and a material witness. On appeal, Lord Kenyon, Ch. J., in reversing the ruling of the trial judge, said: "In order to show that the privilege extends beyond the case of an attorney and client, a hard case has been pressed upon our feelings, of confidence reposed in a friend. But if a friend

and its disclosure forbidden on grounds of public policy. The trial court ruled that there was nothing exempting Judge Person from testifying (to which ruling defendant excepted), and he proceeded and detailed the statement made to him by defendant. The testimony detailing this statement occupies about 3½ pages of the printed record. It may be described briefly as follows: Defendant, with the co-operation of a certain prominent state official, planned to corruptly secure the adoption of a certain joint resolution. To carry out this plan, defendant delivered drafts to the amount of \$20,000 to a prominent member of the house of representatives.

It is to be noted that the purpose of the defendant (though this does not appear to have been known to Judge Person) was "to talk with someone he had confidence in." It is obvious, too, that this confidence was given by reason of Judge Person's profession and official position, and of the advice given by him to defendant. Is the communication made under these circumstances to be regarded as confidential, and its disclosure forbidden by principles of public policy? Counsel for the people has neither in his argument nor brief endeavored to sustain the ruling of the court below. He has taken a course which merits the highest commendation. Apparently doubtful of the propriety of the ruling permitting this disclosure, he has not endeavored to support it by inapplicable argument or authority. He has contented himself with saying: "This matter received the careful attention of counsel in the court below. The court admitted the testimony. It is for this court

could not reveal what was imparted to him in confidence, what is to become of many cases, even affecting life. . . . I therefore think that this privilege is only allowed in the case of attorney and client." And Buller, J., said: "The question therefore here is, whether B. Handley were privileged with respect to any person. As to W. Handley, he certainly was not; for he said that the witness neither was, nor could be, his attorney, because he was at that time acting as under-sheriff. Neither was he privileged as to this defendant for the same reason; and though it was said that the defendant (by W. Handley) consulted him in his profession as a confidential person, the meaning of that was that, as B. Handley was more conversant with business of this kind than those who were not of his profession, W. Handley consulted him, but did not employ him as an attorney. . . . As B. Handley was neither the attorney of W. Handley, nor of the defendant, I am of opinion that he was improperly prevented from producing the letters in question."

And in *Pierson v. Steortz*, Morris (Iowa) 136, it is said that the rule is applicable only to disclosures made to "practising attorneys."

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to say whether or not that decision was correct. If it was correct, there is no error in this case. If incorrect, the conviction should be set aside and defendant discharged, for without this testimony another conviction cannot be obtained."

It seems to us that the principle which prohibits the disclosure of communications between attorney and client prohibits the disclosure under consideration. That principle is found in the common law, and is not confined in its application to cases where the technical relation of attorney and client exists. In the case of *People v. Barker*, 60 Mich., at page 297, 1 Am. St. Rep., at page 513, 27 N. W., at page 546, this court, speaking through Mr. Justice Champlin, said: "Confidential communications made in reliance upon the supposed relation of attorney and client, whether the party assuming to act as such is an attorney or not, are excluded upon the plainest principles of justice." The principle extends to communications made under the erroneous belief that the party consulted had consented to act as counsel. *Smith v. Fell*, 2 Curt. Eccl. Rep. 667. The privilege is not confined to communications made for the purpose of obtaining advice. It extends to "communications made to an attorney in the course of any professional employment, . . . and which may be supposed to have been drawn out in consequence of the relation in which the parties stand to each other." *Williams v. Fitch*, 18 N. Y., at page 551. It is not material that no fee has yet been paid or is to be paid. *Sargent v. Hampden*, 38 Me. 581; *Wade v. Ridley*, 97 Me. 368, 32 Atl. 975; *Davis v. Morgan*, 19 Mont. 141, 47 Pac. 793.

Have these principles any application to the question under consideration? Defendant informed Judge Person that he wished advice as to what course he should pursue for his benefit. When advised by Judge Person to see an attorney, he made known the circumstances which prevented his acting in accordance with this advice. Thereupon Judge Person said: "I cannot give you any advice as to what you ought to do for your personal benefit, but you are not obliged to testify to any thing that will incriminate yourself; but, if you do testify, I will say this much to you: Tell the truth, whatever it is." This statement of Judge Person was obviously advice, and it was advice, which properly should, and in this case did, come from a lawyer to a layman who desired to be advised. It is immaterial that the advice is so simple that an intelligent layman could have given it. This would perhaps characterize the best legal advice that ever was given, but it would be legal advice none the less. If it were true
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that the course of action prescribed by this advice was the only proper course to pursue, a relation of confidence nevertheless resulted from its being given. But it is not true that the course of action prescribed by this advice is the only course an honest lawyer might have advised defendant to follow. It is quite conceivable that a lawyer having regard to the personal interests of defendant, acting from the highest motives, might have said: "Testify to nothing that is not true, but, if you are asked to testify to anything that may incriminate you, I advise you to decline to answer, upon that ground." It is clear that defendant then and there decided to adopt and act upon the advice which Judge Person had given him, and, as a result, gave his confidence, and made the communication under consideration.

If Judge Person had not been, as he was, the judge of the circuit court for the county of Ingham, who had convened the grand jury, the principles of law above referred to would have prevented his disclosing the communication respondent made to him. It is true that Judge Person's position as judge of the circuit court prevented his becoming, in law, respondent's attorney. But it did not, in fact, prevent his advising respondent what course to pursue. How is the principle which regards as confidential communications between attorney and client affected by the fact that the attorney in this case was also a judge? If it be true that the fact that the attorney was the judge prevented his legally acting as attorney, it is also true that the fact that he occupied that position gave an increased weight to his advice. The reasons for regarding as confidential communications made in consequence of advice from an ordinary attorney apply with full force, and are re-enforced by others, when that advice emanates from an attorney who is also a judge. The law protects these communications as confidential, because of the nature of the confidence which exists between the client and the attorney of his choice. That confidence is not diminished, but is increased, when the advice is given by the judge authorized, not merely to express an opinion, but to declare the law. Not often will a judge undertake to give legal advice. Circumstances may, however, as in this case, make it his duty to give it. When they do, he will not, in any technical sense, become the attorney of the person to whom it was given. But if, as a result of such advice, he receives the confidence of that person, the principles of public policy applicable to attorney and client require that confidence to be respected.

I think our decision in this case might be

based on another ground, viz., the communication under consideration is privileged because made to the judge in control of the deliberations of the grand jury before whom defendant had been called as a witness. Defendant, wishing advice as to what testimony he should give before the grand jury, and having no opportunity to consult a lawyer of his own choice, went directly to Judge Person, who had the power to compel him to testify. See *People ex rel. Taylor v. Forbes*, 143 N. Y. 219, 38 N. E. 303; *Minters v. People*, 139 Ill., at page 365, 29 N. E. 45. If defendant had gone before the grand jury, and had refused to answer questions put to him, his right to persist in such refusal would have been determined by Judge Person. See above cases. It is obvious that whatever Judge Person thus learned—and in that event he would have learned what testimony defendant had given—would have been privileged. If in that manner Judge Person had learned all that he did by the communication under consideration, the entire disclosure would have been privileged. Is it to be said that, because defendant anticipated his dilemma, and obtained this advice shortly before it was necessary to act upon it, he thereby loses the privilege which he would otherwise have had? I do not think so. I think we should look upon Judge Person as the judge in charge of the grand jury, the advice given by him as advice respecting testimony to be given before said grand jury, and that we should therefore decide that the communication made in consequence thereof is privileged, in accordance with the principle that governs testimony before said grand jury.

It follows from this reasoning that there was error in receiving the testimony of Judge Person; and inasmuch as, according to the statement of counsel, and according to our own judgment of the record, there can be no conviction without this testimony, the conviction will not only be set aside, but the defendant will be discharged from custody.

Montgomery and Moore, JJ., concur with **Carpenter, J.**

Grant, J., dissenting:

A grand jury had been summoned by the circuit court of Ingham county, Judge Person presiding. One of the subjects under investigation by the grand jury was an attempt to bribe legislators to secure the passage of a certain bill then pending before the legislature. The respondent was the agent of and represented a corporation in the attempt to secure the passage of this bill. Undoubtedly the respondent believed 67 L. R. A.

that he was summoned as a witness before the grand jury to testify in regard to this transaction. Before going before the grand jury he went to the presiding judge, and made a voluntary confession of his crime. He knew that the presiding judge could not act as his attorney or counsel, any more than could the prosecuting attorney. To hold that he believed that the judge could so act would be a reflection upon the respondent's common sense and intelligence. He was a man of age and experience, and the trusted agent of a large corporation. I do not think that it can be said, under this record, that he approached the presiding judge and made his confession with any idea that he stood to him in that confession in the relation of client and attorney. The confession was made, not only without any threats or promises, or even inducements, but after the presiding judge had told him that he could not advise him; thus practically saying to him: "You know that the relation between us is not that of client and attorney, and cannot be, and that whatever you say to me is not privileged, under the law." Everyone knows that a presiding judge cannot advise litigants, for it would disqualify him from sitting in the case. It is immaterial what the motive of respondent was in making this confession,—whether he did it from sting of conscience, or from repentance for his error, or a desire to escape sentence, or in order to obtain a lighter one. The confession was not made as an informer, for the purpose of causing an investigation into the crime of others. It was no less a confession, pure and simple, because it involved other participants in the crime. As against such participants, the confession would not be competent evidence,—at least until a conspiracy had been established by other evidence. Confessions are potent evidence of guilt when made voluntarily, without threats, promises, or duress. See *Daniels v. State*, 6 Am. St. Rep. 238, and note (78 Ga. 98).

It will be conceded that there is no statute of this state covering the case. The only statutory privileged communications are where a confession is made to a priest "in the course of discipline enjoined by the rules or practice of such denomination" to which such priest belongs (Comp. Laws, § 10,180), and information acquired by a physician in attending a patient in his professional character, which information must be necessary to enable him to prescribe (Comp. Laws, § 10,181). Under these statutes, confessions of crime made to a physician, not necessary for the physician's prescription, or to a priest, not in accordance with the discipline of his church, would be competent. At the common law, communi-

cations to clergymen and physicians were not privileged. 1 Greenl. Ev. 16th ed. § 247a. The question of communications by a layman to his priest arose in the English courts, and the court said: "It was not to be supposed for a single moment that a clergyman had any right to withhold information from a court of law. It was a principle of our jurisprudence that justice should prevail, and no unrecognized privilege could be allowed to stand in the way of it." *Normanshaw v. Normanshaw*, 69 L. T. N. S. 468. The common law throws the mantle of secrecy over two classes of communications, viz., between lawyer and client and between government officials and informers. What is the basis of this rule of the common law? Such communications are not excluded for the protection of criminals, but solely on the ground of public policy. Many efforts have been made before the courts to ascertain who informed government officials of frauds and crimes against the government, but the testimony has been universally excluded, not for the purpose of protecting the informer against prosecutions, but solely because public policy requires that this information, so essential to protect the government from frauds and crimes, should not be made public; otherwise the government would suffer, for it is evident that but few, if any, would give such information if they knew that it could be made the basis of a libel suit, or could be used against them in other ways. See *Worthington v. Scribner*, 109 Mass. 487, 12 Am. Rep. 736; *Rex v. Akers*, 6 Esp. 125, note; *Atty. Gen. v. Briant*, 15 Mees. & W. 169; *Robinson v. May*, 2 Smith, 3; *Beaton v. Skene*, 5 Hurlst. & N. 838. In *Shinglemeyer v. Wright*, 124 Mich. 230, 50 L. R. A. 129, 82 N. W. 887, we said: "The defendant did not make these statements for repetition. He made them for the exclusive use and benefit of the trusted and sworn officers of the law. They should have been forever locked in their breasts, and never disclosed; otherwise, few persons would dare to disclose to an officer the name of a suspect, or anything they had learned about his character." This rule also covers communications made to those in authority, relative to the character and conduct of a party applying for a public office. *Earl v. Vass*, 1 Shaw, 229; *Garn v. Lockard*, 108 Mich. 196, 65 N. W. 764; *Pollasky v. Minchener*, 81 Mich. 280, 9 L. R. A. 102, 21 Am. St. Rep. 516, 46 N. W. 5; *Bacon v. Michigan C. R. Co.* 66 Mich. 166, 33 N. W. 181; *Wieman v. Mabec*, 45 Mich. 484, 40 Am. Rep. 477, 8 N. W. 71. This case is not within the principle of those above cited. Evidence of these communications is rejected "upon the ground of public policy, because greater mischiefs

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would probably result from requiring or permitting its admission than from any refusal to receive it." 23 Am. & Eng. Enc. Law, 2d ed. 50.

The rejection of this testimony is sought upon the basis of the existence of the relation of attorney and client. The authorities hold that "it is absolutely essential, [in order to make the communication privileged] that the relation of attorney and client should have existed," and that "the communication must also be made solely on account of the relation of attorney and client, and for the purpose of obtaining professional assistance or advice," etc. 23 Am. & Eng. Enc. Law, 2d ed. pp. 58, 62, and authorities there cited; *Bramwell v. Lucas*, 4 Dowl. & R. 367. If that relation existed, the evidence is inadmissible; otherwise it is admissible. There is no privilege for a confidential communication, merely as such. 1 Greenl. Ev. 16th ed. § 248. It is not a question of sentiment, but of law. The language of Lord Camden, quoted in Greenleaf on Evidence, is appropriate here: "It is not befitting the dignity of this high court of justice to be debating the etiquette of honor at the same time when we are trying lives and liberties." 1 Greenl. Ev. § 248. There must be found some well-recognized rule of the common law, founded upon common sense and justice, which justifies the exclusion of a voluntary confession of crime. Public policy protects communications between lawyer and client from the eyes of the public, because they are regarded as essential to enable the lawyer to make a proper defense for him. It does not protect confessions or communications where that relation does not exist, no matter how close any other relation between the parties to it may be, or what the purpose may be in making the confession. No sacredness attaches to the confession of a criminal, and, when he seeks protection from its consequences, he must show his privilege to be within some well-recognized rule of law. I do not believe in extending the rule for his protection, but, rather, in restricting it for the protection of the public. Chief Justice Shaw said that the communication, to be privileged, must be "with a view to obtain his advice and opinion in matters of law in relation to his legal rights, duties, and obligations, whether with a view to the prosecution or defense of a suit, or other lawful object. . . . This principle we take to be this: That so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and

expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed. To the rule as thus stated we are still inclined to adhere. But the privilege of exemption from testifying to facts actually known to the witness is in contravention to the general rules of law. It is therefore to be watched with some strictness, and is not to be extended beyond the limits of that principle of policy upon which it is allowed. It is extended to no other person than an advocate or legal adviser, and those persons whose intervention is strictly necessary to enable the client and attorney to communicate with each other as an interpreter, agent, or attorney's clerk. And this privilege is confined to counsel, solicitors, and attorneys, when applied to as such, and when acting in that capacity. *Wilson v. Rastall*, 4 T. R. 753. . . . And so strictly is the rule held that the privilege extends only to communications made by the client to his attorney, for the purpose of obtaining legal advice, that in a late case it was held that a communication made by a client to his attorney, not for the purpose of asking his legal advice, but to obtain information as to a matter of fact, is not privileged, and may be disclosed by the attorney if called as a witness in a cause. *Bramwell v. Lucas*, 2 Barn. & C. 745." *Hutton v. Robinson*, 14 Pick. 416, 25 Am. Dec. 415.

As applied to this case, the relation of client and attorney is the only basis upon which the confession can be held privileged. How can this relation be held to exist in the face of the fact that the respondent knew he was not talking to Judge Person as his lawyer; and most certainly did he know this, when the judge promptly told him that he could not advise him. Not only did the judge plainly tell him this once, but also told him he had better see an attorney; and after respondent said he had seen an attorney, but got no advice from him, etc., the judge again said, emphatically, "I cannot give you any advice as to what you ought to do for your personal benefit;" and after all this the respondent told his story of the crime. I cannot yield my assent to the existence of a relation between this respondent and Judge Person which neither, in my judgment, believed to exist.

I have carefully examined the authorities
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to find under what circumstances judges are privileged from testifying as to matters which take place before them, and the only privilege I find accorded to them is that, on grounds of public policy, they cannot be called on to state what occurred before them in court. 1 Greenl. Ev. 16th ed. § 254c. I find one case which is somewhat in point. *State v. Chambers*, 45 La. Ann. 36, 11 So. 944. That case, in its facts, is almost the counterpart of this, except that in that case the judge sought the respondent, while in this the respondent sought the judge. The respondent was charged with the crime of murder. The district judge, before whom he was first tried, visited the respondent in prison, and communicated with him. Upon the second trial, presided over by the judge's successor, he (the judge) was placed upon the stand as a witness. The objection was made, not that the communication was privileged, but that the presence of the judge in his official capacity in the prison intimidated the respondent, so that his answers were not free and voluntary. The court, in disposing of the case, said: "We find no legal and valid reason to set aside the verdict on this account. His testimony shows that he warned and cautioned the defendant, and that he conversed freely and voluntarily." What difference, in principle, does it make whether the judge sought the respondent to obtain, if he could, a confession, or whether the respondent sought the judge to voluntarily make a confession? The only difference between the two cases is that in this case the respondent made the communication after twice being told by the judge that he could give him no advice, while in the other case the respondent made the communication without asking any advice.

The fact that a grand jury was believed to be investigating this crime is of no significance. The same rule would apply if there had been no grand jury, and no suspicion of the crime or of the respondent's guilt. Suppose a case of murder or burglary, and the criminal, for any reason whatever, seeks the presiding judge within whose jurisdiction the crime was committed, and confesses the crime, after being told that he can give him no advice; is the judge's mouth sealed,—should it be sealed? Must a heinous crime go unpunished, under the protection of privileged communications, where no relation of lawyer and client existed or could exist? Would not the judge, under such circumstances, be required by all considerations of public policy to disclose the confession?

I do not think there is any error upon

the record, and the conviction should be affirmed.

Hooker, Ch. J., concurred with Grant, J.

A. L. LAKEY COMPANY

v.

City of KALAMAZOO, *Plff. in Err.*

(.....Mich.....)

1. A municipal corporation which has utilised a stream to carry off the surface water falling within its watershed, and, for the maintenance of the public health, has cleaned its bed, is not liable to a riparian owner for failure to remove obstructions placed in the stream by another riparian owner so that the water is dammed back to the injury of the former.
2. A municipal corporation which turns into a stream flowing through its storm sewers from streets within the watershed of the stream is not bound to remove the sand and debris carried into the stream by the water for the purpose of protecting riparian owners from injury by overflow of the stream.

(December 30, 1904.)

ERROR to the Circuit Court for Kalamazoo County to review a judgment in favor of plaintiff in an action brought to recover damages for injuries to plaintiff's property, which was alleged to have been caused by the overflow of a stream through defendant's negligence. *Reversed.*

Statement by Grant, J.:

The appellant's statement of the case is not disputed, and we therefore adopt it. It is as follows:

This is an action for permitting Arcadia creek to overflow its banks and flood the plaintiff's cellar. Plaintiff had verdict and judgment for \$1,700. Arcadia creek is a natural water course, draining a portion of the area of the defendant city. The city is situated in a valley. The creek has always carried off the rainfall within its natural area, and, as the community grew, streets were paved and laid out across the creek, and the gutters from the streets were connected with it. Later, as the city grew, underground waterways known as "storm sewers" were installed (which served substantially the same purpose as the old gutters) which were also connected with the creek, but no sewer or gutter connected with it drained any area except the natural wa-

tershed. The creek passes through a thickly settled business portion of the defendant city, and substantially all the large buildings of the city are within the drainage area of the creek. The territory occupied by these buildings has been gradually built up, and the water which falls upon the roofs of the buildings collects and is discharged in some instances into the sewers, but usually on the pavements, from whence by gutter or storm sewer it finds its way into the creek. On June 18 and July 2, 1902, heavy rains fell within the drainage area, and the creek overflowed its banks at or near the plaintiff's place of business, and the water ran into its cellar, whereby it claims damage. The city, although it has never admitted that it was bound so to do, has, as a health measure, always cleaned the water courses within the city, and very shortly before the 18th of June, 1902, the creek was thoroughly cleaned by the city employees, with the one exception that at the building occupied by the Harrow Spring Company, which faces on Edwards street in said city, and which is but a few rods from plaintiff's place of business, the workmen were unable to reach the bed of the creek, because for a considerable distance there were private storage sheds built entirely over it. The sheds had been over the creek for a number of years, and entirely upon private property, and there was no method of cleaning it at this place unless the floor of the sheds was removed. Upon inspection, the city employees discovered that there were stored within the sheds harrow teeth and other iron material, and in such a manner that it was impossible for them to reach the bed of the creek. After the floods the Harrow Spring Company moved from their place of business, and then the floor of these sheds was taken up, and it was discovered that harrow teeth had fallen through the floor into the creek in such a manner as to catch debris and drift material, making a dam, which undoubtedly to some extent caused the flood.

The court instructed the jury that the city had the legal right to turn the surface waters of this watershed of the creek into the creek, and that it had turned no more of the surface water into it than it was justified in so doing. The court also instructed the jury that, if they found that the city permitted the creek "to become and be so obstructed on the days in question, and that the obstruction caused the creek to overflow its banks and damage the plaintiff's property, then the plaintiff would be entitled to recover; provided you further find that the rain storms which happened on those days were such as might ordinarily have been expected to occur in this

NOTE.—As to rights and duties of municipalities with respect to surface water, see, in this series, *Johnson v. White*, 65 L. R. A. 250, and *note*.

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latitude, although happening at rare intervals." He further instructed them that, if the rainfall was unprecedented, and would have caused the creek to overflow notwithstanding the obstructions, then the defendant was not liable. He also instructed them that it was the duty of the city to keep the creek reasonably clear and free from obstructions, and that it was responsible for the obstructions by the Harrow Spring Company.

Mr. William R. Fox, with Mr. Harry C. Howard, for plaintiff in error:

Plaintiff cannot recover in this case, because in all that the city did in its corporate capacity within the drainage area of this brook in opening and paving streets and gutters it was performing a governmental duty.

Wilson v. Waterbury, 73 Conn. 416, 47 Atl. 687.

A city is not liable for injuries caused by a defect or insufficiency in the plan or system of drainage adopted under authority conferred by the legislature, or which are a necessary result of the exercise of the authority so conferred.

Gould, Waters, § 261; *Johnston v. District of Columbia*, 118 U. S. 19, 30 L. ed. 75, 6 Sup. Ct. Rep. 923.

A municipal corporation is not liable to the owner of land upon a stream for the overflow of his property by the stream, and to which it has conducted its surface drainage, if no more than the natural amount of water finds its way into the stream, although the flow is hastened, and a considerable amount of soil is washed into the stream, which to some extent obstructs its flow.

Wheeler v. Worcester, 10 Allen, 603; *Cumberland v. Willison*, 50 Md. 138, 33 Am. Rep. 304; *Butler v. Worcester*, 112 Mass. 541; *Diamond Match Co. v. New Haven*, 55 Conn. 510, 3 Am. St. Rep. 70, 13 Atl. 409; *Kellogg v. New Britain*, 62 Conn. 232, 24 Atl. 996; *Fisk v. Hartford*, 69 Conn. 375, 38 L. R. A. 474, 37 Atl. 983; *Platt Bros. v. Waterbury*, 72 Conn. 531, 48 L. R. A. 691, 77 Am. St. Rep. 335, 45 Atl. 154; *Watson v. New Milford*, 72 Conn. 561, 77 Am. St. Rep. 345, 45 Atl. 167; *Strohl v. Ephrata*, 178 Pa. 50, 35 Atl. 713; *Com. ex rel. Tyron v. Stevens*, 178 Pa. 543, 36 Atl. 166.

No action lies against the city for failure to keep a public sewer and cesspool in repair, whereby waste water accumulates and flows into the cellar of a neighboring house not connected with drain.

Barry v. Lowell, 8 Allen, 128, 85 Am. Dec. 690.

The city is not liable where the drain is sufficient for ordinary purposes, not floods. 67 L. R. A.

Watson v. Kingston, 114 N. Y. 88, 21 N. E. 102; *Madison v. Ross*, 3 Ind. 236, 54 Am. Dec. 481; *Cold Water v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601; *Powers v. Council Bluffs*, 50 Iowa, 197; *German Theological School v. Dubuque*, 64 Iowa, 739, 17 N. W. 153; *Haney v. Kansas City*, 94 Mo. 334, 7 S. W. 417; *Taubert v. St. Paul*, 68 Minn. 519, 71 N. W. 684; *Scott v. Provo City*, 14 Utah, 31, 45 Pac. 1005; *Jordan v. Mt. Pleasant*, 15 Utah, 440, 49 Pac. 746; *Allen v. Chippewa Falls*, 52 Wis. 430, 38 Am. Rep. 748, 9 N. W. 284; *Savannah v. Cleary*, 67 Ga. 153.

If a city or town makes provision for carrying off the surface water of its streets and highways, which proves insufficient, and such water overflows upon the land of an adjoining proprietor to his injury, he will have no right of action.

Gould, Waters, 3d ed. § 270; *Barry v. Lowell*, 8 Allen, 127, 85 Am. Dec. 690; *Mills v. Brooklyn*, 32 N. Y. 489; *Kavanagh v. Brooklyn*, 38 Barb. 232; *Acker v. Newcastle*, 48 Hun, 312; *Schmidt v. Rowse*, 35 Mo. App. 288; *Fair v. Philadelphia*, 88 Pa. 309, 32 Am. Rep. 455; *Carr v. Northern Liberties*, 35 Pa. 324, 78 Am. Dec. 342; *Alden v. Minneapolis*, 24 Minn. 254; *Atchison v. Challiss*, 9 Kan. 603.

A municipal corporation is not liable in damages for a failure to enact ordinances with reference to subjects within its jurisdiction, or a failure to enforce ordinances after their enactment.

20 Am. & Eng. Enc. Law, p. 1198; *Fifield v. Phaniz*, 4 Ariz. 283, 24 L. R. A. 430, 36 Pac. 916; *Rivers v. Augusta*, 65 Ga. 376, 38 Am. Rep. 787; *Taylor v. Cumberland*, 64 Md. 68, 54 Am. Rep. 759, 20 Atl. 1027; *Hines v. Charlotte*, 72 Mich. 278, 1 L. R. A. 844, 40 N. W. 333; *Harman v. St. Louis*, 137 Mo. 494, 38 S. W. 1102; *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L. R. A. 755, 56 Am. St. Rep. 543, 36 S. W. 659; *Carroll v. St. Louis*, 4 Mo. App. 191; *Hill v. Charlotte*, 72 N. C. 55, 21 Am. Rep. 451; *Levy v. New York*, 1 Sandf. 465; *Peck v. Austin*, 22 Tex. 261, 73 Am. Dec. 261; *Jones v. Williamsburg*, 97 Va. 722, 47 L. R. A. 294, 34 S. E. 883; *Kelley v. Milwaukee*, 18 Wis. 83.

The nonexercise of a power granted by the legislature creates no liability.

Gould, Waters, § 270; *Lynch v. New York*, 76 N. Y. 60, 32 Am. Rep. 271; *Mills v. Brooklyn*, 32 N. Y. 489; *Flagg v. Worcester*, 13 Gray, 601; *Roll v. Augusta*, 34 Ga. 326; *Fair v. Philadelphia*, 88 Pa. 309, 32 Am. Rep. 455.

A town is not liable for the obstruction of the passage of water through a culvert under a highway, which causes the water to overflow the land of an adjoining owner.

where the obstruction is caused by a railroad company, that owns land adjoining the highway, in filling up a ravine on its land, which constituted a natural channel for the water from the culvert under the highway.

Haynes v. Burlington, 38 Vt. 350; *Coonley v. Albany*, 132 N. Y. 145, 30 N. E. 382; *Buchert v. Boyertown*, 1 Monaghan (Pa.) 577, 17 Atl. 190.

A municipal corporation, being a government agency, is not liable to an action for damages sustained by the torts of its officers or agents, unless it is made so by statutory provision.

Little Rock v. Willis, 27 Ark. 572; *Stevens v. Muskegon*, 111 Mich. 72, 36 L. R. A. 777, 69 N. W. 227; *Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 450; *Webb v. Detroit Bd. of Health*, 116 Mich. 516, 72 Am. St. Rep. 541, 74 N. W. 734; *Taggart v. Fall River*, 170 Mass. 325, 49 N. E. 622; *Pettin-gell v. Chelsea*, 161 Mass. 368, 24 L. R. A. 426, 37 N. E. 380; *Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517; *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499.

The true test should be whether the thing from which the injury is alleged to have resulted was undertaken purely for public benefit and advantage, and not for the benefit of the corporation.

Howard v. Worcester, 153 Mass. 426, 12 L. R. A. 160, 25 Am. St. Rep. 651, 27 N. E. 11; *Gilpatrick v. Biddeford*, 86 Me. 534, 30 Atl. 99; *Murtaugh v. St. Louis*, 44 Mo. 479.

Messrs. Osborn & Mills, for defendant in error:

A city has no more right to invade, or cause the invasion of, private property than an individual.

Rice v. Flint, 67 Mich. 401, 34 N. W. 719; *Defer v. Detroit*, 67 Mich. 346, 34 N. W. 680; *Burford v. Grand Rapids*, 53 Mich. 98, 51 Am. Rep. 105, 18 N. W. 571; *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Seaman v. Marshall*, 116 Mich. 327, 74 N. W. 484; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Barton v. Syracuse*, 36 N. Y. 54; *Jones, Neg. Mun. Corp.* ¶ 143, and note; *Clay v. St. Albans*, 43 W. Va. 539, 64 Am. St. Rep. 883, 27 S. E. 368; 6 Ballard, Real Prop. 890; *Waycross v. Houk*, 113 Ga. 963, 39 S. E. 577.

Grant, J., delivered the opinion of the court:

The overflow of the creek so as to flood the basement of plaintiff's building was caused either by a great rainfall, or by the obstruction of the Harrow Spring Company, or both combined. Of course, but for the heavy rains the overflow would not have occurred. It is very probable that but for 67 L. R. A.

the obstruction the water would have remained within the banks of the creek. The evidence is that no such flooding had before been known. Plaintiff's manager testified that it had occupied the building ever since it was built; that it had never had a flood to that extent before; that only once before had the water reached its basement, and that was about two years previous; that that overflow was caused by a blockade in the bed of the creek by a firm named Bush & Patterson, who were building a mill, and had lumber and brick piled across the creek. After the first flood plaintiff took no steps to remove its material from its basement, because, as its manager testified, "they did not think they would have another flood right on the heels of the first. We never had any damage before; it had never been flooded before; and, basing my judgment upon the line of my former experience, I certainly did not think it would happen so soon again."

The rule is conceded to be that a municipality is not responsible for damages caused by unexpected and unusual rain-falls, but only for those which experience has shown are liable to occur. *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601; *Scaman v. Marshall*, 116 Mich. 327, 74 N. W. 484. It was not claimed by the defendant in the court below, and is not now claimed, that the court erred in leaving to the jury the question whether the rainfall was unprecedented, or one which might have been expected to occur, although happening at rare intervals.

Two questions are raised: First. Was the defendant liable for the obstruction of the creek by the Harrow Spring Company? The defendant did not cause the obstruction. It was not aware of it until after that company had removed the contents of its warehouse, built over the creek, and the defendant had been able to reach the bed of the creek from the inside, the only way it appears by which it could be reached and cleaned. The Harrow Spring Company owned both banks and the bed of the stream. So long as it did not interfere with the natural flow of the water, it had the right to erect buildings over it. The building itself did not interfere with the natural flow. The defendant had no control over the creek (except that inherent in municipal corporations under the police power) to cause it to be cleaned for the protection of the health of its inhabitants. Even under its charter it could only "regulate, improve, alter, widen, or change the channel of Arcadia brook, . . . on making compensation to persons whose property was taken for such purposes." The fact that it had caused the stream to be cleaned for sani-

tary reasons did not make it the duty of the city to protect owners of land from the overflow of water naturally emptying into it. The creek had not been appropriated by the city for the purpose of sewerage. It was no more liable in damages to riparian owners for water running into it, under the circumstances of this case, than it would be for emptying its surface water into the Kalamazoo river, where its general sewerage is conducted. The riparian owners along such streams are entitled to use them for any legitimate purpose so long as they do not affect the rights of other riparian owners or cause a nuisance dangerous to the health of the inhabitants. *Knight v. Barr*, 130 Mich. 673, 90 N. W. 849. It follows that the instruction of the court that the defendant is liable for the obstruction of the Harrow Spring Company is erroneous. *Haynes v. Burlington*, 38 Vt. 350; *Coonley v. Albany*, 132 N. Y. 145, 30 N. E. 382.

Second. Was the defendant liable for obstructions arising from the flow of water into the creek? While the instruction of the court is not very specific as to the character of the obstruction for which the defendant is liable, we infer from its general character, and from briefs of counsel, that it was held responsible for any obstructions caused by the accumulation of sand and mud in its bottom which the water from the streets and buildings washed into it, and that it was the duty of the city to keep the creek at its natural depth and width. Arcadia creek is a natural water course. As the city grew, the watershed of the creek became covered with buildings. Parties who owned land on both sides of it erected buildings over it, as they had the legal right to do. Paved streets became necessary. The speedy discharge of the water from the buildings and streets into the creek was essential to the business, comfort, and health of the inhabitants of the city. The authorities are apparently unanimous in holding that under such circumstances the city had the legal right to construct pavements and storm sewers to speedily carry off the water into the creek through which it was emptied into the river of Kalamazoo, a short distance away. In this process some dirt and material, necessarily deposited upon the pavements, would be carried into the creek. Some of this dirt and material would perhaps settle in the bottom of the creek and lodge along its banks. The cities and villages in this country are usually situated along the banks of rivers and small streams, into which the water falling upon their paved streets and buildings must be conducted. For the dirt and material thus carried into such streams, the municipalities are not liable to the riparian owners, or to others living in the vicin-

ity. If any such owner is damaged thereby, it is *damnum absque injuria*. Neither does the law impose upon the municipality the duty to keep the bed of the stream at its original depth and width. As a measure of health, the municipality undoubtedly has the power to clean, or cause to be cleaned, the bed of the stream, and thus accelerate the flow of the water; but the municipality has no other control over it. It owns no land along the banks. The creek is not a trunk sewer owned by the municipality.

Under the facts of this case the defendant is not liable. Its nonliability is founded in sound reason, and is supported by the authorities. *Wilson v. Waterbury*, 73 Conn. 416, 47 Atl. 687; *Wheeler v. Worcester*, 10 Allen, 603; *Cumberland v. Willison*, 50 Md. 138, 33 Am. Rep. 304; *Fair v. Philadelphia*, 88 Pa. 309, 32 Am. Rep. 455; *Kavanagh v. Brooklyn*, 38 Barb. 232; Gould, Waters, § 270. The learned counsel for the plaintiff cite and rely upon *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Rice v. Flint*, 67 Mich. 401, 34 N. W. 719; *Seaman v. Marshall*, 116 Mich. 327, 74 N. W. 484; *Manning v. Lowell*, 130 Mass. 21; *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470; *O'Brien v. St. Paul*, 18 Minn. 176, Gil. 163; *Clay v. St. Albans*, 43 W. Va. 539, 64 Am. St. Rep. 883, 27 S. E. 368; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Barton v. Syracuse*, 36 N. Y. 54; *Stanchfield v. Newton*, 142 Mass. 110, 7 N. E. 703; *Parker v. Nashua*, 59 N. H. 402; *Waycross v. Houk*, 113 Ga. 963, 39 S. E. 577. In *Ashley v. Port Huron* the city cut a sewer in such a manner as to cause a collection of large quantities of water upon the plaintiff's land which would not otherwise have flowed there. In *Rice v. Flint* the city made a dam by raising the grade of the street, so that the water overflowed the plaintiff's premises. In *Seaman v. Marshall* the city was held negligent in not providing reasonably efficient means to carry off the water which should reasonably have been expected to accumulate. In *Manning v. Lowell* the territory which was drained of its surface water was very much greater than that extent of territory which would be thus naturally drained without the intervention of the artificial means constructed by the city. In other words, the city took water which would not naturally flow upon defendant's land, and discharged it upon his land. In *Brayton v. Fall River* the city drained by its system of sewers a territory of 60 or 75 acres, and emptied it into a creek, whereas only about 15 to 20 acres naturally drained into it. In *O'Brien v. St. Paul* the area of the drainage through the sewer is not clearly shown. It is stated that by means of the sewer the city con-

ducted to and emptied upon the plaintiff's premises a greater body of water than the natural flow of water through the water course,—wore away the banks and soil to a much greater extent than would have been caused by any stream naturally flowing through said water course. If it is meant by this that a municipality cannot pave its streets and construct storm sewers so as to convey water more rapidly into the creek than it would naturally flow, it is against the clear weight of authority, and against the instruction of the court in this case. In *Clay v. St. Albans* we gather from the statement of the case that the city, by its gutters and drains, collected surface water and cast it in a body onto plaintiff's land. It is not a case of draining into a creek or natural water course. In *Noonan v. Albany* the water was collected from the lands and streets of a municipality into an artificial channel and discharged upon plaintiff's lands. The defendant in that case, by means of sewers and manner of grading, concentrated the surface water and sewerage of a

large territory and discharged it in one body into a ravine where a small rivulet formerly ran. *Barton v. Syracuse* involves the duty of the municipality to keep its sewers in proper repair and prevent their becoming filled with dirt and rubbish, thus impeding the overflow of the water, and causing it to set back upon the lands of lot owners. *Stanchfield v. Newton* is a similar case. In *Waycross v. Houk* the plaintiff sought to enjoin defendant from continuing, or from extending, a main sewer so that the sewerage would be discharged directly upon her land. The basis of the decree in that case was that the nuisance should be abated as dangerous to life and health. In *Parker v. Nashua* the liability was based upon the negligent management of the municipality in not keeping a culvert free from obstructions. We are of the opinion that those cases do not apply to this one.

Judgment reversed, and new trial ordered.

The other Justices concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH of Massachusetts
v.

Albert M. PEAR.

SAME

v.

Henning JACOBSON.

(183 Mass. 242.)

1. The legislature may, in the exercise of its police power, authorize the health authorities of a municipal corporation to require, under penalty, all citizens to be vaccinated when, in their discretion, it is necessary for the public health and safety.
2. Evidence as to what vaccination consists of is not admissible in a prosecution for refusal to obey an order of the board of health to be vaccinated, since it is a fact of common knowledge.
3. The views of an individual do not entitle him to be exempted from the operation of an order of the board of health requiring the vaccination of all citizens of the municipality.
4. The testimony of experts that the effects of vaccination are injurious and dangerous does not, in view of facts of history, warrant a court in holding a statute requiring citizens to be vaccinated unconstitutional.

ute requiring citizens to be vaccinated unconstitutional.

5. The constitutional requirement that police powers shall be wholesome and reasonable does not justify the court in setting aside a statute upon a subject in regard to which the legislature is authorized to act because the opinion of the judge differs from that of the legislators on the question whether it will be for the good and welfare of the state.
6. The theoretical possibility of an injury from vaccination in an individual case does not show that a statute requiring the vaccination of all citizens is unreasonable.
7. Exemption of minors and persons under guardianship from the penalty imposed by a statute for refusal to be vaccinated does not render the statute unconstitutional as working an inequality.

(April 2, 1903.)

EXCEPTIONS by defendants to rulings of the Superior Court for Middlesex County, made during the trial of actions which resulted in convicting defendants of refusal to comply with a health ordinance. *Overruled.*

The facts are stated in the opinion.

NOTE.—As to constitutionality of compulsory vaccination, see also, in this series, *Morris v. Columbus*, 42 L. R. A. 175, and *State v. Hay*, 49 L. R. A. 588.

As to validity of regulation making vaccination a condition of attending school, see *Duffield v. Williamsport School District*, 25 L. R. A. 67 L. R. A.

A. 152, and note; *Blissell v. Davison*, 29 L. R. A. 251; *State ex rel. Adams v. Burdge*, 37 L. R. A. 157; *Potts v. Breen*, 30 L. R. A. 152; *Blue v. Beach*, 50 L. R. A. 64; *Mathews v. Board of Education*, 54 L. R. A. 736; and *State ex rel. Freeman v. Zimmerman*, 58 L. R. A. 78.

Messrs. Henry Ballard and J. Winthrop Pickering, for defendants:

If a legislature undertakes to exert any part of that vast, unclassified residue of legislative authority which is called, not always intelligently, the police power, this action must not degenerate into an irrational excess, so as to become in reality something different and forbidden, *e. g.*, the depriving of people of their property without due process of law.

Prof. James B. Thayer, 7 Harvard Law Rev. p. 148.

The source of police power is no exception to the old, sound doctrine that the state legislation is at all times subject to the paramount authority of the Constitution, and cannot violate rights which are safeguarded by the Constitution of the United States.

Mugler v. Kansas, 123 U. S. 663, 31 L. ed. 211, 8 Sup. Ct. Rep. 273; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Clark v. Syracuse*, 13 Barb. 32; *People v. Gillson*, 109 N. Y. 400, 4 Am. St. Rep. 465, 17 N. E. 343; *Re Jacobs*, 98 N. Y. 108, 50 Am. Rep. 636; *People v. Mara*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29.

The obvious absolute necessity of protecting unfit persons—a manifestly large number in the aggregate—from the destructive effects of its improper enforcement is utterly overlooked in this statute.

School Directors v. Breen, 60 Ill. App. 201; *Blue v. Beach*, 155 Ind. 121, 50 L. R. A. 64, 80 Am. St. Rep. 195, 56 N. E. 89.

The summary condemning of an entire community to bodily mutilation and inoculation with disease, with certainty of so much suffering and such terrible risk, and with so much uncertainty as to any benefit therefrom, all without any hearing, merely upon the forming of an "opinion," perhaps a guess,—is not a valid exercise of the police power.

People ex rel. New York C. & H. R. R. Co. v. Board of Health, 58 Hun, 595, 12 N. Y. Supp. 561; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Clark v. Syracuse*, 13 Barb. 32; *Babcock v. Buffalo*, Sheldon, 317; *Tugman v. Chicago*, 78 Ill. 405.

An unconstitutional act, whenever challenged, must fall.

Levin v. Burlington, 129 N. C. 184, 55 L. R. A. 396, 39 S. E. 822; 54 Cent. L. J. 361.

The number of those who seriously object to vaccination is by no means small, and they cannot, except when necessary for the public health, and in conformity to law, be deprived of their right to protect themselves and those under their control from an inva-

sion of their liberties by a practically compulsory inoculation of their bodies with a virus of any description whatever, however meritorious it may be.

Potts v. Breen, 167 Ill. 67, 39 L. R. A. 152, 59 Am. St. Rep. 262, 47 N. E. 81; *Morris v. Columbus*, 102 Ga. 792, 42 L. R. A. 175.

"Due process of law" is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature.

Weimer v. Bunbury, 30 Mich. 201; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *People ex rel. New York C. & H. R. R. Co. v. Board of Health*, 58 Hun, 595, 12 N. Y. Supp. 561; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Clark v. Syracuse*, 13 Barb. 32; *Babcock v. Buffalo*, Sheldon, 317.

It is a matter of common knowledge, and therefore of the judicial knowledge of this court, that among the natural and probable results likely to follow from vaccination are syphilis, vaccine fever, vaccine eczema, vaccine erysipelas, cancer, cirrhosis, blood poisoning, paralysis, tetanus, pneumonia, meningitis, total blindness, spinal contractions, tuberculosis, and leprosy.

See *A Blunder in Poisons*, by C. F. Nichols, M. D.; *The Recrudescence of Leprosy*, by William Tebb, M. D.; *A Century of Vaccination*, by William S. Tebb, M. D.

When a man has treated hundreds of cases of smallpox, both under sporadic and epidemic conditions, through many years and at all seasons, he comes to the decided conclusion that vaccination has not the remotest effect on the outbreak, course, or issue of the disease.

D. Josef Hermann, Chief of the Imperial Wiede Hospital, Vienna, from 1858 to 1884; from the *Naturarzt*.

All such "regulations" and orders must be reasonable in order to be valid and binding.

Parker & W. Public Health & Safety, § 86, p. 98, and note; *State ex rel. Cedar Rapids v. Holcomb*, 68 Iowa, 107, 56 Am. Rep. 853, 26 N. W. 33; *Cushing v. Board of Health*, 13 N. Y. S. R. 783; Cooley, Const. Lim. 6th ed. p. 240; *Hayes v. Appleton*, 24 Wis. 542; *Barking v. West*, 29 Wis. 307, 9 Am. Rep. 576.

The constitutional limitations upon the exercise of legislative powers by the state are equally applicable to the exercise of such powers by municipal corporations.

Parker & W. Public Health & Safety,

pp. 74, 75, § 62; *Cooley*, Const. Lim. pp. 238, 239.

The right to life includes the right of the individual to his body in its completeness and without dismemberment.

Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Mr. Hugh Bancroft, for plaintiff:

The legislature has the power to require all inhabitants of the commonwealth to be vaccinated, and to prescribe penalties for failure to comply with such requirement. It has an extensive, undefined power, usually called the police power, to pass laws for the common good.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Com. v. Alger*, 7 Cush. 53; Mass. Const. pt. 2, chap. 1, § 4.

The police power of the legislature unquestionably extends to the protection and preservation of the public health.

Salem v. Eastern R. Co. 98 Mass. 431, 96 Am. Dec. 650; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036.

The legislature determines what is for the public good, and its wide discretion cannot be controlled by the courts, unless its action is clearly evasive. It is not a question for the court whether vaccination is a preventive of smallpox.

Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Bancroft v. Cambridge*, 126 Mass. 438.

The court may take judicial notice of the fact that vaccination is a successful, and the most effective known, preventive of one of the most dangerous diseases to which the human race is subject.

Duffield v. Williamsport School District, 162 Pa. 476, 25 L. R. A. 152, 29 Atl. 742; *Morris v. Columbus*, 102 Ga. 792, 42 L. R. A. 175, 66 Am. St. Rep. 243, 30 S. E. 850; *State v. Hay*, 126 N. C. 999, 49 L. R. A. 588, 78 Am. St. Rep. 691, 35 S. E. 459.

Familiar instances where natural liberty must yield to promote the common welfare are—

1. Quarantine.

Minneapolis, St. P. & S. Ste. M. R. Co. v. Milner, 57 Fed. 276; *Haverty v. Bass*, 66 Me. 71; Rev. Laws, chap. 75, § 131.

2. Conscription.

Lanahan v. Birge, 30 Conn. 438.

3. Prohibition and regulation of various trades and callings.

Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Mugler v. Kansas*, 123 U. S. 652, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Fisher v. McGirr*, 67 L. R. A.

1 Gray, 1, 61 Am. Dec. 381; *Com. v. Waite*, 11 Allen, 264, 87 Am. Dec. 711; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694.

The legislature may impose penalties for the violation of any laws which it has the power to enact. When such a penalty is imposed after a conviction by a jury in the usual way there is no deprivation of property without due process of law.

Southern Exp. Co. v. Com. 92 Va. 59, 41 L. R. A. 436, 22 S. E. 809; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; *Ex parte Kinnebrew*, 35 Fed. 52.

This act confers on the local boards of health no power of legislation, but gives them discretion as to the execution of the law, to which no valid objection can be made.

Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *People v. Long Island R. Co.* 134 N. Y. 506, 31 N. E. 873.

It is frequent and usual for the legislature to confer such discretionary power on the local boards of health.

Salem v. Eastern R. Co. 98 Mass. 431, 96 Am. Dec. 650.

Legislation requiring vaccination, or authorizing some local board to require it, as a prerequisite to attendance at school, has always been sustained.

Abeel v. Clark, 84 Cal. 226, 24 Pac. 383; *Bissell v. Darison*, 65 Conn. 183, 29 L. R. A. 251, 32 Atl. 348; *Duffield v. Williamsport School District*, 162 Pa. 476, 25 L. R. A. 152, 29 Atl. 742; *Re Walters*, 84 Hun, 457, 32 N. Y. Supp. 322; *Re Rebenack*, 62 Mo. App. 8.

Legislation requiring vaccination is mentioned as a proper exercise of the police power in a leading case in the Supreme Court of the United States.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

Statutes substantially the same as the one before us have been upheld.

Morris v. Columbus, 102 Ga. 792, 42 L. R. A. 175, 66 Am. St. Rep. 243, 30 S. E. 850; *State v. Hay*, 126 N. C. 999, 49 L. R. A. 588, 78 Am. St. Rep. 691, 35 S. E. 459; *Levin v. Burlington*, 129 N. C. 184, 55 L. R. A. 396, 39 S. E. 822.

Knowlton, Ch. J., delivered the opinion of the court:

These are complaints against the respective defendants for refusing to comply with a requirement of the board of health of Cambridge made on February 27, 1902, under Rev. Laws, chap. 75, § 137, ordering that all the inhabitants of the city who had not been successfully vaccinated since March 1, 1897, be vaccinated or revaccinated. The or-

der recites that smallpox has been prevalent to some extent in the city of Cambridge, and still continues to increase; that it is necessary, for the speedy extermination of the disease, that all persons not protected by vaccination should be vaccinated; and that, in the opinion of the board, the public health and safety require the vaccination or revaccination of all the inhabitants of Cambridge. At the trial of each case there was uncontradicted evidence of the adoption of the order making the requirement by the board of health, and that the chairman of the board of health called upon the defendant and informed him that, if he refused to be vaccinated, he would incur the penalty of \$5 provided by the statute, and would be prosecuted therefor, and then and there offered to vaccinate the defendant without any expense to him, and that he then and there absolutely refused to be vaccinated. The requirement of the board of health follows exactly the provisions of the statute. In each case the defense principally relied on is founded upon the refusal of the court to comply with numerous requests for rulings, which, in a variety of forms, called for an instruction that the statute was in violation of the Constitution of Massachusetts and of the Constitution of the United States.

In the second of the cases there is also an exception to the exclusion of evidence offered by the defendant to prove numerous propositions in regard to vaccination, chiefly relating to the alleged injurious and dangerous effects of it. We will consider the cases first in reference to the constitutionality of the statute, without regard to the evidence which was excluded. This statute is as follows: "The board of health of a city or town, if, in its opinion, it is necessary for the public health or safety, shall require and enforce the vaccination and revaccination of all the inhabitants thereof, and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement, shall forfeit \$5." Its language, considered in connection with facts of common knowledge, makes its object plain. It was enacted with a view to the enforcement of necessary measures for the prevention of smallpox. That such an object is worthy of the intelligent thought and earnest endeavor of legislators is too plain for discussion. Under the police power there is general legislative authority to make laws for the common good. Article 4, § 1, chap. 1, of the second part of the Constitution of Massachusetts, states more fully than most constitutions the nature of this power, when it gives authority to "the said general court

from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties or without, so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this commonwealth," etc. That this power extends to the protection and preservation of the public health is not questioned. *Salem v. Eastern R. Co.* 98 Mass. 431, 96 Am. Dec. 650; *Slaughter-House Cases*, 16 Wall. 36-62, 21 L. ed. 391-404; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25-33, 24 L. ed. 989-992; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659-669, 24 L. ed. 1030-1039. The rights of individuals must yield, if necessary, when the welfare of the whole community is at stake. This is true of the right to personal liberty as well as the right to property. *People ex rel. Neckamcus v. Warden of City Prison*, 144 N. Y. 329-535, 27 L. R. A. 718, 39 N. E. 686. Sometimes it is necessary that persons be held in quarantine. *Rev. Laws*, chap. 75, § 131; *Haverty v. Bass*, 66 Me. 71; *Minneapolis, St. P. & S. Ste. M. R. Co. v. Milner*, 57 Fed. 276. Conscriptio may be authorized if the life of the nation is in peril. See *Lanahan v. Birge*, 30 Conn. 438. The use or sale of certain kinds of property may be regulated or prohibited. *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *Com. v. Waite*, 11 Allen, 264, 87 Am. Dec. 711; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 604; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Mugler v. Kansas*, 123 U. S. 652, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. In these and other ways the liberty of the individual may be interfered with whenever the general welfare requires a course of proceedings to which certain persons object because of their peculiar opinions or special individual interests.

It is a fact of common knowledge that smallpox is a terrible disease, whose ravages have sometimes swept away thousands of human beings in a few weeks. It is equally well known that a large majority of the medical profession and of people generally consider vaccination, repeated at intervals of a few years, a preventive of the disease. So far as we are aware, all courts that have considered the subject have recognized the right of the legislature to enact laws founded upon the theory that vaccination is important as a preventive of smallpox, and to impose restrictions, during an epidemic, upon persons who have not been vaccinated. There are some cases in which it has been held that the statute did not go far enough to authorize the restrictions which the authorities sought to impose.

Re Smith, 146 N. Y. 68, 28 L. R. A. 820, 48 Am. St. Rep. 769, 40 N. E. 497; *State ex rel. Adams v. Burdge*, 95 Wis. 390, 37 L. R. A. 157, 60 Am. St. Rep. 123, 70 N. W. 347; *Potts v. Breen*, 167 Ill. 67, 39 L. R. A. 152, 59 Am. St. Rep. 262, 47 N. E. 81; *Mathews v. Kalamazoo Bd. of Edu.* 127 Mich. 530, 54 L. R. A. 736, 86 N. W. 1036. But these assume that the legislature may interfere with the exercise of the ordinary rights of individuals if they are not vaccinated when smallpox is prevalent. Legislation requiring vaccination, or authorizing some local board to require it, as a prerequisite to attendance at school, has been sustained whenever called in question. *Duffield v. Williamsport School District*, 162 Pa. 476, 25 L. R. A. 152, 29 Atl. 742; *Bissell v. Davison*, 65 Conn. 183, 29 L. R. A. 251, 32 Atl. 348; *Abel v. Clark*, 84 Cal. 226, 24 Pac. 383; *Blue v. Beach*, 155 Ind. 121, 50 L. R. A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; *Re Walters*, 84 Hun, 457, 32 N. Y. Supp. 322; *Re Rebenack*, 62 Mo. App. 8. Legislation requiring vaccination is mentioned as a proper exercise of the police power in *Lawton v. Steele*, 152 U. S. 133-136, 38 L. ed. 385-388, 14 Sup. Ct. Rep. 499. Statutes substantially the same as the one now before us have been sustained, after careful consideration, by the highest courts of Georgia and North Carolina. *Morris v. Columbus*, 102 Ga. 792, 42 L. R. A. 175, 66 Am. St. Rep. 243, 30 S. E. 850; *State v. Hay*, 126 N. C. 999, 49 L. R. A. 588, 78 Am. St. Rep. 691, 35 S. E. 459; *Levin v. Burlington*, 129 N. C. 184, 55 L. R. A. 396, 39 S. E. 822.

Let us consider the offer of evidence which was made by the defendant Jacobson. The ninth of the propositions which he offered to prove, as to what vaccination consists of, is nothing more than a fact of common knowledge, upon which the statute is founded, and proof of it was unnecessary and immaterial. The thirteenth and fourteenth involved matters depending upon his personal opinion, which could not be taken as correct or given effect merely because he made it a ground of refusal to comply with the requirement. Moreover, his views could not affect the validity of the statute, nor entitle him to be excepted from its provisions. *Com. v. Connelly*, 163 Mass. 539, 40 N. E. 862; *Com. v. Has*, 122 Mass. 40; *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *Reg. v. Doynes*, 13 Cox, C. C. 111. The other eleven propositions all relate to alleged injurious or dangerous effects of vaccination. The defendant "offered to prove and show by competent evidence" these so-called facts. Each of them, in its nature, is such that it cannot be stated as a truth, otherwise than as a matter of opinion. The only "competent evidence" that could be

presented to the court to prove these propositions was the testimony of experts giving their opinions. It would not have been competent to introduce the medical history of individual cases. Assuming that medical experts could have been found who would have testified in support of these propositions, and that it had become the duty of the judge, in accordance with the law as stated in *Com. v. Anthes*, 5 Gray, 185, to instruct the jury as to whether or not the statute is constitutional, he would have been obliged to consider the evidence in connection with facts of common knowledge, which the court will always regard in passing upon the constitutionality of a statute. He would have considered this testimony of experts in connection with the facts that for nearly a century most of the members of the medical profession have regarded vaccination, repeated after intervals, as a preventive of smallpox; that, while they have recognized the possibility of injury to an individual from carelessness in the performance of it, or even, in a conceivable case, without carelessness, they generally have considered the risk of such an injury too small to be seriously weighed as against the benefits coming from the discreet and proper use of the preventive; and that not only the medical profession and the people generally have for a long time entertained these opinions, but legislatures and courts have acted upon them with general unanimity. If the defendant had been permitted to introduce such expert testimony as he had in support of these several propositions, it could not have changed the result. It would not have justified the court in holding that the legislature had transcended its power in enacting this statute on their judgment of what the welfare of the people demands.

An elaborate argument has been addressed to us upon the effect of the quoted words "wholesome and reasonable" in our Constitution. It is at least doubtful whether these words, considered in connection with accompanying provisions, restrict our general court in the exercise of the police power, otherwise than by the constitutional limitations upon this power which exist under the Constitutions of most of the other states of this country. It is generally held that, if a statute purports to be enacted to promote the general welfare of the people, and is not at variance with any provision of the Constitution, the question whether it will be for the good of the community is a legislative, and not a judicial question. *Powell v. Pennsylvania*, 127 U. S. 678, 684, 686, 32 L. ed. 253, 256, 257, 8 Sup. Ct. Rep. 992, 1257; *Fick Wo v. Hopkins*, 118 U. S. 356, 370, 371, 30 L. ed. 220, 226, 227, 6 Sup. Ct. Rep. 1064; *Mugler v. Kansas*, 123 U. S. 623, 662,

31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Bancroft v. Cambridge*, 126 Mass. 438-441; *Com. v. Blackington*, 24 Pick. 352-357; *Com. v. Alger*, 7 Cush. 53, 96, 102; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Re House Bill, No. 1230*, 163 Mass. 589, 595, 28 L. R. A. 344, 40 N. E. 713; *Re Jacobs*, 98 N. Y. 98, 110, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389-401, 4 Am. St. Rep. 465, 17 N. E. 343. If a law relates to a subject in regard to which the general court is authorized to legislate, this court is not justified in setting aside the statute as unreasonable and unconstitutional merely because the judges differ in opinion from the legislators on the question whether it will "be for the good and welfare of this commonwealth." But if a statute invades personal rights to liberty or property, and is not directed to the promotion of the general welfare, but is an evasion of the principles on which legislative action should be founded and by which it should be regulated, and is thus an abuse of legislative power, it should be declared unconstitutional.

We see no reason for regarding the present statute as outside of legislative authority to enact it. Plainly, it is wholesome and reasonable in the sense that it relates to a subject about which the legislature may well concern itself. There is no reason for holding that the measures authorized by it do not relate directly to the promotion of the

intended object. The theoretical possibility of an injury in an individual case as a result of its enforcement does not show that, as a whole, it is unreasonable. The application of a good law to an exceptional case may work hardship. There is no reason to suppose that the enforcement of the requirement, in the present case, was conducted harshly. Naturally, there would be regard to temporary conditions, if they became important, as to the time and manner of its enforcement. If a person should deem it important that vaccination should not be performed in his case, and the authorities should think otherwise, it is not in their power to vaccinate him by force, and the worst that could happen to him under the statute would be the payment of the penalty of \$5.

The defendants' contention that the statute works unequally, in making an exception of minors and persons under guardianship, is not well founded. It only limits the liability to a penalty for neglect of the requirement to persons who have a right to control their own conduct.

We are of opinion that the statute is constitutional, and that there was no error at the trial. In each case the entry must be:

Exceptions overruled.

Affirmed by Supreme Court of United States February 20, 1905.

MONTANA SUPREME COURT.

SILVER CAMP MINING COMPANY et al.,
Respts.,
v.

Ferdinand DICKERT, *Appt.*

(.....Mont.....)

1. An action to compel specific performance of a contract to convey real estate is one *in personam*.
2. Service of summons by publication will not confer jurisdiction to compel a nonresident to perform his contract to convey real estate located within the state.
3. A statute providing for service of process on nonresident defendants by publication will be construed to apply to cases where, under recognized principles of law, suits may be instituted against such defendants, and will not be held to

confer jurisdiction in case of service of process in that manner in a suit merely *in personam*.

(December 24, 1904.)

APPEAL by defendant from a judgment of the District Court for Lewis and Clarke County in favor of plaintiffs in a suit to enforce specific performance of a contract to convey real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. William Wallace, Jr., and Word & Word, for appellant:

This action is one *in personam*, and not one *in rem*.

Spurr v. Scoville, 3 Cush. 578; *Close v. Wheaton*, 65 Kan. 830, 70 Pac. 891; *Hart v. Sansom*, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586; *Viele v. Van Steenberg*, 31 Fed. 252; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; *Massie v. Watts*, 6 Cranch, 159, 3 L. ed. 185; *Bennett v. Fenton*, 10 L. R. A. 500, 41 Fed. 283; *Roller v. Holly*, 176 U. S. 399, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; *Ormsby*

NOTE.—As to validity of personal judgments rendered upon constructive service of process, see, in this series, *Moyer v. Bucks*, 16 L. R. A. 231, and *note*.

As to what service of process is sufficient to constitute due process of law as basis of judgment *in personam*, see *note* to *Pinney v. Providence Loan & Invest. Co.* 50 L. R. A. 577, 67 L. R. A.

v. *Ottman*, 29 C. C. A. 295, 56 U. S. App. 510, 85 Fed. 492; *Ætna L. Ins. Co. v. Lyon County*, 95 Fed. 331; *Cooper v. Newell*, 173 U. S. 567, 43 L. ed. 812, 19 Sup. Ct. Rep. 506; *Cabanne v. Graf*, 87 Minn. 513, 59 L. R. A. 735, 94 Am. St. Rep. 722, 92 N. W. 461; *Davis v. Parker*, 14 Allen, 94; *First Nat. Bank v. Henry*, 156 Ind. 1, 58 N. E. 1057; *Wood v. Warner*, 15 N. J. Eq. 81; *Needham v. Thayer*, 147 Mass. 536, 18 N. E. 429; *Merrill v. Beckwith*, 163 Mass. 503, 40 N. E. 855; 1 Elliott, Gen. Pr. § 244; 2 Story, Eq. Jur. § 744; *Lehigh v. Green*, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; *Hill v. Henry* (N. J. Eq.) 57 Atl. 554; *Eliot v. McCormick*, 144 Mass. 10, 10 N. E. 705; *McKinney v. Collins*, 88 N. Y. 216; *Fowler v. Fowler*, 204 Ill. 82, 68 N. E. 414. See note to *Pinney v. Providence Loan & Invest. Co.* 50 L. R. A. 577.

Mr. T. J. Walsh, for respondents:

In an action touching or affecting the title to property within the state, whether the same is made the subject of the action by virtue of the averments of the complaint, or has been seized and held by virtue of the process of the court, service may be made by publication under statutes authorizing that procedure.

In an action for specific performance of a contract it is within the power of the court to provide in the decree that, upon failure of the defendant to execute the conveyance, a commissioner appointed by the court should execute it in his behalf.

Muller v. Buyck, 12 Mont. 354, 30 Pac. 386; *Finlen v. Heinze*, 28 Mont. 548, 73 Pac. 123.

There is no constitutional objection to service by publication in an action for specific performance.

Boswell v. Otis, 9 How. 336, 13 L. ed. 164; *Seculovich v. Morton*, 101 Cal. 677, 40 Am. St. Rep. 106, 36 Pac. 387; *O'Sullivan v. Overton*, 56 Conn. 102, 14 Atl. 300; *Mason v. Benedict*, 43 La. Ann. 397, 8 So. 931; *Porter Land & Water Co. v. Baskin*, 43 Fed. 323; *Perkins v. Wakeham*, 86 Cal. 580, 21 Am. St. Rep. 67, 25 Pac. 51; *Loaiza v. Superior Court*, 85 Cal. 11, 9 L. R. A. 376, 20 Am. St. Rep. 197, 24 Pac. 707; 20 Enc. Pl. & Pr. p. 409; *Roller v. Holly*, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; *Lynch v. Murphy*, 161 U. S. 247, 40 L. ed. 688, 16 Sup. Ct. Rep. 523; *Morris v. Graham*, 51 Fed. 56; *United States v. Southern P. R. Co.* 63 Fed. 485; *Dillon v. Heller*, 39 Kan. 599, 18 Pac. 693.

On motion for rehearing.

As a suit for specific performance is usually *in personam*, the defendant must be personally served with process in order to confer jurisdiction upon the court. But, where property which is the subject-matter

of the contract is within the territorial jurisdiction of the court, and the defendant is beyond the jurisdiction, the suit is substantially one *in rem*, and service by publication is sufficient to confer jurisdiction upon the court to bind the property by its decree.

20 Enc. Pl. & Pr. p. 409.

There is no constitutional objection whatever to the entry of a judgment in an action for specific performance against a defendant served by publication, with reference to property which is within the jurisdiction of the court.

Boswell v. Otis, 9 How. 336, 13 L. ed. 164; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Hart v. Sansom*, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; *Galpin v. Page*, 3 Sawy. 93, Fed. Cas. No. 5,206; *Single v. Scott Paper Mfg. Co.* 55 Fed. 553; *Jennings v. Rocky Bar Gold Min. Co.* 29 Wash. 726, 70 Pac. 136; *Robbins v. Martin*, 43 La. Ann. 488, 9 So. 112; *Reeves v. Pierce*, 64 Kan. 502, 67 Pac. 1108; *Robinson v. Kind*, 23 Nev. 330, 47 Pac. 1, 977; *Rourke v. McLaughlin*, 38 Cal. 196; *Dillon v. Heller*, 39 Kan. 599, 18 Pac. 693; *Corson v. Shoemaker*, 55 Minn. 386, 57 N. W. 134; *Lynch v. Murphy*, 161 U. S. 247, 40 L. ed. 688, 16 Sup. Ct. Rep. 523; *Morris v. Graham*, 51 Fed. 53; *United States v. Southern P. R. Co.* 63 Fed. 481.

Holloway, J., delivered the opinion of the court:

This is an action, brought by the Silver Camp Mining Company and another against Ferdinand Dickert, to enforce the specific performance of a contract to convey certain real estate situate in Lewis and Clarke County, Montana, and to compel the defendant, Dickert, to make an assignment of certain dividends. At the time this action was commenced, and so far as this record shows, at all times therein mentioned, Dickert was not a resident of the state of Montana, he being a resident of the state of Utah. The plaintiffs made affidavit for publication of summons, secured an order to that effect, and then made service on the defendant in Utah under the provisions of § 638 of the Code of Civil Procedure. The defendant appeared specially and challenged the jurisdiction of the court. This appeal is from the judgment.

Three questions are presented for solution: First. Is the action for specific performance of a contract to convey real estate one *in personam*? Second. Will service of summons by publication warrant a judgment *in personam*? Third. Does a general statute providing for the publication of summons in civil actions abrogate the common-

law rule which requires personal service of summons in actions *in personam*?

1. As to the first question. Conceding that there may be some conflict in the authorities respecting this, the decided weight of authority is in favor of an affirmative answer, though the courts holding this view have not always been in harmony as to the reasons, or as to the extent to which the doctrine should be carried. As early as 3 Cushing this question was before the supreme court of Massachusetts, and, respecting it, that court said: "The simple question raised in the case is whether the court can proceed in this suit against the defendant, he not being at the commencement of the suit, or now, within the jurisdiction of this court, but being then and now an inhabitant of and within the state of Connecticut. This is strictly a proceeding *in personam*. There is but one person who is the party defendant, and he is not a passive party, but must be eminently active in the performance of any decree which may be made against him. The whole object of the bill is to compel the defendant to execute a conveyance of land, as is alleged, according to his contract." *Spurr v. Scoville*, 3 Cush. 578. This doctrine is reaffirmed by the same court in *Davis v. Parker*, 14 Allen, 94, and *Merrill v. Beckwith*, 163 Mass. 503, 40 N. E. 855. In *Close v. Wheaton*, 65 Kan. 830, 70 Pac. 891, it is said: "The character of an action for specific performance as *in personam* entirely is so well established that courts having jurisdiction of the parties frequently entertain suits to compel the execution of contracts for the conveyance of lands in other states, in which, of course, their decrees as to the *res* cannot operate. *Lindley v. O'Reilly*, 50 N. J. L. 636, 1 L. R. A. 79, 7 Am. St. Rep. 802, 15 Atl. 379. Sometimes a question may exist as to whether the complaining party may not have such peculiar interest in the property as to entitle him to the enforcement of a trust, and not of contract merely (*Merrill v. Beckwith*, 163 Mass. 503, 40 N. E. 855), in which event the action might be local, and not transitory; but the plaintiffs in this case have neither stated in their pleadings, nor claimed before us, such character of right. We are therefore well convinced that the inherent nature of the ordinary proceeding to compel a vendor to comply with his contract, as contract, by the execution of a deed, makes the action one *in personam*, which can be brought only where the defendant resides or may be legally served with personal process." The supreme court of Indiana, in *Coon v. Cook*, 6 Ind. 268, said: "For the reversal of this decree it is contended: (1) That the land in question, being in Hancock county, the circuit court of Henry county

had no jurisdiction of the subject-matter in controversy. This objection is not tenable. We concur with the appellee's counsel that the present, being a suit for a specific performance of a contract, operates on the person, and may properly be instituted in any county where the contractor resides." This is approved and followed in *Dehart v. Dehart*, 15 Ind. 167. In *McQuerry v. Gilliland*, 89 Ky. 434, 7 L. R. A. 454, 12 S. W. 1037, the court said: "The court is of the opinion that in case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." In such case the subject-matter is not that of the recovery of land. In other words, it is not an action *in rem*. The court need not have the land before it in order to be able to render a judgment; but the action is *in personam*, for the purpose of enforcing a personal obligation of contract or of trust. It is true that the title to land is to be affected by the decree, in so far as it compels the party to convey; but, as said, by reason of his trust or contract duty, he is personally obliged to convey, and that duty may be discharged in one state as well as another, although the land may not be situated in such state. It is the breach of trust or contract to convey that may be complied with, without regard to the location of the land, that gives the right of action *in personam*." In *Brown v. Desmond*, 100 Mass. 267, the court said: "A suit for specific performance of a contract for the conveyance of land proceeds *in personam*." This doctrine is affirmed by the supreme court of Indiana in *Bethell v. Bethell*, 92 Ind. 318. As if to place particular emphasis upon the view that an action to enforce the specific performance of a contract to convey land operates strictly *in personam*, the chancery courts in England and of many of the states in this country have repeatedly held that such an action may be commenced in, and relief had from, a court having jurisdiction of the parties, even though the land to be affected lies in another state or in a foreign country. *Penn v. Baltimore*, 1 Ves. Sr. 444; *Cranstown v. Johnaton*, 3 Ves. Jr. 170; *Ward v. Arredondo*, Hopk. Ch. 213, 14 Am. Dec. 543; *Sutphen v. Fowler*, 9 Paige, 280; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89; *Davis v. Headley*, 22 N. J. Eq. 115; *Massie v. Watts*, 6 Cranch, 148, 3 L. ed. 181. The doctrine is broadly stated by Story as follows: "The proposition may, therefore, be laid down in the most general form that, to entitle a court of equity to maintain a bill for the specific performance of a contract respecting land, it is not necessary that the land should be situate with-

in the jurisdiction of the state or country where the suit is brought. It is sufficient that the parties to be affected and bound by the decree are resident within the state or country where the suit is brought, for in all suits in equity the primary decree is *in personam*, and not *in rem*. The incapacity to enforce the decree *in rem* constitutes no objection to the right to entertain such a suit." 1 Story, Eq. Jur. 10th ed. § 744; *Brown v. Desmond*, 100 Mass. 267; Elliott, Gen. Pr. § 244; *Close v. Wheaton*, 65 Kan. 830, 70 Pac. 891. As further illustrating the view that this character of action is purely *in personam*, and that a statute of the character of our § 610 of the Code of Civil Procedure has no application to an action to enforce the specific performance of a contract for the conveyance of real estate, the supreme court of Washington, in *Morgan v. Bell*, 3 Wash. 554, 16 L. R. A. 614, 28 Pac. 925, said: "The first point argued by the appellant is that this is an action affecting the title to the real estate, and should have been brought in Clallam county, where the land is situated, by virtue of § 47 of the Code, which provides that actions for the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of all questions affecting the title, or for any injuries to, real property, shall be commenced in the county or district in which the subject of action, or some part thereof, is situated. We do not think this is the character of cases contemplated by the statute. The title to this land was not in dispute, and could not be affected by the decree of the court, under the pleadings. It is true that the court could decree a specific performance of the contract, under the allegations of the complaint, but it would be a decree affecting the parties to the action personally. It would not determine any question affecting the title, in the sense in which the word 'title' is evidently employed in the statute."

For the purpose of differentiating between the legal effects which flow from that class of actions wherein service of summons may be properly made by publication and actions strictly *in personam*, reference is had to the language used by the Supreme Court in *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931. The court there had under consideration an action which grew out of an action for damages, wherein summons had been served by publication, and in which property of one of the defendants which was within the jurisdiction of the court had been seized by attachment and sold under execution to Cooper. The original owner of the property, who was a defendant in that action, then brought ejectment against

Cooper, who asserted title under the sheriff's deed. After reviewing the proceedings had in the original action for damages, the court carefully reviewed the whole subject, and announced a rule which has since been followed. The court said: "But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within that territorial jurisdiction, and cannot be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued and levied on any of the defendant's property, and a publication may be made warning him to appear, and that thereafter the court may proceed in the case, whether he appears or not. If the defendant appears, the cause becomes mainly a suit *in personam*, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. That such is the nature of this proceeding in this latter class of cases is clearly evinced by two well-established propositions: First, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proved in court."

2. As to the second question. If any doubt existed respecting the proper answer to be made to this inquiry, that doubt was settled by the Supreme Court of the United States in *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 585. In 1866, J. H. Mitchell obtained a judgment in the district court of Oregon against Neff, a nonresident of Ore-

gon, for services alleged to have been rendered to Neff. Summons was served by publication, and Neff did not appear. Judgment was rendered by default. Execution was issued, and land belonging to Neff in Oregon was levied upon and sold to Pennoyer. Neff later returned and brought ejectment against Pennoyer, who pleaded title in himself, based upon the deed which he had received from the sheriff by virtue of the execution sale in *Mitchell v. Neff*. The validity of the judgment in *Mitchell v. Neff* was put directly in issue. Respecting the doctrine that a personal judgment can only be had after personal service on the defendant or his voluntary appearance in the action, the court said: "It is the only doctrine consistent with proper protection to citizens of other states. If, without personal service, judgments *in personam*, obtained *ex parte* against nonresidents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished. Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken, where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants,—that is, where the suit is merely *in personam*,—constructive service in this form upon a nonresident is ineffectual for any purpose." *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, is directly approved and followed by the Supreme Court in *Hart v.*

Sansom, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586, and the doctrine of that case reannounced in *Leigh v. Green*, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390. That doctrine has also been followed by the courts of last resort of several states where it has been in issue. In *Eliot v. McCormick*, 144 Mass. 10, 10 N. E. 705, it is said: "The Supreme Court of the United States has held, in recent decisions, that under this provision it is not competent for a state court to render a judgment *in personam* against a person who is not a resident of the state, who does not appear in the suit, and who is not served personally with process within the state. It is held that, where property of a nonresident defendant is found within the state, the state court may attach it on the writ, and may proceed to a judgment so far as to apply the property to the debt; but if there is no appearance of the defendant, and no personal service on him, a judgment rendered against him personally is void, and has no effect beyond the property attached; and no suit can be maintained on such a judgment, either in the same or any other court. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Freeman v. Alderson*, 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165." In *Needham v. Thayer*, 147 Mass. 536, 18 N. E. 429, the views of the court in *Eliot v. McCormick*, 144 Mass. 10, 10 N. E. 705, were adopted and followed, and it is there held that a judgment *in personam* against a person who is not a resident of the state in which the judgment is rendered, who has not been personally served in the state with summons, and who has not appeared in the action, is wholly void, and no suit can be maintained on it either in that or any other court; that the court obtained no jurisdiction, and its judgment has no force either in the state in which it is rendered or in any other state. *Pennoyer v. Neff* is also approved and followed in *First Nat. Bank v. Henry*, 156 Ind. 1, 53 N. E. 1057. In *Hill v. Henry*, 57 Atl. 554, the court of chancery of New Jersey said: "The following propositions have been established by the supreme court: First. That a personal judgment is without validity, if it be rendered by a state court in an action upon a money demand against a nonresident, proceeded against by publication, but not personally served with process within the state, and not appearing. Second. That no validity is imparted to such a judgment by the fact that the defendant has, at the time the action is commenced, property within the state, upon which a levy can be made under the judgment. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565." The supreme court of Minnesota, in *Cabanne v. Graf*, 87 Minn. 510, 59 L. R. A. 735, 94

Am. St. Rep. 722, 92 N. W. 461, said: "Prior to the decision in the case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, it was the law of this state, and in some other jurisdictions, that, if a nonresident defendant had property in this state, its courts had jurisdiction, without seizing it, to proceed by publication of the summons, and render a judgment *in personam*, valid within the state to the extent of any property of the defendant therein. *Stone v. Myers*, 9 Minn. 303, 86 Am. Dec. 104, Gil. 287; *Cleland v. Tavernier*, 11 Minn. 194, Gil. 126. Such, however, is not now the law, for a statute authorizing such a proceeding would not be due process of law. *Kennedy v. Goergen*, 36 Minn. 190, 31 N. W. 210; *Lydiard v. Chute*, 45 Minn. 277, 47 N. W. 967; *Plummer v. Hatton*, 51 Minn. 181, 53 N. W. 460. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, is the leading authority in support of the now well-settled proposition that, except as to proceedings affecting the personal status of the plaintiff, or *in rem*, or as to actions to enforce liens, or to quiet title, or to recover possession of property, or for the partition thereof, or to set aside fraudulent transfers thereof, or to obtain judgment enforceable against property seized by attachment or other process, no state can authorize its courts to compel a citizen of another state remaining therein to come before them and submit to their decision a mere claim upon him for a money demand, no matter what the prescribed mode of service of process against him may be. An attempt to do so is not due process of law."

3. As to the third question. It is contended that it is competent for the state by statute to provide for valid service by publication in actions *in personam*. If this state has done so, the question of the constitutionality of such a statute might be involved. If it has not done so, that question is, of course, eliminated from consideration. Section 637 of the Code of Civil Procedure provides: "When the person on whom the service of a summons is to be made, resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of the summons; or when the defendant is a foreign corporation, having no managing or business agent, cashier, secretary, or other officer within the state, and an affidavit stating any of these facts is filed with the clerk of the court in which the action is brought, and such affidavit also states that a cause of action exists against the defendant in respect to whom the service of the summons is to be made, and that he or it is a necessary or proper party to the action, the clerk of the

court in which the action is commenced shall cause the service of the summons to be made by publication thereof." Counsel for respondents cites *Perkins v. Wakeham*, 86 Cal. 580, 21 Am. St. Rep. 67, 25 Pac. 51, as sustaining the view that service of summons by publication in actions strictly *in personam* may be had under a statute similar to our § 637, above, and there is an expression to be found in the opinion of the court in that case bearing out that idea, and that case is apparently cited with approval in *Seculovich v. Morton*, 101 Cal. 673, 40 Am. St. Rep. 106, 36 Pac. 387, in an action to have a trust declared and enforced, and in which we are unable to see any applicability of the doctrine announced in *Perkins v. Wakeham*. In *Loaiza v. Superior Court*, 85 Cal. 11, 9 L. R. A. 376, 20 Am. St. Rep. 197, 24 Pac. 707, the same court had at great length reviewed the cases, and put itself in harmony with the weight of authority as we have outlined it, and distinguished between the classes of cases where service of summons may be made by publication and where it may not be, and in the latter class included actions strictly *in personam*; and this case was not alluded to or overruled in either of the cases cited above. An examination of the opinion in *Perkins v. Wakeham*, above, discloses that the decision of the court is made upon the theory that an action to quiet title, which was the form of action in that case, is one affecting the title to real estate. Whether that doctrine would be approved by this court is not decided; suffice it to say that the present action, being to enforce the specific performance of a contract, is not one which affects title to real estate, for, if it did, it could only be tried in the county where the real estate is situated, whereas the authorities are practically unanimous in holding that such an action may be tried where jurisdiction of the defendant is obtained, without reference to the location of the real estate. In *Roller v. Holly*, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410, a statute of Texas, as broad in its provisions as our § 637, above, was under consideration, and, respecting it, the court said: "It is true there is no statute of Texas specially authorizing a suit against a nonresident to enforce an equitable lien for purchase money, but article 1230 of the Code of Texas, hereinafter cited, contains a general provision for the institution of suits against absent and nonresident defendants, and lays down a method of procedure applicable to all such cases. Obviously this article has no application to suits *in personam*, as was held by the supreme court of Texas in *York v. State*, 73 Tex. 651, 11 S. W. 869; *Kimmarle v. Houston & T. C. R. Co.* 76 Tex. 686, 12 S. W.

698; *Maddox v. Craig*, 80 Tex. 600, 16 S. W. 328; and by this court in *Pennoyer v. Neff*, 95 U. S. 714, 723, 24 L. ed. 565, 569. The article must then be restricted to actions *in rem*; but to what class of actions, since none is mentioned specially in the article? We are bound to give it some effect. We cannot treat it as wholly nugatory, and, as it is impossible to say that it contemplates a procedure in one class of cases and not in another, we think the only reasonable construction is to hold that it applies to all cases where, under recognized principles of law, suits may be instituted against nonresident defendants." We prefer to adopt this

view as more in consonance with reason and the general practice which has heretofore prevailed throughout this country.

The other questions involved in this case need not be considered. The court had no jurisdiction of the defendant. The judgment rendered is nugatory and is reversed, and the cause remanded.

Reversed and remanded.

Brantly, Ch. J., and Milburn, J., concur.

Petition for rehearing denied February 6, 1905.

NEW HAMPSHIRE SUPREME COURT.

STATE of New Hampshire *ex rel.* Martha S. MUNSEY

v.

M. Swain CLOUGH.

(72 N. H. 178.)

1. Failure of the governor's warrant, for the arrest and rendition of an alleged fugitive from justice, to state that the person whose arrest is directed is a fugitive from justice, does not require his release in habeas corpus proceedings, where the written evidence required by law for the issuance of the warrant is before the court, and is legally sufficient to support a finding of such fact.
2. That one of the crimes for which an alleged fugitive from justice is indicted was committed after his departure from the state, and that in case he is returned to the state, he may be tried on that charge, do not remove him from the class of persons liable to rendition under the Federal Constitution, where the indictment also charges the commission of other crimes before the date of his departure.
3. The finding of the governor that an alleged fugitive from justice is such, and should be returned to the state from which he fled, is subject to review by the courts in a habeas corpus proceeding to obtain his release from custody under the governor's warrant.
4. A finding that an accused is a fugitive from justice is not precluded by the fact that the indictment shows that the offenses were committed more than six years before the indictment was found.

NOTE.—As to who are fugitives subject to extradition, see, in this series, *State v. Hall*, 28 L. R. A. 289 and note; *Re Sultan*, 28 L. R. A. 294; *Drinkall v. Spiegel*, 36 L. R. A. 486; *Ex parte Tod*, 47 L. R. A. 566, and *People ex rel. Corkran v. Hyatt*, 60 L. R. A. 774.

As to presumption that warrant for arrest was granted on competent proof that person was a fugitive from justice, see *State ex rel. McNichols v. Justus*, 55 L. R. A. 325. 67 L. R. A.

5. A governor's warrant for the arrest of a fugitive from justice is not void because it describes the offense as uttering forged wills, where the indictment in each count charged the uttering and publication as true of "a certain forged instrument purporting to be a will," where, by reference to the indictment, the meaning of the warrant is rendered plain and definite.

6. A joinder in one indictment of several counts charging distinct offenses will not prevent the rendition of accused as a fugitive from justice,—at least if, under the laws of the state where the indictment was found, it was sufficient to support a conviction under one of the counts.

7. A clerical error in the affidavit of the clerk of court, to the effect that an indictment was found in 1892, does not preclude the governor from finding that it was in fact found in 1902, for the purpose of upholding a proceeding for the interstate rendition of one accused of crime.

8. The addressing of the governor's warrant for the rendition of a fugitive from justice to a local officer, rather than to the agent of the demanding state, affords no reason for the discharge of the accused from custody, where the statute merely directs that the warrant shall authorize the agent to take and transport the fugitive out of the state without prescribing to whom it shall be addressed.

On Second Hearing.

9. One whose rendition is sought from a sister state as a fugitive from justice is not entitled, as matter of right, to a hearing before the governor upon the question whether or not he is such fugitive.

10. A governor, in determining whether or not one whose rendition is demanded by a sister state is in fact a fugitive from justice, is not precluded from receiving evidence that falls to meet the requirements of legal proof.

11. The governor's order directing the rendition of a person as a fugitive from justice is not nullified by the fact that he acted upon copies of affidavits showing that accused was a fugitive from justice, the originals of which were on file with the governor of the demanding state, rather than

requiring the originals to be produced before him.

(December 27, 1902.)

TRANSFER by the Superior Court for Merrimack County on relator's exceptions for the opinion of the Supreme Court of a petition for a writ of habeas corpus to discharge petitioner from custody to which she had been committed under extradition proceedings. *Overruled.*

Statement by **Walker, J.:**

The defendant, who is the sheriff of the county, states in his return that he has the custody of the relator under a warrant from the governor of this state issued on the requisition of the governor of Massachusetts. The warrant recites that "it has been represented to me by the acting governor of the commonwealth of Massachusetts that Martha S. Munsey stands charged with the crime of uttering forged wills, which he certifies to me to be a crime under the laws of said commonwealth, committed in the county of Middlesex, in said commonwealth, and has taken refuge in the state of New Hampshire; and the said governor of Massachusetts having, in pursuance of the Constitution and laws of the United States, demanded of me that I shall cause the said Martha S. Munsey to be arrested and delivered to Jophanus H. Whitney, who is duly authorized to receive her into his custody, and convey her back to the said commonwealth of Massachusetts; and whereas, the said representation and demand is accompanied by certified copy of an indictment, whereby the said Martha S. Munsey is shown to have been duly charged with the said crime, and with having fled from said commonwealth, and taken refuge in the state of New Hampshire, which is duly certified by the acting governor of Massachusetts to be authentic and duly authenticated: Therefore, you are required to arrest and secure the said Martha S. Munsey wherever she may be found within this state, and afford her such opportunity to sue out a writ of habeas corpus as is prescribed by the laws of this state, and to thereafter deliver her into the custody of the said Jophanus H. Whitney to be taken back to the said commonwealth from which she fled, pursuant to the said requisition." From the copy of the indictment referred to it appears that the relator was indicted by the grand jury of the county of Middlesex, in Massachusetts, on the second Monday of February, 1892, in which it is charged that the relator, on February 28, 1895, "at Cambridge, in the county of Middlesex, aforesaid, with intent to injure and defraud, did utter and publish as true a certain forged

instrument purporting to be a will, well knowing the same to be forged." In the second and third counts she is charged with similar offenses committed, respectively, on May 17, 1895, and November 20, 1901. In each count the alleged forged will is set out in full. In the certificate of the clerk of the court it was stated that the indictment is pending it was stated that the indictment was found and returned "on the second Monday of February, A. D. 1892." The requisition papers also contain the affidavit of Whitney, in which it is stated that the relator has "fled from the limits of said commonwealth, and is a fugitive from justice;" also that "at the time of the commission of said crime she was in the state of Massachusetts; . . . that she fled from said commonwealth of Massachusetts on or about the 4th day of November, A. D. 1901; that she is not now within the limits of the commonwealth, but, as I have reason to believe, is now in Pittsfield, in the state of New Hampshire." The affidavit of the district attorney was submitted to the governor, in which he refers to Martha S. Munsey as one "who stands charged by indictment with the crime of uttering forged wills, committed in the county of Middlesex on the 28th day of February, A. D. 1895, on the 17th day of May, A. D. 1895, and on the 20th day of November, A. D. 1901, and who, to avoid prosecution, fled from the jurisdiction of this commonwealth, and is now a fugitive from justice, and, as I am informed, is within the jurisdiction of said state of New Hampshire. And I further certify that the offense charged against the said fugitive is a felony, and that said offense and punishment therefor is defined in § 1 of chapter 204 of the Public Statutes. Application for the arrest and return of the said fugitive has not been made sooner because the indictment was not found by the grand jury until the February sitting of the superior court in the year 1902." The relator, claiming that on the face of the documents submitted to the governor he was not authorized to issue his warrant, and that the warrant is defective, made a motion for her discharge, which was denied, subject to exception.

Mr. Edward A. Lane, for relator:

All the necessary facts to give the governor authority to issue the warrant should appear on its face.

Re Jackson, 2 Flipp. 184, Fed. Cas. No. 7,125.

The court may review the proceedings and discharge relator, if the charge of "fleeing" is not sustained by the record evidence.

Re Jackson, 2 Flipp. 183, Fed. Cas. No. 7,125; *Ex parte Thornton*, 9 Tex. 635; *Ex*

parte Hart, 28 L. R. A. 801, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 249; *Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12,968; *People ex rel. Lawrence v. Brady*, 56 N. Y. 182; *Jones v. Leonard*, 50 Iowa, 106, 32 Am. Rep. 116; *Hartman v. Aveline*, 63 Ind. 344, 30 Am. Rep. 217; 3 Spear, Extradition, pp. 391, 498, 548.

To arrest relator on a warrant which denies her a sufficient description of the charges against her, to enable her to tell how many and when they were committed, and to intelligently petition for a writ of habeas corpus, is denying her her constitutional right to enjoy its privilege and benefit in the most free, easy, cheap, expeditious, and ample manner.

Ex parte Butler, 7 Luzerne Legal Reg. 209; *Re Leary*, 10 Ben. 197, Fed. Cas. No. 8,162.

Relator has the same constitutional right to remain unmolested on account of charges of crimes as to which he is not a fugitive as the demanding state has to take him for crimes as to which he is a fugitive, consequently the demanding state in pursuing its lawful remedy must also respect the constitutional rights of relator, and not indict him for extraditable and non-extraditable offenses and then endeavor to remove him in order to try him for both at once.

Re Mohr, 73 Ala. 503, 49 Am. Rep. 63; *Re Cook*, 49 Fed. 833; *Re White*, 5 C. C. A. 29, 14 U. S. App. 87, 55 Fed. 54.

This indictment is intended to charge three distinct crimes.

Benson v. Com. 158 Mass. 164, 33 N. E. 384; *Carlton v. Com.* 5 Met. 532.

The claim that the act of the governor of a state in issuing his warrant of removal is conclusive, and that the presumption is he had the necessary papers, duly authenticated, before him, when he acted, cannot be assented to.

Ex parte Hart, 28 L. R. A. 801, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. 260; *Jones v. Leonard*, 50 Iowa, 109, 32 Am. Rep. 116; *Work v. Corrington*, 34 Ohio St. 64, 32 Am. Rep. 345; *Ex parte Reggel*, 114 U. S. 653, 29 L. ed. 253, 5 Sup. Ct. Rep. 1148.

The burden is on the demanding state to make it plain by record evidence clear and consistent that a valid indictment exists against relator.

Re Manchester, 5 Cal. 237; *Com. v. Certain Intoxicating Liquors*, 128 Mass. 73.

Messrs. **Sargent, Niles, & Morrill**, also for relator:

An indictment containing accusations of three felonies, based upon three entirely distinct transactions, violates all the constitutional provisions guaranteeing liberty, trial by jury, and due process of law.

10 Am. & Eng. Enc. Law, 2d ed. p. 295; 67 L. R. A.

Cooley, Const. Lim. 6th ed. 434; *State v. Gerry*, 68 N. H. 495, 38 L. R. A. 228, 38 Atl. 272; *Opinion of the Justices*, 41 N. H. 550; *King v. Hopkins*, 57 N. H. 350; *Pierce v. State*, 13 N. H. 536; *State v. Hodge*, 50 N. H. 510; *Opinion of the Justices*, 44 N. H. 633; *East Kingston v. Toule*, 48 N. H. 57, 2 Am. Rep. 174, 97 Am. Dec. 575; *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82; *Copp v. Henniker*, 55 N. H. 179, 20 Am. Rep. 194; *State v. Griffin*, 66 N. H. 326, 29 Atl. 414; *State v. Parker*, 43 N. H. 83; *State v. Nelson*, 8 N. H. 163; *Young v. King*, 3 T. R. 98; *State v. Snyder*, 50 N. H. 150; *State v. Canterbury*, 28 N. H. 195; *State v. Lincoln*, 49 N. H. 464.

The established practice in the demanding state is by no means conclusive. If it appears to the courts of the jurisdiction upon which the demand is made that the practice of the demanding jurisdiction is such that the accused, if surrendered, will be subjected to an unconstitutional form of trial, that fact alone will warrant and compel a refusal to comply with the requisition.

Re Dana, 7 Ben. 1, Fed. Cas. No. 3,554; *State v. Gerry*, 68 N. H. 495, 38 L. R. A. 228, 38 Atl. 272; *Jones v. Robbins*, 8 Gray, 329.

Even if the Massachusetts courts had decided that indictments of this description were constitutional the courts of New Hampshire would be under no obligation to surrender a citizen of this state to be tried in a manner which, whatever the holding of the courts of Massachusetts, is clearly unconstitutional.

State v. Jackman, 69 N. H. 318, 42 L. R. A. 438, 41 Atl. 347.

The warrant upon which the relator is arrested, which forms a part of the officer's return and is before the court, is fatally defective.

The governor is not above the Constitution. In issuing warrants he acts as a magistrate of limited jurisdiction, and there is no presumption in favor of his jurisdiction in any particular case; his warrant, like any other, is void unless the facts essential to jurisdiction appear on its face.

Ex parte Smith, 3 McLean, 121, Fed. Cas. No. 12,968; 1 Bishop, New Crim. Proc. 126; *Re Doo Woon*, 9 Sawy. 417, 18 Fed. 898; *Thurston v. Adams*, 41 Me. 419; *State v. Staples*, 37 Me. 228; *Bridge v. Ford*, 4 Mass. 641; *Granite Bank v. Treat*, 18 Me. 340; *State v. Hartwell*, 35 Me. 129; *McGlinchy v. Barrows*, 41 Me. 74.

Messrs. **Mitchell & Foster**, for defendant:

The guilt or innocence of the prisoner will not be investigated on this writ. The prisoner cannot, on habeas corpus, show by parol that the affidavit or indictment was

a forgery; or that it is untrue; or that it was procured upon insufficient evidence. The governor of the surrendering state can insist, and it will be presumed on habeas corpus that he has insisted, upon the production of whatever he deems necessary or important properly to inform himself on the subject as to whether or not a crime has been committed against the laws of the demanding state.

Church, Habeas Corpus, § 468; *Kurtz v. State*, 22 Fla. 36, 1 Am. St. Rep. 173; *Re Cook*, 49 Fed. 833; *Ex parte Brown*, 28 Fed. 653; *Re Clark*, 9 Wend. 212.

An indictment is sufficient for the purpose of extradition proceedings, when it is framed in accordance with the technical rules of pleading of the state within which it is found, and where the offense was committed.

8 Enc. Pl. & Pr. p. 816.

The indictment is in accord with the Massachusetts rules of pleading.

Com. v. Hills, 10 Cush. 530; *Carlton v. Com.* 5 Met. 552; *Com. v. Costello*, 120 Mass. 358; *Com. v. Jacobs*, 152 Mass. 276, 25 N. E. 463; *Benson v. Com.* 158 Mass. 164, 33 N. E. 384.

Walker, J., delivered the opinion of the court:

One question presented by the case is whether the record evidence submitted to the governor upon the proceeding before him for the extradition of the relator shows, as a matter of law, that he exceeded his authority in issuing the warrant for her arrest and removal to Massachusetts. How far his duty was discretionary, and to what extent he was obliged to comply with the demand for the surrender of the alleged fugitive from justice, are questions not necessarily material to the present inquiry. He has exercised whatever discretion he possesses, and has complied with the demand. He has issued his warrant for the arrest of the relator and for her return to Massachusetts. Has he thereby violated any of her rights of citizenship under the Constitution and laws of the United States or of this state? The rendition of a fugitive from justice to the state from which he fled is authorized by the Constitution of the United States (art. 4, § 2), which provides that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." To make this provision effectual, and to afford means for its practical operation, Congress has enacted that, "whenever the executive authority of any state or territory demands

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any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear." U. S. Rev. Stat. § 5278, U. S. Comp. Stat. 1901, p. 3597. As supplementary to these provisions, the legislature of this state has enacted the following statute: "If the governor is satisfied that the demand is conformable to law and ought to be complied with, he shall issue his warrant under the seal of the state, authorizing the agent who shall make the demand, either forthwith or at such time as shall be designated in the warrant, to take and transport such person to the line of the state, at the expense of such agent, and shall also, by the warrant, require the civil officers within this state to afford all needful assistance in the execution thereof." Pub. Stat. chap. 263, § 8. If the governor has not substantially complied with these constitutional and statutory provisions, the relator must be discharged from arrest. She cannot be forcibly removed from this jurisdiction, except by virtue of legal process and procedure. Unless she is one of the class of persons which the Federal Constitution makes liable to rendition, and unless the legal requirements in such cases have been substantially observed, the governor's warrant is void, and the court must order her discharge. It is the duty of the court to protect the rights of citizenship.

The question of the validity of the governor's warrant must be considered in connection with the demand, the copy of the indictment, and the affidavit submitted to him. It is not essential that the warrant should contain a formal statement of all the facts upon which it is issued. *Kingsbury's Case*, 166 Mass. 223; *People ex rel. Draper v. Pinkerton*, 17 Hun, 199; *Re Romaine*, 23 Cal. 585. If an examination of the record evidence presented to the governor legally authorizes the finding of the necessary facts, it will be presumed, in the absence of evidence to the contrary, that he made such findings. It is insisted that the

warrant is fatally defective, because it contains no statement of a finding by the governor that the relator is a fugitive from justice. In *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291, in which the warrant was similar to the one in this case, the court says (p. 95, 116 U. S., p. 549, 29 L. ed., and p. 300, 6 Sup. Ct. Rep.): "It is conceded that the determination of the fact by the executive of the state in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof." In *State ex rel. Arnold v. Justus*, 84 Minn. 237, 243, 55 L. R. A. 325, 87 N. W. 770, the court says upon this subject: "This is a matter upon which the chief magistrate granting the warrant should have evidence, although the law does not describe its character, nor the precise rules by which such fact shall be established. It would seem to follow that the issuance of the warrant embraces the exercise of a prerogative of the governor of the state where the fugitive is, and that it must be presumed, in the absence of proof to the contrary, where the executive acts in such case, that he has performed his duty in that respect. Hence, when a proper warrant has been issued, the burden of showing that the prisoner has not fled, or is not a fugitive [from justice], rests upon such prisoner in habeas corpus proceedings." In that case the warrant did not contain a finding that the prisoner was a fugitive. It simply recited that "a demand has been made, pursuant to the Constitution and laws of the United States, by H. A. Northcott, acting governor of the state of Illinois, upon the governor of the state of Minnesota, for the delivery of Eddie McNichols as a fugitive from justice of the state of Illinois." The court held this sufficient, on the ground that technical precision is not necessary in a warrant. See also *Ea parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148; *Com. v. Hall*, 9 Gray, 262, 266, 69 Am. Dec. 285; *Kingsbury's Case*, 106 Mass. 223; *Davis's Case*, 122 Mass. 324; *People ex rel. Jourdan v. Donohue*, 84 N. Y. 438; *Ex parte Sheldon*, 34 Ohio St. 319. What the result might be, upon habeas corpus proceedings, if none of the written evidence required by law for the issuance of the warrant were before the court, and the validity of the warrant was attacked (*People ex rel. Draper v. Pinkerton*, 17 Hun, 199), it is unnecessary to inquire. If the evidence is legally sufficient to support the necessary facts, it must be presumed, even from a warrant which does 67 L. R. A.

not contain a full recital of such facts, that it was based upon their existence. No particular form of a warrant is prescribed, and an examination of the cases shows that the warrant in this case is not an exceptional one. The case of *Re Jackson*, 2 Flipp. 183, Fed. Cas. No. 7,125, holding that a warrant was invalid because it recited that the person charged had been "represented" to be a fugitive from justice, instead of stating an express conclusion on this point, is against the weight of authority, and was substantially overruled by *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; 2 Moore, Extradition, § 640. Whether the relator is charged with a crime in another state, and whether she is a fugitive from justice, are questions upon which it was the duty of the governor to pass before ordering her removal from the state. "Under the act of Congress it became the duty of the governor of Utah to cause the arrest of Reggel, and his delivery to the agent appointed to receive him, when it appeared: (1) That the demand by the executive authority of Pennsylvania was accompanied by a copy of an indictment, or affidavit made before a magistrate, charging Reggel with having committed treason, felony, or other crime within that state, and certified as authentic by her governor; (2) that the person demanded was a fugitive from justice." *Ex parte Reggel*, 114 U. S. 642, 649, 29 L. ed. 250, 252, 5 Sup. Ct. Rep. 1148, 1152. "To be a fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having, within a state, committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense he has left its jurisdiction, and is found within the territory of another." *Roberts v. Reilly*, 116 U. S. 80, 97, 29 L. ed. 544, 549, 6 Sup. Ct. Rep. 291. In *Re Voorhees*, 32 N. J. L. 141, 150, the court says: "A person who commits a crime within a state, and withdraws himself from such jurisdiction without waiting to abide the consequences of such act, must be regarded as a fugitive from the justice of the state whose laws he has infringed. Any other construction would not only be inconsistent with good sense, and with the obvious import of the word to be interpreted in the context in which it stands, but would likewise destroy, for most practical purposes, the efficacy of the entire constitutional provision." "The fact

that a man is charged with crime in one state, and is afterwards found in another, has generally been regarded as *prima facie* evidence that he is a fugitive." *Drinkall v. Spiegel*, 68 Conn. 441, 448, 36 L. R. A. 486, 36 Atl. 830; *Kingsbury's Case*, 106 Mass. 223. The evidence that the relator departed from Massachusetts after the commission of the alleged crimes, and was found in this state, supports the necessary finding that she is a fugitive. The affidavit of Whitney tends to show that she fled "about the 4th day of November, A. D. 1901," after the dates of the crimes alleged in the first two counts of the indictment, but before the date of the third crime. It may be true that she could not be a "fugitive" on account of a crime committed by her when not within the jurisdiction of Massachusetts, or that a person cannot be said to "flee" from a state unless he was personally there at the time of the alleged offense. Constructive presence may not be sufficient. 2 Moore, *Extradition*, §§ 581-585; *People ex rel. Corkran v. Hyatt*, 172 N. Y. 176, 60 L. R. A. 774, 92 Am. St. Rep. 706, 64 N. E. 825. But the fact, if it be one, that the relator departed from the demanding state before the commission of one crime alleged in the indictment, for which alone she could not be extradited, suggests no reason why she could not legally be returned for other crimes alleged to have been committed there before she left. The liability that she may be tried on the last count alone does not exclude her from the class of persons made liable to extradition by the Federal Constitution. She is still "a person charged . . . with . . . crime." The question is, not whether the governor might decline to extradite her for that reason, or because he believed the demand was not made in good faith, but whether her rights of citizenship are infringed by her rendition to answer to such an indictment. Neither the Constitution nor the statutes upon the subject make an exception of that character. *Lascelles v. Georgia*, 148 U. S. 537, 542, 547, 37 L. ed. 549, 551, 552, 13 Sup. Ct. Rep. 687; *Com. v. Wright*, 158 Mass. 149, 19 L. R. A. 206, 35 Am. St. Rep. 475, 33 N. E. 82. If the indictment upon which this proceeding is based had contained only the first count, but it appeared that another indictment, containing the other counts, was pending in the same court, that fact would not prevent the rendition of the prisoner, though the question, in legal effect, would be substantially the same as is presented here. The governor was justified in finding that she was a fugitive with reference to the first two counts in the indictment. But upon that question the relator was entitled to submit evidence and be heard, and the 67 L. R. A.

justice before whom the habeas corpus proceedings were returned may review the action of the governor in this respect. The governor's finding that the relator is a fugitive is not conclusive upon the court on habeas corpus. *Church, Habeas Corpus*, § 474a; 2 Moore, *Extradition*, § 640; *Spear, Extradition*, 391; *Hartman v. Aveline*, 63 Ind. 344, 30 Am. Rep. 217; *Jones v. Leonard*, 50 Iowa, 106, 32 Am. Rep. 116; *Re Mohr*, 73 Ala. 503, 49 Am. Rep. 63. If his finding of fact in this respect is erroneous, the prisoner is unlawfully restrained of her liberty, and is entitled to a discharge. It is a principle of general application that one cannot be finally deprived of his liberty except upon a judicial trial.

The fact that it appears from the indictment that the offenses charged in the first two counts were committed more than six years before the finding of the indictment does not preclude a finding that she was a fugitive from justice, and such finding by the governor was justified by the evidence before him. If Whitney's affidavit is ambiguous, and may be open to more than one construction, so far as it relates to the length of time Mrs. Munsey resided in Massachusetts after the date of the offense alleged in the first count and before November 4, 1901, when he certifies she fled, it was not incompetent as evidence, to be considered by the governor, upon the question whether she was a fugitive from justice as to the first two counts. It does not necessarily establish the proposition, as claimed by her, that during all the time she was "usually and publicly resident" (Mass. Pub. Stat. chap. 213, § 25) in that state. If it did, it would become necessary to consider the question whether, under those circumstances, she could be a fugitive from justice within the meaning of the law of extradition. The affidavit states unequivocally that she was "a fugitive from justice." This statement, though in some sense a conclusion of law, was held sufficient in *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 260, 5 Sup. Ct. Rep. 1148, where the court says (p. 653, 114 U. S., p. 253, 29 L. ed., and p. 1154, 5 Sup. Ct. Rep.) that the accused should not be discharged "merely because, in the judgment of the court, the evidence as to his being a fugitive from justice was not as full as might properly have been required, or because it was so meager as, perhaps, to admit of a conclusion different from that reached by" the governor. It was sufficient to make out a *prima facie* case. Whether, in this case, there was other evidence before the governor upon which his finding could be based, it is unnecessary to inquire.

The indictment upon which the requisition is founded consists of three counts, each

charging the respondent with intentionally and fraudulently uttering and publishing as true "a certain forged instrument purporting to be a will." It is conceded that forging a will is a crime under the laws of Massachusetts. But it is claimed that the warrant is faulty, because it states that the relator is "charged with the crime of uttering forged wills." This is a sufficiently definite statement of the charges in the indictment for practical purposes, and affords no substantial or reasonable ground for holding the warrant to be void; especially when, by a reference to the indictment, its meaning is rendered sufficiently plain and definite.

The objection is made that the relator is charged in the indictment with three distinct and independent offenses, and that for this reason the indictment is bad at common law, and is repugnant to article 12 of the Bill of Rights of Massachusetts, which provides that "no subject shall be . . . deprived of his . . . liberty, . . . but by the judgment of his peers or the law of the land." It is also claimed to be repugnant to the 14th Amendment of the Constitution of the United States for the same reason. Whether this court has jurisdiction, under the Federal Constitution and the law of Congress relating to extradition, to decide upon the validity of the formal allegations in the indictment, which substantially charges the fugitive with the commission of a crime, is a question which the weight of authority answers in the negative. *Kentucky v. Dennison*, 24 How. 66, 107, 16 L. ed. 717, 729; *Ex parte Reggel*, 114 U. S. 642, 651, 29 L. ed. 250, 253, 5 Sup. Ct. Rep. 1148; *Re Roberts*, 24 Fed. 132; *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; *Re Voorhees*, 32 N. J. L. 141, 146; *People ex rel. Nubell v. Byrnes*, 33 Hun, 98, 101; *State ex rel. O'Malley v. O'Conner*, 38 Minn. 243, 36 N. W. 462; *Spear*, Extradition, 499; 2 Moore, Extradition, §§ 550, 638; and cases cited *supra*. But without deciding whether the joinder of two or more counts in an indictment charging distinct offenses is faulty as a matter of criminal pleading, it does not appear that in Massachusetts such joinder renders the indictment absolutely void. The indictment may still be sufficient to support a conviction under one of the counts. In *Com. v. Tuck*, 20 Pick. 356, 361, it is said: "A defective indictment cannot be cured by verdict. If the crime be not correctly described, no judgment can be rendered either upon verdict or plea of guilty. 2 Hale, P. C. 193; *Com. v. Morse*, 2 Mass. 128, 130; *Com. v. Hearsey*, 1 Mass. 137. But the objection now under consideration is totally different. It is not that the offense is de-

fectively set forth, but that more than one offense is sufficiently set forth in the same indictment. The only argument which lies against the latter is that it subjects the defendant to inconvenience and danger by requiring him to prepare himself to meet several charges at the same time. The appropriate remedy would be a motion to the court to quash the indictment, or to confine the prosecutor to some one of the charges." "The objection that the indictment is bad because more than one offense is joined in it cannot be sustained. It is settled in this commonwealth that several offenses may be charged in the same indictment when they are of the same general nature, and when the mode of trial and the nature of the punishment are the same." *Com. v. Brown*, 121 Mass. 69, 82. In *Josslyn v. Com.* 6 Met. 236, 239, Chief Justice Shaw remarks: "The next objection is that there were two distinct offenses charged, in two distinct counts, which is irregular. Without considering whether, if this is an irregularity for which a court would, on motion, quash the indictment, or put the prosecutor to his election on which count to proceed (*Com. v. Tuck*, 20 Pick. 356, 362), we think that, within certain limits, different offenses of the same nature may be stated in different counts of an indictment, when the same mode of trial applies, and the same judgment is to be given." "It is always open to the presiding judge to order a separate trial on each distinct charge, when there is any reason for supposing that the defendant will be perplexed in his defense, or unnecessarily embarrassed by being put on trial for two distinct offenses. We see no good reason for holding that it is illegal to present in the same indictment felonious offenses of a similar character, and having a like punishment." *Com. v. Hills*, 10 Cush. 530, 534. See also *Com. v. Carey*, 103 Mass. 214; *Com. v. Costello*, 120 Mass. 358.

Even if it were conceded that this indictment is faulty for the reason assigned by the relator, and that a trial and conviction on all the counts would not be in accordance with "the law of the land," it would not follow that the indictment was a nullity, and that her arrest thereon was illegal. The fact that it contains three counts does not make it necessary that she should be tried upon each, or prevent the entry of a *nolle prosequi* as to two of them and a trial as to the other; and a verdict of guilty under one count alone would not be erroneous because the indictment contained other counts for which she was not tried. *Com. v. Holmes*, 103 Mass. 440. If she cannot, under the Constitution of the United States or under that of Massachusetts, be tried

for three distinct offenses set out in one indictment, it is not to be presumed that the courts of that state would sanction such a procedure, but that they would protect her in the enjoyment of all her constitutional rights. Her constitutional right to be tried according to "the law of the land" does not necessarily include a right to escape a trial upon one good count in a regularly returned indictment containing other counts. *Com. v. Cain*, 102 Mass. 487, 489.

But it is not necessary to determine what the effect of the alleged misjoinder may be upon the validity of the indictment at common law, or to discuss the question whether the decisions of the Massachusetts court above referred to, and many other similar cases in that jurisdiction, are repugnant to constitutional provisions. If they are open to that objection, as the relator claims, the courts of that state, where her alleged crime was committed, and where she must be tried, if tried at all, will afford her ample protection in all her constitutional rights. The contrary presumption cannot be entertained if the Federal law providing for the extradition of alleged criminals is recognized as an effectual means of aiding in the enforcement of the criminal laws of the various states. An authoritative determination of this question has been made by the Supreme Court of the United States, as far, at least, as the Federal Constitution is concerned. One Pearce was arrested in Texas, on a requisition from the governor of Alabama, for his extradition for trial in the latter state on two indictments for embezzlement and larceny. He sought his discharge upon habeas corpus on the ground that the indictments were insufficient to authorize his extradition, because it was not alleged therein that the offenses were committed in Alabama, that no time or place were laid therein, and that it did not appear where the offenses were committed. He relied entirely for his discharge upon the invalidity of the indictments. The trial court in which the habeas corpus proceedings were instituted refused to discharge him. He thereupon took an appeal to the court of criminal appeals of Texas, where it was held that, "if it reasonably appears upon the trial of the habeas corpus that the relator is charged by indictment in the demanding state, whether the indictment be sufficient or not under the law of that state, the court trying the habeas corpus case will not discharge the relator because of substantial defects in the indictment under the laws of the demanding state. To require this would entail upon the court an investigation of the sufficiency of the indictment in the demanding state, when the true rule

is that, if it appears to the court that he is charged by indictment with an offense, all other prerequisites being complied with, the applicant should be extradited." *Ex parte Pearce*, 32 Tex. Crim. Rep. 301, 307, 23 S. W. 15. The case was then brought before the Supreme Court of the United States, and the decision of the state court was affirmed in an opinion delivered by Chief Justice Fuller, in which he says: "It was not disputed that the indictments were in substantial conformity with the statute of Alabama in that behalf, and their sufficiency as a matter of technical pleading would not be inquired into on habeas corpus. *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148. Nor was there any contention as to the proper demand having been made by the executive authority of the state from whence the petitioner had departed, or in respect of the discharge of the duty imposed by the Constitution and laws of the United States on the executive authority of the asylum state to cause the surrender. The question resolved itself, therefore, into one of the validity of the statute on the ground of its repugnancy to the Constitution, and the court of appeals declined to decide in favor of its validity. And if it could be said upon the record that any right under the Constitution had been specially set up and claimed by plaintiff in error at the proper time and in the proper way, the state court did not decide against such right, for the denial of the right depended upon a decision in favor of the validity of the statute. What the state court did was to leave the question as to whether the statute was in violation of the Constitution of the United States, and the indictments insufficient accordingly, to the demanding state. Its action in that regard simply remitted to the courts of Alabama the duty of protecting the accused in the enjoyment of his constitutional rights; and, if any of those rights should be denied him,—which is not to be presumed,—he could then seek his remedy in this court. We cannot discover that the court of appeals, in declining to pass upon the question raised in advance of the courts of Alabama, denied to plaintiff in error any right secured to him by the Constitution and laws of the United States, or that the court, in announcing that conclusion, erroneously disposed of a Federal question." *Pearce v. Texas*, 155 U. S. 311, 313, 314, 39 L. ed. 164, 167, 15 Sup. Ct. Rep. 116; *Ex parte Hart*, 59 Fed. 894.

As the relator is substantially charged with the commission of one crime, at least, in Massachusetts, upon an indictment properly authenticated, and as it appears that the form of the indictment, if peculiar, is in accordance with the uniform practice in

that state, this court will neither affirm nor deny the constitutionality of that method of procedure in the courts of the demanding state. To do so would be based upon the assumption of a right to impugn the validity of the decisions of a sister state, and to hold that the relator could not be extradited unless it appeared that her trial in that state would be in accordance with the ideas of this court upon the question of its constitutionality. Such a holding, while opposed to the ordinary principles of comity existing between the states, would go far toward abrogating the salutary provisions of the Federal law upon the subject of extradition. *People ex rel. Nubell v. Byrnes*, 33 Hun, 98, 101, 104. So far as the trial of the question of her rendition is concerned, the joinder of counts in the indictment presents no serious difficulty.

The evidently clerical error in the affidavit of the clerk of court, that the indictment was returned "on the second Monday of February, A. D. 1892," did not preclude a finding by the governor that the true date was the second Monday of February, 1902. The caption of the indictment, as well as the affidavit of the district attorney, fully authorized that conclusion, which is placed beyond peradventure by an amendment of the clerk's affidavit in this court. The objection urged on this ground is a refinement of technical reasoning, which has nothing to commend it in the modern administration of justice in criminal cases.

Nor does the fact that the warrant was addressed to the sheriff of Merrimack county, and not to the agent appointed by the demanding state, afford any reason for the relator's discharge. The statute (Pub. Stat. chap. 263, § 8) does not require that the warrant should be directed to the agent, but that it should authorize him "to take and transport" the fugitive out of the state, and should require the civil officers of the state to render necessary assistance for that purpose. The warrant was issued in compliance with these requirements.

As the relator has not succeeded in showing that any of her rights of citizenship are jeopardized by the action of the governor, the denial of her motion for a discharge upon the reserved case presents no error.

Exception overruled.

All concur.

A petition for rehearing was denied on January 24, 1903, the court making some slight modifications in the opinion as originally filed, which are incorporated in the opinion as published above.

The trial in the superior court, having been suspended pending the hearing of the 67 L. R. A.

exceptions by the supreme court, was resumed March 28, 1903, and relator, having moved for her discharge because of having been denied a hearing before the governor, and the motion having been denied, took the case to the supreme court a second time on exceptions.

Bingham, J., delivered the opinion of the court on June 2, 1903:

The relator contends that the warrant upon which she was arrested was illegally issued, because she was not permitted to be heard before the governor upon the question whether she was a fugitive from justice, and assigns this as a reason why she should be discharged from arrest. It was a question of fact, to be determined in the first instance by the governor, whether the relator was a fugitive from justice. *Re Cook*, 40 Fed. 833, 838. But she was not then entitled as of right to be heard. It was discretionary with the governor to grant or deny her request. It is not the practice in such proceedings to give the accused notice before the rendition warrant is issued, and the act of Congress and the statutes of this state do not contain a provision requiring that she should be notified. The reason for the omission of such a provision is apparent. If notice were required, the practical operation of the law would be rendered nugatory and its purpose defeated. It is an *ex parte* proceeding, and necessarily so. *Re Cook*, 49 Fed. 838. While the presence of the relator at the hearing obviated the usual objection to giving the accused notice, yet her presence did not create a legal right to be heard, and no such right previously existed.

If the relator had the right not to be removed from the state without a judicial trial, the issuing of the warrant for her arrest did not conclude her right in this respect. Under the law of this state, she could sue out a writ of habeas corpus, and test the question whether she was a fugitive from justice; and, if it were made to appear to the court that the finding of the governor on this question was erroneous, she would be entitled to her discharge. *State ex rel. Munsey v. Clough*, 71 N. H. 594, 600, 601, *ante*, 949, 53 Atl. 1086. It was also expressly provided in the rendition warrant that she should be afforded an opportunity to sue out a writ of habeas corpus before being delivered over to the Massachusetts authorities. She has availed herself of that privilege; but in the trial before the superior court she declined and expressly waived the right to then, or at any future time, offer evidence showing that she was not a fugitive from justice, and contented herself with submitting the record evidence pre-

sented to the governor, and causing it to appear that she had been denied a hearing before him. As the relator was entitled, in the trial before the superior court, to review the action of the governor, and to be discharged if his finding upon this question of fact was erroneous, or if there was no evidence from which he was warranted in making the finding, we are unable to see wherein she has been deprived of any right to be heard to which she was legally entitled.

As the governor should not have issued his warrant without proof that the accused was a fugitive from justice (*State ex rel. Munsey v. Clough*, 71 N. H. 598, 599, *ante*, 949, 53 Atl. 1086; *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148), it is argued that the record evidence was incompetent and insufficient to warrant such a finding. But the character of proof essential to establish the fact is not prescribed by the act of Congress (U. S. Rev. Stat. § 5278, U. S. Comp. Stat. 1901, p. 3597) or the statutes of this state (Pub. Stat. 1901, chap. 263, §§ 7, 8). And while it has been said that "the executive of the state in which the accused is found . . . does not fail in duty if he makes it a condition precedent . . . that it be shown to him by competent proof that the accused is in fact a fugitive from justice" (*Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148), this does not mean that he shall not receive evidence that fails to meet the requirements of legal proof, if he deems it advisable. It appears to have been the policy of Congress and of the legislature to permit the chief executive to determine the question upon such proof as seems to him worthy of credit; and in *Roberts v. Reilly*, 116 U. S. 80, 95, 29 L. ed. 544, 549, 6 Sup. Ct. Rep. 291, and *Re Cook*, 49 Fed. 838, it was held that the executive of the state upon which the demand is made is to decide the question "upon such evidence as he may deem satisfactory."

Among the documents accompanying the requisition of the governor of Massachusetts, and which he certified to be authentic and 67 L. R. A.

duly authenticated, was a copy of an affidavit made by Jophanus H. Whitney, purporting to have been sworn to before a justice of the peace, in which it was stated that the relator had fled from the limits of said commonwealth, and was a fugitive from justice; also that at the time of the commission of said crime she was in the state of Massachusetts. This copy of an affidavit would not answer the requirements of legal proof in a court of justice, and the same is true of the original affidavit. But legal rules prescribing the competency of proof do not, in the absence of statute, govern the admission of evidence in extradition proceedings, except so far as the executive may see fit to adopt them. A statute of Massachusetts provides that sworn proof that the accused is a fugitive from justice shall accompany an application for a requisition to the governor of that state. Mass. Rev. Laws, chap. 217, § 11. The original affidavit of Whitney, from which the copy here under consideration was made, is without doubt the sworn proof required by the statute of that state to be there filed with the governor; and we cannot say that the governor of this state was not justified in receiving a copy of that sworn proof in evidence and treating it as worthy of credit. That the Whitney affidavit contained evidence warranting a finding that the accused was a fugitive from the justice of Massachusetts, and was actually present in that state at the time of the commission of the crime charged, has already been decided. *State ex rel. Munsey v. Clough*, 71 N. H. 594, *ante*, 949, 53 Atl. 1086.

The relator's motion to be discharged was properly denied.

Exception overruled.

All concur.

Petition for rehearing denied.

Affirmed by Supreme Court of United States January 30, 1905.

NEW JERSEY COURT OF ERRORS AND APPEALS.

William J. A. BURNS

v.

DELAWARE & ATLANTIC TELEGRAPH
& TELEPHONE COMPANY, *Plff. in*
Err.

Owen DONAHUE

v.

SAME, *Plff. in Err.*

(70 N. J. L. 745.)

- *1. It is one of the duties of an employer to exercise reasonable care that the place in which he sets his servant to work and the system or method adopted by the employer for the doing of the work shall be reasonably safe for the servant, and free from latent dangers known to the master, or discernible by an ordinarily prudent master in the circumstances.
2. Where there is evidence from which the jury may reasonably find that the injured servant had no knowledge of the latent danger that necessitated the use of certain precautions for his safety, it cannot be held as a conclusion of law that, because the servant knew of the absence of the precautions, he thereby assumed the risk of injury resulting to him from their absence.
3. It is not merely the physical surroundings of the servant that must be obvious to him in order that he may be held to have assumed the risks arising therefrom, but it must be obvious to him, or at least to an ordinarily prudent servant under the circumstances, that there is danger to him in such a situation.
4. The rule that the duty of a master with respect to care as to the tools and appliances furnished for his servant's work is limited to such as are in fact supplied by the master has no applicancy to the failure of the master to supply appliances needed, not for the work itself, but solely to protect the servant against latent dangers arising out of the work.
5. The duty of the master to exercise care for the safety of the servant cannot be evaded by the employment of others for its performance. The persons so employed are not fellow servants engaged in common employment with the servant for whose safety the care is to be exercised.
6. The question whether a witness has such special knowledge or experience as to qualify him to give opinion evidence is a question of fact for the determination of the trial court, whose finding is not review-

*Headnotes by PITNEY, J.

NOTE.—As to liability of electric companies to employees for injury caused by electric shock, see also, in this series, *Western U. Teleg. Co. v. McMullen*, 32 L. R. A. 351, and *note*, and the later case of *Bergin v. Southern New England Teleph. Co.* 39 L. R. A. 192. 67 L. R. A.

able on writ of error if there be any legal evidence to support it.

(Dixon, J., *dissents.*)

(November 14, 1904.)

ERROR to the Supreme Court to review judgments in favor of plaintiffs in actions brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. Norman Grey for plaintiff in error.
Messrs. John W. Wescott and Ralph W. E. Donges for defendants in error.

Pitney, J., delivered the opinion of the court:

These were two actions of tort, brought to recover damages for personal injuries sustained by the plaintiffs below while in the employ of the defendant company. They were tried together, and resulted in a verdict and judgment in favor of each plaintiff. Errors at the trial are asserted as ground for reversal.

Plaintiffs were laboring men, and, with others, were engaged in attending reels from which copper wires were being unwound, while at the same time another gang of men were stringing them upon poles of the defendant company. There were 10 reels, each of which carried a single coil of wire. The outer ends of the wires were attached by snaphooks to a device known as a "running board," to which in turn was attached a rope by means of which a team of horses drew the 10 wires simultaneously from the reels. These wires were bare, and, of course, were normally "dead" wires. The defendant's line of poles carried two sets of cross-arms, each arm being designed to carry 10 wires. The 10 wires that were being unreeled were being placed upon the upper set of cross-arms. From the reels the wires passed to the cross-arm upon a pole near by, and thence along the line of poles. As each successive pole was reached and passed by the team, the wires were detached from the running board, lifted over the cross-arm by the polemen or "climbers," and then once more attached to the running board. Thus the strain of the wires was intermittent. The lower cross-arms carried 8 telephone wires, previously strung, and running parallel to the wires that were being strung at the time in question. Between 350 and 400 feet from the place where the plaintiffs were working the wires that were in process of being unreeled passed above a trolley-feed wire, the elevation of which was below the

lower cross-arms of the telephone line. It was in evidence that between the place where the plaintiffs worked and the trolley line the line of wires passed through trees or woods that obscured the plaintiffs' view of all beyond. As to the cause of the accident, the evidence tended to show that one or more of the new wires broke or sagged, and thus came in contact with the trolley wire, deriving from it a strong current of electricity that was conveyed along the new wires to the plaintiffs, who were shocked and seriously burned thereby. The team was about 3,500 feet from the reels at the time. The evidence tended to show that the current proceeded from the trolley wire, and to exclude the theory that it could have proceeded from any other source. The evidence on the part of the plaintiffs tended to show that a wire or wires were permitted in the ordinary progress of the work to sag and come in contact with the trolley wire. Upon the part of the defendant the insistence was that one of the wires broke while being drawn from the reel; but, as it was at least disputable whether the breaking, if it occurred, was occasioned by any negligence of the plaintiffs or their fellow workmen, it makes little difference for present purposes whether the wire broke or not. If it broke without negligence of the workmen, the jury had a right to treat the breaking as an ordinary incident of the method or system adopted by the defendant in the prosecution of its work.

The negligence attributed by the plaintiffs to the defendant was the failure to take precautions to prevent the powerful current of the trolley wire from being communicated to the persons of the employees. The precautions suggested by the evidence were a sling or basket made of rope, to be suspended over the trolley wire in order to prevent the telephone wires from dropping at that point, and, as a further precaution, the use of rubber gloves for the hands of the workmen, or a board platform or wagon upon which they might stand. It appeared that the reels were placed upon the ground, that the earth at this point was damp and muddy, and that this rendered the men more liable to be injured by the escape of electric current from the wire through their bodies to the ground. The rope sling or basket, of course, would tend to prevent the wires upon which they were working from becoming charged with electricity. The gloves or platform would tend to prevent the men from receiving a serious shock if the wires should become charged.

There was a motion for nonsuit, and also a motion to direct a verdict in favor of the defendant, both of which were refused. The grounds upon which these motions were

based, so far as necessary to be now mentioned, are (1) absence of evidence to show negligence on the part of the defendant; (2) or to show knowledge on the part of the defendant that the telephone wires were crossing a live wire; (3) or to show that the absence of boards and gloves was the proximate cause of the accident; (4) or to show that it was the usual custom in the business for employing companies to supply such devices to men working under the circumstances that surrounded the plaintiffs. A similar question was raised by defendant's fourth request to charge, which was refused. The proposition thus rejected was that "it was no portion of any duty of defendant to supply gloves and boards or a platform under the circumstances in this case."

It is one of the duties of an employer to exercise reasonable care that the place in which he sets his servant to work, and the system or method adopted by the employer for the doing of the work, shall be reasonably safe for the servant, and free from latent dangers known to the master or discernible by an ordinarily prudent master in the circumstances. *Western U. Teleg. Co. v. McMullen*, 58 N. J. L. 155, 32 L. R. A. 351, 33 Atl. 384. That the duty of the master to exercise care with respect to the place of working extends to the system or method of arranging the work is established in this state. *Belleville Stone Co. v. Moonhey*, 60 N. J. L. 323, 38 Atl. 835, 61 N. J. L. 253, 39 L. R. A. 834, 39 Atl. 764. In the present case the jury might reasonably find from the evidence that the danger of contact between the wires at which the plaintiffs were working and the trolley wire was a latent danger, unknown to the plaintiffs. They severally denied that they knew there was any danger connected with the work, and it was shown they were inexperienced in the work of line construction. They were not linemen, and had no knowledge or experience of electricity. Even had they known their wires were to be carried across a trolley wire, it was not necessarily obvious to them that there was a probability of contact with the latter wire. Again, an obvious probability of such contact would not necessarily import notice to the plaintiffs of an obvious danger to them: First, because, even on defendant's own evidence, the jury had a right to find that not all trolley wires carry current sufficiently powerful to injure a human being; and, secondly, because there is much evidence in the case indicating that even a powerful current might be harmless to men handling wires, except where their feet were placed upon damp ground; and there is nothing to show that the plaintiffs knew that the dampness of the ground at all

imperiled their safety. The jury had a right to find that the entire situation, as well as the danger that was latent in the situation, was known to defendant's agents, who acted for it in laying out the work, and who represented it in respect of the duty to exercise care for the safety of the plaintiffs, or that it would have been known to an ordinarily prudent employer under the like circumstances. There was likewise abundant evidence from which the jury might reasonably infer that ordinarily prudent employers, under such circumstances, employed either a guard wire or a rope sling or basket to prevent the wires upon which employees were working from dropping upon a live wire carrying a current of high power, and that, as an additional precaution against danger to the men in case of such contact, it was customary to use rubber gloves or a board platform, or, as a substitute for the latter, to place the men upon a wagon while employed in such work. It is urged here that the evidence as to the failure to supply rubber gloves and a guard wire was irrelevant and immaterial to the issue as framed, since the plaintiffs' declarations counted solely upon the absence of boards or a platform for the plaintiffs to stand upon. The criticism ignores some of the averments of the declarations, but, without spending time upon the point, it is sufficient to say that the objection of variance was not taken at the trial. If it had been, an amendment would doubtless have been applied for and allowed. As it appears from the testimony returned with the bills of exception that both parties went fully into the question of the propriety and necessity of guard wires and gloves, the pleadings will be treated in this court as amended, if necessary, so as to be applicable to the issues that were actually tried. For these reasons we think the trial court properly denied the motion to nonsuit and the motion to direct a verdict in favor of the defendant.

To return now to the fourth request to charge, that "it was no portion of any duty of defendant to supply gloves and boards or a platform, under the circumstances in this case." It is suggested here that, because the plaintiffs knew that no gloves, boards, or platform had been supplied, and voluntarily continued in the employment, they should not have been permitted to recover for injuries arising from the absence of such precautions, and that for this reason the refusal of the request just quoted was erroneous. But it is entirely plain from the context that the phrase, "under the circumstances in this case," was intended to mean, and was understood by the trial judge to mean, the physical circumstances that

bore upon the existence or nonexistence of a necessity for such precautions. During the trial defendant's counsel and the witnesses called by him repeatedly used the phrase "existing conditions" and "existing circumstances" in the sense just indicated. As there was abundant evidence to show that under such circumstances reasonable prudence dictated the employment of such precautions as gloves and boards or a platform, the trial judge could not properly accede to a request that, if complied with, would have prevented the jury from considering the omission of such safeguards as any breach of duty on the part of the defendant. We cannot treat this request as intended to include the proposition that, because the plaintiffs knew that neither gloves, boards, nor platform had not been supplied, they assumed any risk of danger resulting to them from the absence of such precautions. And this for several reasons. The assumption of risk is not mentioned in the request, but was dealt with in a separate request. The question of the master's duty with respect to care for the servant's safety is distinct from the question of the servant's assumption of risks, whether those ordinarily incident to the employment or those obviously resulting from the master's breach of duty. The request under consideration directed the attention of the trial judge solely to the question of the master's duty. Moreover, the fact that the plaintiffs knew that no gloves, boards, or platform had been furnished cannot be held to excuse the master from furnishing them, if required in the exercise of reasonable care for the servant's safety. The jury might properly find from the evidence that the plaintiffs had no knowledge of the danger that necessitated the use of such precautions, and that the defendant, on the other hand, either had such knowledge, or, if reasonably careful, would have possessed it. It is not merely the physical surroundings of the servant that must be obvious to him in order that he may be held to have assumed the risks arising therefrom, but it must be obvious to him, or at least to an ordinarily prudent servant under the circumstances, that there is danger in such a situation. It is his voluntary acceptance of, or persistence in, an employment that involves personal hazard to him that debars his action; the theory of the law being that his wages have been fixed in view of the hazard. But where the danger is unknown to the servant he cannot be held to have voluntarily assumed it, although the physical surroundings that create the danger are known to him. And so the known absence of safeguards or precautions cannot prevent a recovery where the danger that renders them necessary is un-

known to the injured servant. 4 Thomp. Neg. New ed. §§ 4608-4610, 4640, etc. Thus, in *Van Steenburgh v. Thornton*, 58 N. J. L. 160, 33 Atl. 380, the negligence for which the master was held liable was the failure to brace the sides of a sewer trench in which the plaintiff was working. The plaintiff, of course, knew that the trench was not braced. But the defendant's representative knew, while the plaintiff did not, that there was danger of caving from the existence of a parallel trench that had been filled up. See this case commented on in *Regan v. Palo*, 62 N. J. L. 35, 41 Atl. 364, and *Curley v. Hoff*, 62 N. J. L. 760, 42 Atl. 731. So, in *Smith v. Erie R. Co.* 67 N. J. L. 636, 644, 59 L. R. A. 302, 52 Atl. 634, it was insisted that, since the plaintiff knew there was a defect in the railroad track, he assumed the risk of a derailment caused by such defect. But this court said: "It was far from obvious to one traveling upon the train that the roughness of the track indicated a weakness sufficient to cause derailment. The trial judge therefore could not say, as a matter of law, that the plaintiff assumed the risk of the injury that he received, and so it was at best a question for the jury to determine whether the special danger was known to the plaintiff, or was so obvious that he ought to have known of it." In a multitude of other cases in our courts the principle is impliedly recognized, if not distinctly declared, that it is the danger that must be known or obvious, and not merely the physical situation, in order to charge the injured servant with assumption of an obvious risk. The doctrine of "latent dangers" is largely grounded upon this distinction. *Paulmier v. Erie R. Co.* 34 N. J. L. 151; *Smith v. Irwin*, 51 N. J. L. 507, 14 Am. St. Rep. 699, 18 Atl. 852; *Foley v. Jersey City Electric Light Co.* 54 N. J. L. 411, 24 Atl. 487; *New York, S. & W. R. Co. v. Marion*, 57 N. J. L. 94, 30 Atl. 316; *Essex County Electric Co. v. Kelly*, 57 N. J. L. 100, 29 Atl. 427; *Western U. Teleg. Co. v. McMullen*, 58 N. J. L. 155, 32 L. R. A. 351, 33 Atl. 384; *Chandler v. Atlantic Coast Electric R. Co.* 61 N. J. L. 380, 39 Atl. 674; *Johnson v. Devoe Snuff Co.* 62 N. J. L. 417, 41 Atl. 936; *Dillenberger v. Weingartner*, 64 N. J. L. 292, 45 Atl. 638; *Christensen v. Lambert*, 67 N. J. L. 341, 51 Atl. 702.

It is suggested that the duty of a master with respect to care as to the tools and appliances furnished for his servant's work is limited to such as are in fact supplied by the master. But this has no applicancy to the failure of the present defendant to supply gloves, boards, or a platform. These articles, if furnished, would have been, not tools and appliances for the work that the plaintiffs were doing, but rather safeguards

against the dangers that arose out of the work. In the absence of such dangers, the plaintiffs could perform the work at which they were set just as well without gloves, boards, or platform as with them. See *Belleville Stone Co. v. Mooney*, 61 N. J. L. at page 254, 39 L. R. A. 834, 39 Atl. 764. It was not the exigencies of the work, but the latent danger that inhered in the work, and of which the jury have found the plaintiffs were ignorant, that necessitated the use of gloves, boards, or a platform. And so, in any and every aspect, we think the fourth request to charge was properly refused.

It is argued that, if there was any negligence in not furnishing boards, rubber gloves, or guard wires, it was the negligence of one Naylor, a fellow servant of the plaintiffs, and the defendant is not liable for his negligence. This point was raised by one of the requests to charge that was overruled. *Knutter v. New York & N. J. Teleg. Co.* 67 N. J. L. 646, 58 L. R. A. 808, 52 Atl. 565, is cited in support of it. But in that case the foreman, through whose negligence, as was claimed, the plaintiff was injured, was in respect of the act that produced the injury employed merely as a fellow servant, and not in the performance of any duty that had to do with the master's precautions for the safety of its employees. As has been frequently declared in this court, the test is whether the negligent act or omission was in discharge of the master's or the servant's duty. It is for the master to make preparation for the general employment, and what he does in establishing a system of work and furnishing the plant, appliances, and place of work is done in this behalf. It is for the servants to carry on the employment when the master has thus prepared for it. The duty of the master to exercise care for the safety of the servant cannot be evaded by the employment of others for its performance. The agent thus employed is a "vice principal," and the question is whether he in truth exercised due care. *Nord Deutscher Lloyd S. S. Co. v. Ingebregsten*, 57 N. J. L. 400, 31 Atl. 619; *Van Steenburgh v. Thornton*, 58 N. J. L. 160, 33 Atl. 380; *Maher v. Thropp*, 59 N. J. L. 186, 35 Atl. 1057; *Hustis v. James A. Banister Co.* 63 N. J. L. 465, 43 Atl. 651; *Smith v. Erie R. Co.* 67 N. J. L. 636, 59 L. R. A. 302, 52 Atl. 634. And so, in the present case, whether it was the duty of Naylor, or of some other agent of the employer, to make those preparations that the situation and circumstances required for the conduct of the general employment with reasonable safety for the men, the person doing or assuming to do that work for the master was not, within the meaning of the rule, a

fellow servant engaged in common employment with the plaintiffs.

Exception was taken to certain testimony of the plaintiffs tending to show the custom of other employers, on the ground that the witnesses called upon this point were not shown to have sufficient experience to qualify them to speak as experts upon the question. We think, however, there was sufficient evidence of experience to justify the action of the trial court in admitting them to express opinions. The question whether a witness has such special knowledge or experience as to qualify him to give opinion evidence is a question of fact for the determination of the trial court, whose finding is not reviewable on writ of error if there be any legal evidence to support it. *State v. Arthur* (N. J. L.) 57 Atl. 156, and cases there cited.

It is assigned for error that the trial judge admitted evidence over objection to show that the defendant, after the injury to the plaintiffs, furnished gloves and boards for the protection of their men. But the bills of exception show that the defendant was responsible for the introduction of this evidence.

The remaining points raised have been examined, and found unsubstantial.

The judgments under review should be affirmed.

Dixon, J., dissenting:

The testimony in these cases, I think, presented for decision these three questions: First. Were the plaintiffs injured by an electric current transmitted to the wires which they were handling from a trolley wire over which those wires were being strung? Second. Was the defendant, the employer of the plaintiffs, chargeable with knowledge that such injury was probable? Third. Were the plaintiffs, notwithstanding the exercise of due care on their part, ignorant that such injury was probable? A finding on all these questions favorable to

the plaintiffs would necessarily result in establishing their right to compensation from the defendant but a finding of any of them adverse to the plaintiffs would necessarily result in the denial of such right. If the first question were negatived, then the injury did not occur in the defendant's service. If the second were negatived, then the defendant was not guilty of negligence. If the third were negatived, then the plaintiffs assumed the risk. In a case thus conditioned, the furnishing or nonfurnishing of rubber gloves for the hands, or of a wooden platform for the feet, of the workmen, was legally unimportant. It merely affected the degree of risk. If the probability that the current might be thus transmitted was patent to the employer, but not to the workmen, then he could not relieve himself from responsibility by providing such means of lessening the injury; and, if that probability was patent to the workmen, then they assumed the risk of it, under all conditions known to them, including, of course, the absence of gloves and platform. Now, as I understand the charge of the court at the trial of these cases, it was to the effect that, even if the jury should find adversely to the plaintiffs on either the second or the third of the questions above stated, yet they might conclude that, under the circumstances of the case, a duty rested on the defendant to furnish gloves or a platform, as a customary precaution, and they might base a verdict for the plaintiffs on the nonperformance of that duty. In order to preclude such a verdict, the defendant's fourth request was made, for a distinct instruction "that it was no portion of any duty of defendant to supply gloves and boards, or a platform, under the circumstances of this case." After the charge which had been given to the jury, it was erroneous to refuse this instruction. However humane it might have been for the defendant to provide such safeguards, it was not its legal duty to do so.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York *ex rel.*
COMMERCIAL CABLE COMPANY

v.

William J. MORGAN, State Comptroller.

(178 N. Y. 433.)

1. The court of appeals cannot review

the decision of the comptroller when based on sufficient evidence and affirmed by the appellate division of the supreme court as to the capital employed within the state upon which a corporation is subject to a franchise tax.

2. A ruling that, because of its character, property alleged to be employed within the state by a corpora-

NOTE.—As to taxation of corporate franchisees in the United States, see also, in this series, *Louisville Tobacco Warehouse Co. v. Com.* 57 L. R. A. 33, and *note*; *People ex rel. United States Aluminium Printing Plate Co. v. Knight*, 63 L. R. A. 87; *People ex rel. Metropolitan* 67 L. R. A.

Street R. Co. v. State Tax Comrs. 63 L. R. A. 884; and *Bank of California v. San Francisco*, 64 L. R. A. 918.

As to taxation of capital stock of corporations in the United States, see *State Board v. People*, 58 L. R. A. 513.

tion sought to be subjected to a franchise tax cannot in fact be made the basis of the assessment, presents a question of law reviewable by the court of appeals.

3. The amount of capital employed by a corporation, and not its share stock, is to be considered under a statute imposing a franchise tax upon corporations, to be computed upon the basis of the amount of capital stock employed within the state.
4. Government bonds and those of other corporations held by a corporation whose capital stock is subject to a franchise tax cannot be presumed to have been purchased with surplus so as to bring them within the rule withdrawing them from consideration in ascertaining the capital employed within the state, if so purchased, against the finding of the comptroller that they were purchased with capital as distinguished from surplus.
5. The value of stock of another corporation purchased by a corporation against which a franchise tax is to be enforced and paid for with its bonds, to secure which the stock is deposited with a trustee, is to be regarded as part of the capital employed within the state, where the identity of the former corporation is preserved, although the stock was purchased for the purpose of securing the assets and privileges of the other corporation.

(Gray and O'Brien, JJ., dissent.)

(May 17, 1904.)

CROSS APPEALS from an order of the Appellate Division of the Supreme Court modifying a finding of the State Comptroller assessing a franchise tax against the relator corporation; the relator appealing from so much of the ruling as held it liable in an amount in excess of its claim; and respondent appealing from so much as altered the finding of the Comptroller. *Reversed on respondent's appeal.*

Statement by **Werner, J.:**

The relator is a domestic corporation owning and operating a system of cable and telegraph lines extending from this state into other states and countries. Its authorized capital stock is \$10,000,000, upon which it paid in 1897 a dividend of 8 per cent. Its aggregate assets were \$31,414,469.21, of which \$13,162,068.33 were concededly employed without the state. The basis for the tax was originally fixed by the comptroller at \$5,485,860, capital stock employed in this state, upon which the tax was fixed at \$10,967.72, but upon a hearing for revision the amount of capital stock employed in this state was reduced to \$4,500,000, upon which the tax was cut down to \$9,000. Upon appeal from this decision of the comptroller, the appellate division of the third department still further reduced the amount of capital stock employed in this state to \$1,104,691.92, upon which the tax was fixed at \$7 L. R. A.

\$2,209.38, and from the order entered upon that decision both parties appeal to this court. The relator contends that of its aggregate assets of about \$31,000,000, at least \$29,000,000 are employed without the state, leaving approximately \$2,000,000 within the state, the larger portion of which is not capital stock or capital employed within this state in any such sense as to furnish a basis for taxation. This contention is sought to be fortified by various combinations of figures set forth at great length in the relator's relief. The learned attorney general presents other schedules of figures, from which it is argued that the relator has at least \$29,000,000 of assets employed within this state.

In our view of the case it is unnecessary to reproduce in detail these elaborate and confusing computations except in so far as they bear upon the questions which this court has jurisdiction to review, and that will be done in the opinion.

Mr. Edmund L. Cole, for relator:

The basis upon which the franchise tax of relator should be computed is such part of the relator's capital share stock at par as is evidenced by the proportion of the relator's capital employed in the state of New York to the entire employed capital, within and without the state of New York.

When the tax is based upon dividends, it is upon the capital stock at par value; but, when no dividends have been declared, it must be assessed upon the appraised capital.

People ex rel. Jewelers' Circular Pub. Co. v. Roberts, 155 N. Y. 1, 40 N. E. 248; *People v. Delucare & H. Canal Co.* 54 Hun, 598, 1 N. Y. Supp. 890, Affirmed in 121 N. Y. 668, 24 N. E. 1093; *People v. Home Ins. Co.* 92 N. Y. 328; *People v. Horn Silver Min. Co.* 105 N. Y. 76, 11 N. E. 155.

In case of dividends of less than 6 per cent, if the market value of the stock is known, the basis must be the proportion of share stock employed in this state at market value.

People ex rel. New York & E. River Ferry Co. v. Roberts, 168 N. Y. 14, 60 N. E. 1043; *People v. Delaware & H. Canal Co.* 54 Hun, 598, 1 N. Y. Supp. 890; *People ex rel. New York C. & H. R. R. Co. v. Knight*, 173 N. Y. 255, 65 N. E. 1102.

In case of no dividends, if the value of the share stock is known, then the tax should be assessed upon the capital share stock employed in this state at market value.

People ex rel. Colonial Trust Co. v. Morgan, 47 App. Div. 126, 62 N. Y. Supp. 191, Affirmed in 162 N. Y. 654, 57 N. E. 1116; *People ex rel. Edison Electric Light Co. v. Wemple*, 63 Hun, 444, 18 N. Y. Supp. 511.

If the value of the capital share stock is not known, then the basis should be the actual value of the capital employed in this state.

People ex rel. Wiebusch & H. Co. v. Roberts, 154 N. Y. 101, 47 N. E. 980; *People ex rel. Niagara River Hydraulic Co. v. Roberts*, 30 App. Div. 180, 51 N. Y. Supp. 771.

The statute seeks to impose a franchise tax proportionate to, or measured by, only that part of the capital which is employed within this state.

People ex rel. New York & E. River Ferry Co. v. Roberts, 108 N. Y. 14, 60 N. E. 1043; *People ex rel. New York C. & H. R. R. Co. v. Knight*, 173 N. Y. 255, 65 N. E. 1102.

Messrs. John Gunneen, Attorney General, and **William H. Wood**, for defendant:

The term "capital stock," employed in the final sentence of § 182, means the capital share stock of the corporation, as distinguished from its capital or assets.

The amount of capital stock employed within this state is to be ascertained by assuming that it is the same proportion of the total capital stock as the capital or assets employed within this state is of the total capital or assets of the corporation.

The holdings of the relator, of West Shore Railroad bonds, United States bonds, New York Central & Hudson River Railroad and New York Times bonds were properly included by the comptroller as assets employed within this state.

People ex rel. American Contracting & Dredging Co. v. Wemple, 129 N. Y. 558, 29 N. E. 812; *People ex rel. John A. Roebling's Sons' Co. v. Wemple*, 138 N. Y. 587, 34 N. E. 386; *People ex rel. Western Electric Co. v. Campbell*, 145 N. Y. 587, 40 N. E. 239.

The stock of the Postal Telegraph Cable Company, a domestic corporation owned by the relator, was capital of the relator employed within this state.

People ex rel. Edison Electric Light Co. v. Campbell, 139 N. Y. 545, 20 L. R. A. 453, 34 N. E. 370.

Werner, J., delivered the opinion of the court:

If we had the right to review the facts in proceedings to revise and readjust franchise taxes, the case at bar would present some embarrassing questions that evidently perplexed the comptroller and the appellate division. As our jurisdiction is limited, however, to the review of questions of law, we must take the facts as established by the record. The comptroller decided, in the first instance, that the relator's capital stock to the extent of \$5,483,860 was employed within this state, and upon this basis he fixed

the relator's franchise tax at \$10,967.72. The relator then applied for a revision and readjustment of this tax, and the comptroller, under the power conferred upon him by § 195 of the corporation tax law (*Laws* 1896, chap. 908, p. 864), reviewed his first decision, reducing the amount of relator's capital stock held to be employed within this state to \$4,500,000, and cutting down the tax to \$9,000. This decision by the comptroller, based upon sufficient evidence, has the effect of a judgment rendered by a court, and his return is conclusive upon this appeal (*People ex rel. John A. Roebling's Sons' Co. v. Wemple*, 138 N. Y. 586, 34 N. E. 386), unless the facts upon which his conclusions are based were reversed by the appellate division. Upon consulting the order of the appellate division, we find that it reduces the amount of relator's capital stock employed in this state from \$4,500,000 to \$1,104,691.92. In many cases such a reduction would necessarily involve a reversal of the comptroller's decision upon questions of fact, but in the case at bar it clearly appears from the order itself that the conclusion of the appellate division was reached, not because the comptroller erred in holding that capital stock was employed here when in fact it was employed elsewhere, but because he held that property owned by the relator, and concededly within this state, was not capital stock or capital that was a proper basis for taxation. In other words, the appellate division differed from the comptroller, not as to the amount of the relator's property held within this state, but as to the character of a part of it. This presents a legal conclusion that is reviewable by this court.

According to the relator's own showing, its New York assets in 1897 were West Shore Railroad bonds, \$107,125; Commercial Union Telegraph stock, \$33,945; United States bonds, \$158,125; New York Times bonds, 9,000; New York Central & Hudson River Railroad bonds, \$775,779.25; Commercial Cable Building bonds, \$250,000; United States bonds, \$228,500; bank balances, \$163,215.36; real estate, Postal Telegraph lines, \$140,000; real estate, Commercial Cable lines, \$84,505; bills and accounts receivable, Cable and Postal lines, \$311,931.26; Supply stores, \$52,904.30. These items make an aggregate valuation of \$2,315,330.17. In addition to the foregoing properties, the relator was the owner of 107,750 shares of the capital stock of the Postal Telegraph Cable Company, of the face value of \$10,775,000, all of which was in this state under circumstances that will be more fully stated later on. The comptroller's decision does not set forth the items from which he computed the amount of relator's capital

stock employed within this state, but it is evident that if the assets above enumerated, which were concededly within this state, are to be regarded as capital stock or capital employed therein, the relator has no just cause for complaint, since the amount upon which its tax was based is considerably less than the sum which might properly have been fixed as the basis of taxation. The appellate division held that the bonds of the West Shore Railroad Company, of the New York Times, of the New York Central & Hudson River Railroad Company, and of the United States were neither capital stock nor capital, but simply investments, and therefore not taxable. No reference is made in the order of the appellate division to the stock of the Postal Telegraph Cable Company, above referred to, but, as it is excluded from the schedule of assets held to be a proper basis for taxation, it is obvious that it was regarded as not belonging to that class. As we view the case, it presents for our review three questions of law:

(1) What is the meaning to be given to the term "capital stock," as used in § 182 of the corporation tax law? (2) Are the railroad bonds, the United States bonds, and the New York Times bonds held by the relator to be considered as part of its capital stock employed within this state under that section? (3) Is the capital stock of the Postal Telegraph Cable Company held by the relator to be considered as part of its capital stock employed within this state under that section? These questions, together with the subsidiary considerations which they involve, we will proceed to discuss in the order in which they are stated.

Section 182 of the corporation tax law (p. 856) provides that "every corporation, joint stock company or association incorporated, organized, or formed under, by, or pursuant to, law in this state, shall pay to the state treasurer, annually, an annual tax to be computed upon the basis of the amount of its capital stock employed within this state, and upon each dollar of such amount, at the rate of $\frac{1}{4}$ of a mill for each 1 per cent of dividends made and declared upon its capital stock during each year ending with the 31st day of October, if the dividends amount to 6 or more than 6 per cent upon the par value of such capital stock. If such dividend or dividends amount to less than 6 per cent on the par value of the capital stock, the tax shall be at the rate of $1\frac{1}{2}$ mills upon such portion of the capital stock at par as the amount of capital employed within this state bears to the entire capital of the corporation." It is apparent, of course, that this section applies to two classes of corporations. In the first class are those that declare and pay divi-

dends of 6 per cent or more upon their capital stock, and in the second class are those that declare and pay dividends of less than 6 per cent upon their capital stock. The tax upon corporations in the first class is "to be computed upon the basis of the amount of its capital stock employed within this state," while the tax upon corporations in the second class is "upon such portion of the capital stock at par as the amount of capital employed within this state bears to the entire capital of the corporation." It will be observed that in either case the tax can only be based upon the capital stock employed in this state, although the methods for ascertaining the amount thereof are different. If the share stock were the basis for the tax, as distinguished from the assets representing capital, then this difference in method might be very material, for in one case it would be competent for the comptroller to fix the amount of capital stock within this state without reference to the amount or location of capital, while in the other case the presence of share stock within the state would furnish a basis for taxation only to the extent of the capital employed here. But if, on the other hand, the actual capital employed in this state, not exceeding the authorized capital stock, is the basis upon which the tax is to be computed, then, notwithstanding the difference in rate, it is in both cases based upon the same thing, namely, the amount of capital employed within this state. And, if the tax is to be computed upon that basis, the rule of proportion, practically agreed upon by the respective counsel, but discarded by the appellate division, is simply a rule of confusion. This is a simple fact which no amount of statutory verbiage can obscure, and which no divergence in methods can change. What, then, is the basis upon which the tax is to be computed? Is it the share stock held by individuals, or is it the capital held by the corporation? The tax is upon the corporation. It would seem to follow that the amount of the tax is to be measured by something that the corporation owns. A franchise stock corporation owns three things: (1) Its capital, existing in money or property; (2) its surplus, if any; (3) its franchise. The franchise is the thing taxed, and the tax is "computed upon the basis of the amount of its capital stock employed within the state." The share stock, or, in other words, the paper certificates held and owned by individuals, are not employed within this state. It is the capital represented by such certificates that is so employed. The total share stock of a domestic corporation may be held by nonresidents, and yet all of its

capital may be employed within the state. In such a case there would be absolutely no basis for taxation, unless the capital of the corporation, instead of the share stock held by its members, is the thing upon which the tax is to be computed. In construing this section of the corporation tax law, the authorized issue of the share stock of a corporation needs to be considered only as fixing the limit beyond which a corporate franchise cannot be taxed in a case where all of the corporate capital is employed within this state. This court has held that the term "capital stock," as used in statutes similar to the one under consideration, means, not share stock, but the property of the corporation contributed by its stockholders, or otherwise obtained by it, to the extent required in its charter. *Williams v. Western U. Teleg. Co.* 93 N. Y. 162. The expression "capital stock" is often loosely used in speech, and sometimes in statutory phraseology, to denote capital and nothing more. *State, Canfield, Prosecutor, v. Morristown Fire Asso.* 23 N. J. L. 195. In *Burrall v. Bushwick R. Co.* 75 N. Y. 211, capital stock was defined as "money or property which is put into a single corporate fund by those who, by subscription therefor, become members of the corporate body." "Capital stock" and "capital" are practically the equivalent of each other when considered as a basis for a franchise tax.

The second question to be considered is whether the bonds of the United States, and of the railroads above mentioned, and of the New York Times, held by the relator within this state, are to be treated as capital employed within this state, and therefore as a part of the basis upon which the relator's franchise tax is to be computed. If these bonds were purchased with capital, as distinguished from surplus, they furnish a proper basis for taxation (*People ex rel. Edison Electric Light Co. v. Campbell*, 138 N. Y. 543, 20 L. R. A. 453, 34 N. E. 370); and so, if they were bought with surplus, they are not a basis for taxation (*People ex rel. United Verde Copper Co. v. Roberts*, 156 N. Y. 585, 51 N. E. 293). The comptroller has included these bonds in the list of assets that represent capital for the purpose of franchise taxation. There is nothing to show that they were bought with surplus. The relator does, it is true, claim that they were bought with surplus, but its contention is founded upon nothing more than an argument to the effect that, because it has more assets than share stock, there must be a presumption that capital would be invested in properties relating to its business, while surplus would naturally be invested in safe interest-bearing securities. We can

indulge in no such presumption, but, if we could, it would be of no avail as against the comptroller's decision, which should not be disturbed unless clearly erroneous. *People ex rel. American Contracting & Dredging Co. v. Wemple*, 120 N. Y. 558, 29 N. E. 812.

The third question that remains to be considered is whether the stock of the Postal Telegraph Cable Company held by the relator is a proper element in the basis for taxation. Stocks of other corporations held by a corporation sought to be taxed upon its franchise fall within the same rules that govern the bonds above referred to. *People ex rel. Edison Electric Light Co. v. Campbell*, 138 N. Y. 543, 20 L. R. A. 453, 34 N. E. 370, and *People ex rel. United Verde Copper Co. v. Roberts*, 156 N. Y. 585, 51 N. E. 293. The recital of a few facts relating to the acquisition of the Postal Telegraph Cable Company's stock by the relator will enable us to determine whether there was anything in that transaction to take it out of the operation of the general rule. The relator not only acquired all of the share stock of the Postal Telegraph Cable Company, but all of its assets, property, and privileges, except its corporate franchise and some nonassignable contracts. The relator issued bonds in payment of the property and rights thus acquired by it, and then deposited with a trust company, to whom the bonds were turned over for collection, the stock of the Postal Telegraph Cable Company as collateral security to the bonds. Upon these facts the relator contends, in effect, that its ownership of the stock was merged in the ownership of the assets and privileges represented by it, and was therefore of no value. The difficulty with this contention is that the Postal Telegraph Cable Company is, in a legal sense, as much of a corporation as it ever was. The holder or holders of its stock can at any time pursue the business for which it was organized. The corporation has never been dissolved, and it still retains its corporate franchise. That its stock has not ceased to have life and value is very cogently shown by the deposit thereof as collateral security to relator's bonds. To some extent the tangible property and equipment of the Postal Telegraph Cable Company acquired by the relator is used by the latter in the name of the former and under its franchise. It seems clear, therefore, that the stock of the Postal Telegraph Cable Company held by the relator should be regarded as capital employed within this state, and is a proper item in the sum total upon which the relator's franchise tax should be computed.

This view of the large features of this

case renders it unnecessary to discuss some of the incidental matters, which in other aspects might have had an important bearing upon the result, and leads to the conclusion that *the order of the Appellate Division should be reversed* and the revised decision

of the Comptroller affirmed, with costs to Comptroller.

Parker, Ch. J., and Bartlett, Haight, and Vann, JJ., concur.

Gray and O'Brien, JJ., dissent.

MICHIGAN SUPREME COURT.

Frank MORRISON, *Plff. in Certiorari*,
v.

Fred W. KENT.

(.....Mich.....)

1. A statute, authorizing superintendents of the poor to draw from time to time on the county treasury for expenses incurred in the discharge of their duties is annulled by a subsequent statute providing that all bills against the county shall be audited or allowed by the board of auditors except those of the drain commissioners and board of supervisors.
2. A bill which is introduced into the legislature within the time designated by the Constitution may properly become a law, although the constitutional authority for such legislation is not granted until after the expiration of the time when bills might constitutionally be introduced for passage at the pending session of the legislature.

(November 9, 1908.)

NOTE.—Construction of constitutional limitations as to time for the introduction of bills in legislative assemblies.

- I. Text of constitutional provisions, 965.
- II. Presumptions respecting the regularity of legislative action, 966.
- III. Amendment and substitution of bills after expiration of constitutional limitation, 967.

I. Text of constitutional provisions.

Constitutional provisions like that referred to in *MORRISON v. KENT*, requiring all legislative bills to be introduced within a stated number of days after the legislature convenes, appear to be peculiar to the states of California, Colorado, and Michigan. The text of the several provisions of those states is as follows:

"No bill shall be introduced in either house . . . after fifty days after the commencement" of the session, "without the consent of two thirds of the members thereof." Cal. Const. art. 4, § 2.

"No bill, except the general appropriation for the expenses of the government only, introduced in either house of the general assembly after the first twenty-five days of the session, shall become a law." Colo. Const. art. 5, § 19.

"No new bill shall be introduced into either house of the legislature after the first fifty days of the session shall have expired." Mich. Const. art. 4, § 28.

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CERTIORARI to the Circuit Court for Saginaw County to review a judgment granting a writ of mandamus to compel defendant to pay an order in favor of relator. *Reversed.*

The facts are stated in the opinion.

Messrs. Weadock & Purcell, for plaintiff in certiorari:

The act is unconstitutional and void for the reason that it was never legally introduced, and that at the time when it was introduced such an act was unconstitutional and void.

The board of county auditors had no power to change, alter, modify, reject, or interfere with, the bills made by the superintendents of the county poor for Saginaw county.

The local act providing for a board of county auditors does not repeal, either directly or by implication, the provisions of chapter 3, Statutes 1897, for the maintenance of the poor and the organization and

The Constitution of Georgia contains a similar limitation in respect to bills of a special or local nature in the following language: "No bill shall be considered or reported to the house, by said [the specified] committee, unless the same shall have been laid before it within fifteen days after the organization of the general assembly, except by a two-thirds vote." Ga. Const. § 7, ¶ 15.

And in North Dakota the introduction of appropriation bills is limited as follows: "No bill for the appropriation of money, except for the expenses of the government, shall be introduced after the fortieth day of the session, except by unanimous consent of the house in which is sought to be introduced." N. D. Const. 1889, art. 2, § 60.

Besides the foregoing, provisions are found in a number of state Constitutions prohibiting the introduction of bills during the closing days of the legislative session. In some states, however, the limitation is applicable only to appropriation bills.

Arkansas: "No new bill shall be introduced into either house during the last three days of the session." Const. 1874, art. 5, § 34.

Louisiana: "No appropriation of money shall be made by the general assembly in the last five days of the session thereof." Const. art. 55.

Maryland: "No bill shall originate in either house during the last ten days of the session." Const. art. 3, § 27.

Minnesota: "No new bill shall be introduced in either branch, except on the written request

maintenance of a board of superintendents of the poor of Saginaw county.

It was held in *Sackrider v. Saginaw County*, 79 Mich. 59, 44 N. W. 105, that, after the expiration of the fifty-day limit, a bill introduced within the time could not be amended by adding a subject-matter not germane to the bill as originally introduced.

Constitutional provisions are not directory.

People v. Dettenthaler, 118 Mich. 595, 44 L. R. A. 164, 77 N. W. 450.

There is no remedy for a bill that has no lawful beginning.

Atty. Gen. v. Rice, 64 Mich. 385, 31 N. W. 203.

It cannot be presumed that the legislature intended to repeal the law when no

reference is made to it in the later act, unless the intent is clear.

Re Bushey, 105 Mich. 64, 62 N. W. 1036; *Hatch v. Calhoun Circuit Judge*, 127 Mich. 177, 80 N. W. 518; *Highland Park v. Mo-Alpine*, 117 Mich. 666, 76 N. W. 159; *University of Michigan v. Auditor General*, 103 Mich. 134, 66 N. W. 956.

Repeal by implication is not favored.

23 Am. & Eng. Enc. Law, pp. 489-492.

The superintendents of the county poor in any county in this state are a corporation by that name, and by statute are given the essential powers of a corporation for public purposes, including the right to sue and be sued.

Newaygo County v. Nelson, 75 Mich. 160, 42 N. W. 797.

of the governor, during the last twenty (20) days of such sessions." Const. art. 4, § 1.

Mississippi: "No new bills shall be introduced into either house of the legislature during the last three days of the session." Const. art. 4, § 67.

Montana: "No bill for the appropriation of money, except for the expenses of the government, shall be introduced within ten days of the close of the session, except by unanimous consent of the house in which it is sought to be introduced." Const. 1889, art. 5, § 21.

Texas: "No bill shall be passed which has not been presented and referred to and reported from a committee at least three days before the final adjournment of the legislature." Const. art. 3, § 37.

Washington: "No bill shall be considered in either house unless the time of its introduction shall have been at least ten days before the final adjournment of the legislature, unless the legislature shall otherwise direct by a vote of two thirds of all the members elected to each house, said vote to be taken by yeas and nays and entered upon the journal, or unless the same be at a special session." Const. art. 2, § 36.

Wyoming: "No bill for the appropriation of money, except for the expenses of the government, shall be introduced within five (5) days of the close of the session, except by unanimous consent of the house in which it is sought to be introduced." Const. art. 3, § 22.

The purpose of the foregoing provisions, unless it be that of Georgia, is said by Judge Cooley to be "to prevent hasty and improvident legislation, and to compel, so far as any previous law can accomplish that result, the careful examination of proposed laws, or, at least, the affording of opportunity for that purpose." Cooley, Const. Llm. 7th ed. 199.

Another purpose, it is said, is, "to give the people of the state, or of any locality in the state, an opportunity to be heard upon proposed legislation affecting their interests. The legislative journals, referring, as they do, to the titles of all bills introduced, give some warning to the people of the measures introduced. The right of petition and protest has ever been recognized as one of the established privileges of the people in a free country; and they have a right to notice of proposed legislation, and an opportunity to express their assent or dissent. If there was no constitutional inhibition against such practice, bills might be 67 L. R. A.

introduced upon the last days of the session, and rushed at once through both houses, without any chance for the people to be heard before their passage, or to rectify the action until another biennial session of the legislature." *Atty. Gen. v. Rice*, 64 Mich. 388, 389, 31 N. W. 203.

Respecting the use of skeleton bills for the purpose of evading these constitutional provisions, Judge Cooley says: "A practice has sprung up of evading these constitutional provisions by introducing a new bill after the time has expired when it may constitutionally be done, as an amendment to some pending bill, the whole of which, except the enacting clause, is struck out to make way for it. Thus, the member who thinks he may possibly have occasion for the introduction of a new bill after the constitutional period has expired takes care to introduce sham bills in due season which he can use as stocks to graft upon, and which he uses irrespective of their character or contents. The sham bill is perhaps a bill to incorporate the city of Slam. One of the member's constituents applies to him for legislative permission to construct a dam across the Wild Cat river. Forthwith, by amendment, the bill entitled A Bill to incorporate the City of Slam has all after the enacting clause stricken out, and it is made to provide, as its sole object, that John Doe may construct a dam across the Wild Cat. With this title and in this form it is passed; but the house then considerably amends the title to correspond with the purpose of the bill, and the law is passed, and the Constitution at the same time saved. This trick is so transparent, and so clearly in violation of the Constitution, and the evidence at the same time is so fully spread upon the record, that it is a matter of surprise to find it so often resorted to." Cooley, Const. Llm. 7th ed. p. 199, note 3.

II. Presumptions respecting the regularity of legislative action.

Where the validity of a statute is questioned, the parties will not be permitted to stipulate, or agree, or admit by pleadings, that the same was not properly passed by the legislature in accordance with these provisions. Neither can parol proof be resorted to for that purpose. In such case the legislative record must prevail, and, unless the journal shows affirmatively that

Mr. John F. O'Keefe for defendant in certiorari.

Montgomery, J., delivered the opinion of the court:

The relator presented to the respondent, as county treasurer, an order drawn in relator's favor by the superintendents of the poor of Saginaw county, and demanded payment thereof. Payment was refused for the reason that the relator's claim had not been audited by the board of county auditors. On application to the circuit court mandamus was granted, and the case is brought here for review.

At the spring election of 1903, § 10 of article 10 of the Constitution was amended so as to read: "Sec. 10. The board of super-

visors, or, in the counties of Saginaw, Jackson, Washtenaw, Kent, and Wayne, the board of county auditors, shall have the exclusive power to fix the compensation for all services rendered for, and to adjust all claims against, their respective counties, and the sum so fixed and defined shall be subject to no appeal." At the legislative session of 1903 act No. 397 was passed, establishing a board of auditors of Saginaw county, and prescribing their powers and duties. Section 7 of this act reads in part as follows: "No bills against the county of Saginaw shall be audited or allowed in any other manner than provided for in this act, except the bills of the county drain commissioner and such expenditures as may be authorized by the board of supervisors of said

the constitutional directions were not complied with, it will be presumed that they were followed. *Atty. Gen. v. Rice*, 64 Mich. 385, 31 N. W. 203; *People ex rel. Hart v. McElroy*, 72 Mich. 446, 2 L. R. A. 609, 40 N. W. 750; *Sackrider v. Saginaw County*, 79 Mich. 59, 44 N. W. 165.

Therefore, although the constitutional provision, that no new bill may be introduced after the first fifty days of the session, is violated by the report of a substituted bill by a committee for one in mere skeleton form, a mere title, handed up to pass as a bill until convenience or some future interest might enable the member introducing it to engraft upon it any legislation he might desire, yet, if such facts do not appear upon the journals of the legislative assembly, the presumption that the constitutional requirement was complied with is conclusive. *Atty. Gen. v. Rice*, 64 Mich. 385, 31 N. W. 203.

In *Hale v. McGettigan*, 114 Cal. 112, 45 Pac. 1049, it is said: "There can be no presumption that the legislature has disregarded any constitutional requirements in the passage of a statute, and, if the journals are silent upon the observance of any constitutional requirement, it cannot be assumed that such requirement was omitted by the legislature." But, although the question was raised, the court refused to determine, in this case, whether the journals might be examined for the purpose of impeaching the validity of an act because the introduction of the bill was not within the time limited by the Constitution.

In Michigan, it seems to be settled that this presumption does not attach to the enrolled bill, as is held in some of the states, but the courts will examine the legislative journals to ascertain whether the constitutional method has been followed in the enactment of a statute. *People ex rel. Hart v. McElroy*, 72 Mich. 446, 2 L. R. A. 609, 40 N. W. 750; *Sackrider v. Saginaw County*, 79 Mich. 59, 44 N. W. 165.

And, although the presumption is strong that the legislature has not violated the Constitution, still, if the proof furnished by the journals is clear that an act was not constitutionally passed, it is the duty of courts to so declare, and to hold it void. *Sackrider v. Saginaw County*, 79 Mich. 59, 44 N. W. 165.

III. Amendment and substitution of bills after expiration of constitutional limitation.

Such limitations upon the introduction of G7 L. R. A.

bills are not violated by the amendment, after the time limit, of a bill regularly introduced within the limitation, if the amendment is germane to the purpose which the original bill had in view. Thus, a bill introduced for the organization of the "township" of Montmorency may be so amended after the time as to make it a bill for the organization of the "county" of Montmorency, since both the original bill and the amendment had in view the same general purpose, namely, to give the inhabitants of the territory described a distinct municipal government. *Pack v. Barton*, 47 Mich. 520, 11 N. W. 367.

To the same effect is *Davock v. Moore*, 103 Mich. 120, 28 L. R. A. 783, 63 N. W. 424, where a bill was amended after the time limited for the introduction of new bills; but the nature of the amendment is not indicated.

A section added to a bill after the time limited by the Constitution for the introduction of new bills is not invalid for that reason, if the bill itself was introduced in time, and the section is a proper one to be embodied in the bill. *Renackowsky v. Water Comrs.* 122 Mich. 613, 81 N. W. 581.

Even though the amendments be extensive, they will not render the act of the legislature invalid, if they indicate no purpose to violate the Constitution, or to exceed the proper limits of legislative discretion. *Powell v. Jackson*, 51 Mich. 129, 16 N. W. 369.

Likewise, it is held, under a constitutional provision that no "new" bill shall be introduced after a stated time, that a substitute for a bill introduced within the prescribed time may be introduced after such time, if in harmony with the objects and purposes of the original, as expressed in its title. *Atty. Gen. ex rel. Crane v. Amos*, 60 Mich. 372, 27 N. W. 571.

Within this rule, a bill "to incorporate the city of Marine City, in the county of St. Clair" may be substituted for one "detaching certain lands from the township of Ft. Gratiot, in the county of St. Clair, and organizing the same into a township." In such case, although the journal does not reveal the description of the particular territory contained in the original bill as introduced, the court will not go outside the journal to ascertain if it was identical with the territory affected by the substitute. *People ex rel. Hart v. McElroy*, 72 Mich. 446, 2 L. R. A. 609, 40 N. W. 750.

When both the original and the substitute

county at any regular, special, or adjourned session thereof, where payment shall be provided for in the resolution authorizing the same." The circuit judge was of the opinion that this section did not abrogate the provisions of subdivision 7 of § 4506 of the Compiled Laws, which authorizes the superintendents of the poor to draw from time to time on the county treasurer for all necessary expenses incurred in the discharge of their duties, and directs the treasurer to pay such draft out of moneys placed in his hands for the support of the poor, and that, under this and other provisions of the act relating to superintendents of the poor, full control of the funds raised for the support of the poor by counties is given to the superintendents, and has not been withdrawn by

the act of 1903; and it is contended in this court by relator's counsel that the superintendents of the poor constitute a corporate body whose powers are not affected by the act of 1903. The fact that the superintendents may make contracts which bind the county does not necessarily establish that the bills for work performed under such contract may not, or should not, be audited by a distinct auditing body. Indeed, such fixed allowances have been audited in many instances by the boards of supervisors. *People ex rel. Bristow v. Macomb County*, 3 Mich. 475; *People ex rel. Douville v. Manistee County*, 40 Mich. 589. The language of § 7 of the act of 1903 is very broad, and includes all claims against the county excepting certain distinct claims. The inference is

bills relate to the same subject-matter, *viz.*, the collection of taxes, and have the same object in view, the enforcement of such collection, they come within the foregoing rule, although the title of the former recites that it is to authorize and empower the township treasurers of a particular county to force the collection of taxes in certain cases, and the title of the latter recites that it is to authorize the issuance of injunctions to restrain waste upon certain lands when taxes upon same shall be due and unpaid. *Caldwell v. Ward*, 83 Mich. 13, 46 N. W. 1024.

A bill to require the judge of the sixteenth judicial circuit to hold the terms of court of the thirty-first judicial circuit in certain cases, and also to require the judge of the thirty-first judicial circuit to hold the terms of the sixteenth judicial circuit under certain circumstances, may be substituted after the expiration of the constitutional limitation for the introduction of bills, for "a bill to vacate the sixteenth judicial circuit, and to reorganize the thirty-first judicial circuit," the general purpose of the two bills being to provide for the holding of courts in the territory covered by the sixteenth and thirty-first judicial circuits. *Toll v. Jerome*, 101 Mich. 468, 59 N. W. 816.

In *Detroit v. Schmid*, 128 Mich. 379, 92 Am. St. Rep. 408, 87 N. W. 383, it is said that the law is fully settled in that state, "that whatever might have been incorporated into the original act under the title of such original act may be added by way of amendment under the most general title;" and the validity of a substituted bill, whose title indicates the amendment of a section of an existing statute, different from that proposed in the title of the original bill, is upheld.

But a bill which is not germane to the purpose and object of the original bill cannot be offered as a substitute after the constitutional limit for the introduction of bills has expired. And whether it is germane may be determined from the titles of the respective bills, as contained in the journal. Such titles, being a part of the journal, may be used to support or rebut the presumption of the correctness of legislative action. *Sackrider v. Saginaw County*, 79 Mich. 59, 44 N. W. 165; *Caldwell v. Ward*, 83 Mich. 13, 46 N. W. 1024.

Tested by this method, a bill for the bonding of Saginaw county, to maintain stone and other roads within that county, cannot be substituted for a bill to vacate a state road in Midland 67 L. R. A.

county. Parol evidence will not be received, however, to show the proceedings of the legislature, and to prove the contents of the respective bills. *Sackrider v. Saginaw County*, 79 Mich. 59, 44 N. W. 165.

In *Hale v. McGittigan*, 114 Cal. 112, 45 Pac. 1049, the only case upon this question we have been able to find outside the state of Michigan, there were introduced, during the first fifty days of the session, eight different bills entitled "An Act to Amend 'an Act to Establish a Uniform System of County and Township Governments, Approved March 31, 1891,'" and twenty-nine other bills, amendatory of different sections of the same act, were introduced into the assembly. Of these latter, assembly bill No. 74 was entitled "An Act to Amend Section 165" of said act. These several bills were referred to a committee, which reported a substitute for all of said bills, and recommended its passage. After bill No. 74 had been read a first and second time, the bill reported by the committee, entitled "An Act to Establish a Uniform System of County and Township Governments," was offered and passed. In sustaining the validity of the act the court says: "If a bill has been introduced in either house within the first fifty days of the session, whatever is proper in the way of amendment is as admissible after the fifty days as before, and this will include whatever is within the purpose of the bill. By the same rules, a substitute that is germane to the subject of the bill may be adopted, without violating this provision of the Constitution, since such substitute is in effect only an enlarged amendment to the bill for which it is offered. *Toll v. Jerome*, 101 Mich. 468, 59 N. W. 816. The various bills for which the substitute in the present instance was reported, related to the county government act of 1891, some of them purporting by their titles to amend the entire act, and others to amend certain sections of the act, and it was within the proper function of the committee to which they were referred for consideration to consolidate them into one bill, if in its judgment it was expedient, and to report the same as a substitute for them all. Such report and substitute, instead of being the introduction of a new bill, was only bringing together before the house, in a revised form, bills that had already been introduced and referred to that committee, with a recommendation from it for the action by the house which that committee deemed advisable." N. B. R.

irresistible that the exceptions stated are the only ones intended. It follows that the claim in question is within the act.

The point is made in this court that, as the bill which was finally enacted into a law after the Constitution was amended was introduced at a time when its provisions would have been unconstitutional, the spirit of the provision requiring bills to be introduced within the first fifty days of the session was thereby violated. This contention cannot be allowed. The practice of the leg-

islature has been in harmony with the action taken in this case for many years. To admit relator's contention would work havoc in legislation which has stood unquestioned up to this time. We think it is enough to expect or require that a statute shall be constitutional when enacted.

The order of the Circuit Court is reversed, with costs.

The other Justices concur.

VERMONT SUPREME COURT.

Susan W. HUBBARD

v.

Asahel H. HUBBARD, Appt.

(.....Vt.....)

The legislature cannot empower the court, in its discretion, to authorize a married woman to convey her real estate by separate deed, in jurisdictions where the common law, giving the husband a freehold right in the property, is in force, since it would deprive him of his property without due process of law.

(September 15, 1904.)

A PPEAL by defendant from a decree of the Chancery Court for Addison County empowering petitioner to sell her real estate by separate deed. *Reversed.*

The facts are stated in the opinion.

Mr. W. H. Davis, for appellant:

No power to authorize the sale resides in the court of chancery, independent of the discretionary power conferred by the statute.

Chapman v. Long, 66 Vt. 656, 30 Atl. 3; *Dietrich v. Hutchinson*, 73 Vt. 134, 87 Am. St. Rep. 698, 50 Atl. 810.

The real estate in question was not the sole and separate property of the petitioner. Her husband is entitled to the rents and profits thereof.

Dietrich v. Hutchinson, 73 Vt. 134, 87 Am. St. Rep. 698, 50 Atl. 810; *Hackett v. Mozley*, 68 Vt. 210, 34 Atl. 949; *Gould v. Gould*, 29 Vt. 504.

A married woman may not convey her real estate, except by deed executed jointly with her husband.

Vt. Stat. § 2646.

NOTE.—For a case in this series as to validity of statute giving judge discretion to allow separation of jury in criminal case, see *King v. State*, 3 L. R. A. 210.

As to statute empowering court to commit one acquitted of murder, because of insanity, to asylum for treatment without notice to him or provision for investigation as to his present mental state, see the following case of *Re Boyett*, *post*, 972.
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The legislature could not enact a law suspending § 2646, Vt. Stat., in favor of one individual and allowing it to remain in force as to others.

Holden v. James, 11 Mass. 397, 6 Am. Dec. 174; *King v. State*, 87 Tenn. 304, 3 L. R. A. 210, 10 S. W. 509; *Tillman v. Cocke*, 9 Baxt. 429; *Cooley*, Const. Lim. 558; *Lewis v. Webb*, 3 Me. 326.

The discretion as to the regulation of property rights between husband and wife is a legislative discretion, and must be exercised by the legislature. It cannot be delegated to the courts.

Vt. Const. art. 3; *Noel v. People*, 187 Ill. 587, 52 L. R. A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *State ex rel. Hahn v. Young*, 29 Minn. 474, 9 N. W. 737; *Smith v. Strother*, 68 Cal. 194, 8 Pac. 852; *Re North Milwaukee*, 93 Wis. 616, 33 L. R. A. 638, 67 N. W. 1033; *Galesburg v. Hawkenson*, 75 Ill. 152; *Merrill v. Sherburne*, 1 N. H. 203, 8 Am. Dec. 52.

No. 49 of the Acts of 1896 is unconstitutional because it vests in the court of chancery a purely arbitrary power, by virtue of which, at the uncontrolled will of the chancellor, one husband may be deprived of his freehold and another protected.

Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; *Noel v. People*, 187 Ill. 587, 52 L. R. A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Re Wo Lee*, 26 Fed. 471; *King v. State*, 87 Tenn. 304, 3 L. R. A. 210, 10 S. W. 509; *Tillman v. Cocke*, 9 Baxt. 429; *Galesburg v. Hawkenson*, 75 Ill. 152.

Mr. W. H. Bliss for appellee.

Stafford, J., delivered the opinion of the court:

The question is whether No. 49, p. 42, of the Acts of 1896 is constitutional. It provides that "the court of chancery, in its discretion, upon the petition of a married

woman, may empower her to convey her real estate by her separate deed" as effectually as if the deed were executed by herself and her husband. In the present case the petition set forth the marriage of the petitioner to the petitionee; that the petitioner was then the owner in fee simple of a piece of land described; that since her marriage she had bargained the land to a party named, and needed the proceeds for her support and to meet her obligations, and thereupon prayed for authority under said act. These, so far as the case shows, were the only averments in the bill. There was an answer, but there is nothing before us to show what it contained. The cause was referred to a special master to hear and determine the issues of fact, and the master, having heard the testimony, made his report to the court of chancery. The printed "case" purports to give the substance of the findings, as well as certain concessions, from which it appears that the parties were married in 1899; that the petitioner then owned the land described in the petition, holding the same by ordinary conveyance, and not to her sole and separate use; that the parties lived together for about a year, and since that period have lived apart in the circumstances and for the reasons stated by the master, which need not be noticed further than to say that they seem to show a case of separation begun and continued through the fault of the husband; that the property, free of encumbrances, is worth about \$900; that the husband brought a petition for divorce, which was dismissed, and that the wife brought one, which was discontinued; that she bargained the land, and that the petitionee refused to join in the deed. The cause was heard in the court of chancery upon the report and the petitionee's exceptions thereto (what the exceptions were does not appear) and a decree was entered empowering the petitioner to convey the real estate by her separate deed "pursuant to the provisions of No. 49, p. 42, of the Acts of 1896," from which decree this appeal was taken.

It will be observed that the petition is brought and the decree rendered strictly under and pursuant to the act in question. The petition does not attempt to make a case under the provisions of Vt. Stat. 2650, nor does the court of chancery treat the case as arising thereunder. That statute provides that, when a married man is incapacitated by intemperance, insanity, or otherwise for supporting his family, or deserts, neglects, or abandons his wife, or by ill usage or criminal conduct gives her cause to live apart from him, the chancellor may, upon her petition, if she is of full age, authorize her to sell and convey her real estate or any personal estate which came to

the husband by reason of the marriage. How the case might have stood under that enactment we have, for the reason stated, no occasion to inquire. Even in this court the petitioner's counsel does not rely upon, or even refer to, that provision.

If the decree is valid, what is its effect? We are still living under the common-law rule which gives the husband a freehold estate for the joint lives of himself and his wife in her lands which she held at the time of her marriage, except such as she held to her sole and separate use. In this land, therefore, the petitionee has such a freehold interest. In that sense and to that extent it is his estate. He is entitled to the rents and profits thereof. *Dietrich v. Hutchinson*, 73 Vt. 134, 87 Am. St. Rep. 698, 50 Atl. 810; *Hackett v. Mozley*, 68 Vt. 210, 34 Atl. 949; *Chapman v. Long*, 66 Vt. 656, 30 Atl. 3. Such estate is still recognized and protected by statute, for the wife may not convey nor mortgage her real estate except by deed duly executed by herself and her husband. Vt. Stat. 2646. The effect of the decree, then, is to deprive the husband of his estate. This, of course, cannot be done without due process of law. U. S. Const. Amend. 14, § 1. Does the act in question provide or contemplate due process of law? It declares that the husband's estate may, in effect, be taken from him and bestowed upon the wife, upon her petition, by the court of chancery, "in its discretion." Legitimate judicial discretion is, without doubt, due process of law. Consequently the exact question is whether the power attempted to be vested in the court of chancery is a permissible instance of judicial discretion. Many attempts have been made to define the term, and there is no harmonizing the results. See 6 Enc. Pl. & Pr. p. 819, title, *Discretion*; 2 Enc. Pl. & Pr. pp. 409-420, title, *Appeals*; and 9 Am. & Eng. Enc. Law, p. 473. One court treats it as nothing more than the power to determine finally and without appeal upon the question of fact, treating the legal rule as settled and binding. *Bundy v. Hyde*, 50 N. H. 120. Another declares that it can have no meaning whatever unless it extends to the determining of the rule of law itself, and be recognized as final and conclusive in that respect also. *Oneida Common Pleas Judges v. People*, 18 Wend. 99. Others treat it as a freedom to determine both the rule and the fact within certain bounds, which bounds are inviolable, and are not to be overpassed without redress. All agree that by judicial discretion is never intended the whim or caprice of the magistrate, nor a course of judicial action inconsistent with itself in dealing with cases essentially alike. It is the essence of all law that when the facts are the same the result

is the same. It is always necessary in the decision of a matter in court that the judge should have in mind, first, a rule or standard and, second, the facts which are to be tested thereby. But certain matters seem hardly to admit of the formulation of inflexible rules in advance, and to be most wisely left to the sound judgment of the magistrate when the exigency shall arise, leaving him to be governed by the general analogies of the law and his own sense of justice. The better view seems to be that, even in these instances, he is not altogether a law unto himself, but may be overruled if his action is such as to shock the universal or the common sense of what is right among his fellows. All judicial discretion may thus be considered as exercisable only within the bounds of reason and justice in the broader sense, and to be abused when it plainly overpasses these bounds. See an article entitled *Judicial Discretion*, 17 Am. L. Rev. 569; Sir John Romilly's opinion, [*Hayward v. Cope*, 25 Beav. 151], 17 English Ruling Cases, 823; *Gardner v. Jay*, L. R. 29 Ch. Div. 52, 3 English Ruling Cases, at pages 251, 252. The deposit of discretion is most usually found in matters of procedure and the conduct of trials, where not only would it be difficult to prescribe exact and minute regulations, but where the situation itself is not easily reproduced in its original character, and cannot safely be reviewed. Such are questions concerning the latitude of cross-examination, the course of argument, within certain bounds, questions of continuance and frequently of new trials, whether actions should be consolidated, whether and when election between counts should be compelled, questions of contempt in the presence of the court, and the like. Instances are not wanting, however, in the field of substantive law. Whether specific performance shall be decreed is said to be a matter of discretion, but the rules governing the exercise of the discretion have become so well fixed and understood that the conditions determining the right to a decree are almost capable of being stated in the form of a rule. 3 Pom. Eq. Jur. § 1404; *Fowler v. Sands*, 73 Vt. 237, 50 Atl. 1067. We are not aware of any instance where the law has attempted to subject the right of a person to retain his estate to the decision of a magistrate unguided and unregulated save by his own sense of fairness and justice. The grant of discretionary power in the legal sense apparently implies the existence of certain well-understood principles within which it should be exercised. But when a statute declares that a husband's property may be taken from him and bestowed upon his wife in the discretion of the chancellor, what are the well-understood principles

which are to govern him in the exercise of his discretion? In the statute referred to above (Vt. Stat. 2650) the legislature undertook to lay down the law upon that very subject, carefully defining the circumstances in which a wife might be given the authority now asked for. When the chancellor is bidden to exercise his discretion beyond and regardless of these circumstances, how is he to judge? He has no law to govern him, because the law is against divesting the husband of his estate. Is he to make a law? Is he to formulate a rule governing such cases? Then he becomes the legislature for that case. And is one chancellor to make one rule and another chancellor a different rule? Then we live under a government of men; not of laws. Is it a case for the exercise of discretion, or is it not rather a field wherein the rights of men and women must be regulated by positive law? Is it not too much to ask that one's right to hold his estate should be made to depend upon its appearing fair and just to a chancellor that he should do so, merely in view of the circumstances existing between himself and another?

Analogous cases are to be found. A statute attempting to give the judge in criminal trials authority to keep the jury together or permit them to disperse, in his discretion, has been held void. *King v. State*, 87 Tenn. 304, 3 L. R. A. 210, 10 S. W. 509. An ordinance forbidding the use, upon certain streets, of heavy vehicles without special permission of a board, was held unreasonable and void as failing to prescribe conditions upon which the permission should be granted, and leaving it to the arbitrary will of the officers. *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 26, 42 L. R. A. 696, 68 Am. St. Rep. 155, 51 N. E. 758. Similar cases are *Plymouth v. Schulteis*, 135 Ind. 339, 35 N. E. 12; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. R. p. 243; *Noel v. People*, 187 Ill. 587, 52 L. R. A. 287, 79 Am. St. Rep. 238, 58 N. E. 616; *Re Wo Lee*, 26 Fed. 471; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064. In our opinion, to take one's property under a statute like the present is to deprive him thereof without due process of law, and accordingly we hold that Acts 1896, p. 42, No. 49, is unconstitutional and void in that it undertakes to clothe a court with power to deprive a property owner of his estate without making the exercise of the power depend upon proof of any prescribed facts, but leaving it to the arbitrary and unregulated will of the magistrate.

Decree reversed, with costs in this court, and cause remanded, with mandate that the bill be dismissed.

NORTH CAROLINA SUPREME COURT.

Re Emmett BOYETT.

(136 N. C. 415.)

1. Empowering the court, in its discretion, to commit one acquitted of murder because of insanity to an asylum for treatment, from which he cannot be released without an act of the legislature, without notice to him or giving him an opportunity to be heard, or any provisions for investigation as to his present mental state, deprives him of his liberty without due process of law.
2. The legislature cannot assume the right to pass upon the question of the release of one committed to a hospital for criminal insane, and thereby deprive the courts of their jurisdiction to inquire into the legality of his restraint.
3. If the evidence indicates that one committed to an asylum for the insane under an invalid statute is actually insane, the court should not order his discharge, but should direct his detention for a reasonable time until proceedings can be taken for his commitment in a proper manner.

(November 15, 1904.)

APPEAL by petitioner from an order denying his application for release under a writ of habeas corpus from an asylum to which he had been committed as an insane person. *Reversed*.

The facts are stated in the opinion.

Messrs. Land & Cowper, for petitioner:

Law of the land means the general law, a law which hears before it condemns, and renders judgment only after trial.

Black, Const. Law, 419; Cooley, Const. Lim. 502; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Parish v. East Coast Cedar Co.* 133 N. C. 483, 98 Am. St. Rep. 718, 45 S. E. 768.

The essential elements of due process of law are notice and an opportunity to defend.

Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; *Phillips v. Postal Teleg. Cable Co.* 130 N. C. 513, 89 Am. St. Rep. 868, 41 S. E. 1022.

The gist of the constitutional require-

NOTE.—For a case in this series holding that a statute permitting commitment to hospital for insane upon application of relative or friend of alleged insane person, or by any of certain officials, without notice to such person, is invalid, see *Re Lambert*, 55 L. R. A. 856.

As to validity of order by judge for temporary confinement of person alleged to be insane pending proceedings for determination of his insanity, see *Porter v. Ritch*, 39 L. R. A. 353.

As to necessity of notice of lunacy proceedings to alleged lunatic generally, see note to *Evans v. Johnson*, 23 L. R. A. 737, 67 L. R. A.

ments of due process of law implies "a regular proceeding before a competent court, possessing jurisdiction, with an opportunity to the party to appear and to be heard in his own defense, or in rebuttal of the claim made against his property."

Black, Const. Law, § 153, pp. 424, 425; *Portland v. Bangor*, 65 Me. 120, 20 Am. Rep. 681.

The proceeding must be such as conforms to the Constitution, and gives the citizen the right to be heard.

Re Dowdell, 169 Mass. 387, 61 Am. St. Rep. 290, 47 N. E. 1033; *Montana Co. v. St. Louis Min. & Mill. Co.* 152 U. S. 160, 38 L. ed. 398, 14 Sup. Ct. Rep. 506; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678.

A person supposed to be insane may not lawfully be committed to an asylum, at the instance of public authority, against his will, without some sort of judicial inquiry into his sanity; and such proceeding should give notice and an opportunity to be heard in order to meet the constitutional requirement.

16 Am. & Eng. Enc. Law, p. 599 (6); Black, Const. Law, 399; *Re Lambert*, 134 Cal. 626, 55 L. R. A. 857, 86 Am. St. Rep. 296, 66 Pac. 851; *Evans v. Johnson*, 23 L. R. A. 737, and note, 39 W. Va. 299, 45 Am. St. Rep. 912, 19 S. E. 623; *Armstrong v. Short*, 8 N. C. (1 Hawks) 11.

Asylums are not places of punishment.

State v. Pritchett, 106 N. C. 673, 11 S. E. 357; Clark, Crim. Proc. § 149, p. 427; *State v. Vann*, 82 N. C. 635; *Van Deusen v. Newcomer*, 40 Mich. 93.

Petitioner has established the fact that he is not now insane. One cannot lawfully be placed or detained in an insane asylum against his will unless actually insane.

Van Deusen v. Newcomer, 40 Mich. 90.

The writ of habeas corpus is the proper remedy and right of any person unlawfully restrained of his liberty in an asylum.

15 Am. & Eng. Enc. Law, p. 160 (6); 16 Am. & Eng. Enc. Law, p. 598 (4); *Palmer v. Buck*, 83 Mich. 528, 47 N. W. 355; *Re Dixon*, 4 N. Y. L. Bul. 84, 11 Abb. N. C. 118; *Re Le Donne*, 173 Mass. 552, 54 N. E. 244.

A statute which provides that an insane person may be committed to an asylum by others, and there held and detained without the right to institute proceedings for his own release, is unconstitutional and void.

16 Am. & Eng. Enc. Law, p. 599 (7); *Doyle's Petition*, 16 R. I. 537, 5 L. R. A. 359, 27 Am. St. Rep. 759, 18 Atl. 159; *Black Hawk County v. Springer*, 53 Iowa, 417, 10 N. W. 791; *Chavannes v. Priestley*, 80 Iowa,

317, 9 L. R. A. 193, 45 N. W. 766; *State v. Pritchett*, 106 N. C. 672, 11 S. E. 357; *State ex rel. Blaisdell v. Billings*, 55 Minn. 473, 43 Am. St. Rep. 524, 57 N. W. 206, 794; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633; *People ex rel. Atty. Gen. v. Lawton*, 30 Mich. 386.

Connor, J., delivered the opinion of the court:

The petition herein was filed by E. M. Land on behalf of Emmett Boyett on the 28th day of September, 1904, before his honor Judge Ferguson, setting forth: That Emmett Boyett was detained of his liberty by J. S. Mann, Esq., superintendent of the Hospital for the Dangerous Insane in the city of Raleigh, North Carolina. That such detention was by virtue of an order made by the judge of the superior court presiding at the November term, 1903, of Lenoir county. That at said term said Boyett, pursuant to indictment theretofore found by the grand jury, was put on trial charged with the murder of his wife, Lena Boyett. That upon his arraignment on said indictment he pleaded not guilty, and was upon such plea tried before the court and jury. That by the verdict of the jury he was acquitted of said charge. That to sustain his said plea he introduced evidence tending to show that he was insane at the time he killed his wife, and that it was upon such evidence that he relied for his acquittal. That, after said verdict was returned by the jury, his honor, the judge presiding, made the following order: "Whereas, Emmett Boyett was indicted at the above term of the Lenoir superior court for the murder of Lena Boyett, his wife; and whereas, upon trial of said indictment before the petty jury, duly impaneled to try the same, it was admitted by the prisoner's counsel that said prisoner did kill his said wife by shooting her; and whereas, said counsel pleaded insanity as a defense to said indictment; and whereas, the jury acquitted the said prisoner on the ground of insanity: It is therefore ordered and adjudged by the court, in the exercise of its discretion, in accordance with § 65, Acts of the general assembly of 1899 [p. 25] chap. 1, that said Emmett Boyett be at once committed to the Hospital for the Dangerous Insane, to be kept in custody therein as provided in said section, and until discharged in accordance with the provisions of § 67 of said act, or otherwise discharged according to law. Chapter 1 [p. 3], Acts 1899. The sheriff of Lenoir county is commanded at once to deliver said prisoner to the Hospital for the Dangerous Insane at Raleigh, and to the authorities governing the same." That no investigation has been

had for the purpose of determining the mental condition at any other time than that of the homicide. That when the verdict was rendered and the court committed him to the custody of the sheriff he moved the court that an inquiry as to his mental condition at that time be had. That the court refused the motion, and made the order set out in the record. Judge Ferguson issued the writ of habeas corpus as prayed for. Pursuant thereto, the officer in charge of the dangerous insane produced the body of the said Boyett, making return to said writ that the said Boyett was "confined in the Hospital for the Criminal Insane by virtue of the order of Judge Brown, one of the judges of the superior court of North Carolina, made at the November term, 1903, of the superior court of Lenoir county, a copy of which is herewith filed." Upon the hearing before his honor Judge Ferguson, a certified copy of the record in the case of *State v. Boyett* in the superior court of Lenoir county was introduced, by which the facts set out in the petition were verified. Dr. J. R. Rogers, the physician in charge of the hospital for the criminal insane of this state, filed an affidavit stating that he had given careful examination and study of said Boyett in reference to his mental condition, and that in his opinion Boyett "is of sound mind, and has entirely recovered from any mental derangement from which he may have suffered in the past." His honor denied the motion that Boyett be discharged, and remanded him to the custody of the superintendent of the hospital. From this order the petitioner appealed.

The order committing the petitioner to the Hospital for the Dangerous Insane was made pursuant to the provision of chapter 1, p. 3, Pub. Laws 1899, entitled "An Act to Revise, Consolidate, and Amend the Insanity Laws of This State." Section 65, p. 25, provides that, "when any person accused of the crime of murder . . . shall have escaped indictment, or shall have been acquitted upon the trial upon the ground of insanity, . . . the court before which such proceedings are had shall, in its discretion, commit such person to the Hospital for the Dangerous Insane to be kept in custody therein for treatment and care as herein provided," etc. Section 67, p. 26, provides that "no person acquitted of a capital felony on the ground of insanity, and committed to the Hospital for the Dangerous Insane, shall be discharged therefrom unless an act authorizing his discharge be passed by the general assembly." Other provisions are made in this section for the discharge of persons committed under § 65 upon indictments of lower grade. The petitioner concedes that the order of committal made by

his honor Judge Brown is authorized by the terms of the statute. He attacks its validity upon the ground that the statute (§ 65), in conferring the power to commit a person acquitted on the grounds of insanity at the time the act was committed, and (§ 67) prescribing the only mode by which he may be released from custody, violates both the state and Federal Constitutions, in that: First. No provision is made for giving the persons so acquitted notice, or an opportunity to be heard, or requiring the question of his insanity at that time to be inquired into; that, on the contrary, the court is empowered, "in its discretion," without any finding of facts in respect to his mental condition, to commit him to the hospital for an indefinite period of time. Second. That not only is there an absence of any provision by which, in a judicial proceeding, his mental condition can at any time thereafter be inquired into, but by express language he is deprived of his constitutional right to the writ of habeas corpus or any other remedial writ, the sole power to grant relief being conferred upon the legislature. These contentions, it must be conceded, present serious questions involving the liberty of the citizen and his constitutional rights. The right and duty of the state to provide for the care and treatment of its insane, with such confinement and restraint of their liberty as may be necessary for that purpose, is conceded. It is made the duty of the general assembly to do so. Const. art. 11, § 10. It is also conceded that the state may, pursuant to general laws, and after proper judicial proceedings, confine insane persons for their own protection and that of other persons. "The state, in respect to the care of the insane, owes a duty to these unfortunate people as well as to the public. . . . The state has undoubtedly the right to provide for the involuntary confinement of the harmlessly insane in order that the proper medical treatment may be given, and a cure effected." Tiedeman, *Pol. Power*, p. 106. It is also true that, to meet sudden emergencies, and prevent either self-destruction or injury or harm to other persons, an insane person may be restrained temporarily without any adjudication of his insanity. The writers and courts have not undertaken to define the limitations of the power which the state has to deal with these unfortunate people, except by the announcement of general principles essential to their welfare and the protection of the public. We do not propose to enter upon a discussion of this delicate subject. It is discussed with ability by Mr. Tiedeman in his work on *Limitations of the Police Power*, chap. 5. See also Buswell, *Insanity*, p. 33. A very different question 67 L. R. A.

is presented when the legislature undertakes to confer upon courts discretionary power to confine persons in asylums or hospitals, and makes no provision for notice or adjudication before the order for confinement, or for review of such discretion after the person is committed. It is well settled that a person acquitted by a jury upon the ground of insanity existing at the time of the commission of the act is entitled to all of the protection and constitutional rights as if acquitted upon any other ground. He enters his plea, and upon issue joined by the state puts himself upon his country. "It is probably the rule of law in every civilized country that no insane man can be guilty of a crime, and hence cannot be punished for what would otherwise be a crime. . . . Insanity, when it is proved to have existed at the time when the offense was committed, constitutes a good defense, and the defendant is entitled to an acquittal. If the person is still insane, he can be confined in an asylum until his mental health is restored, when he will be entitled to his release, like any other insane person." Tiedeman, 110. Campbell, J., in *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633, says: "There can be no reason to doubt the propriety of making provision to secure to such unfortunate persons protection and care in such a way as to prevent them injuring, or being injured, if they are dangerous, or in need of seclusion. The state has an ultimate guardianship over *non compos* in cases where it is necessary. But, inasmuch as such authority can only exist over those who are thus disqualified, the power of determining their condition is one of great importance, and one which especially involves judicial oversight. In this country, where all legislation must be within constitutional limits, and does not reach the full parliamentary range, private liberty can never be subjected to the mere discretion of any person. No one can be deprived of liberty without due process of law. . . . But the more serious difficulty is in the nature of the proceedings themselves. In the first place, the prisoner is sent into confinement without any legal investigation into his [mental] condition at that time, when he may be perfectly sane, and when, having been acquitted, he is entitled to all the privileges of an innocent man. . . . Neither judge nor expert has any power under our Constitution to select his own means and process of inquiry and pass *ex parte* upon the liberty of citizens." *Re Dowdell*, 169 Mass. 387, 61 Am. St. Rep. 290, 47 N. E. 1033. In *Re Lambert*, 134 Cal. 626, 55 L. R. A. 856, 86 Am. St. Rep. 296, 66 Pac. 851, it is said: "An order for the commitment of a person to an

insane hospital is essentially a judgment by which he is deprived of his liberty, and it is a cardinal principle in English jurisprudence that before any judgment can be pronounced against a person there must have been a trial of the issue upon which the judgment is given." In *State ex rel. Blaisdell v. Billings*, 55 Minn. 467, 43 Am. St. Rep. 525, 57 N. W. 206, 794, the court says: "While the state should take charge of such unfortunates as are dangerous to themselves and to others, not only for the safety of the public, but for their own amelioration, due regard must be had to the forms of law and to personal rights. To the person charged with being insane to a degree requiring the interposition of the authorities and the restraint provided for, there must be given notice of the proceeding, and also an opportunity to be heard in the tribunal which is to pass judgment upon his right to his personal liberty in the future." The statute under which the defendant was committed to an asylum in that case was in several respects similar to ours. The court declared it void. It is true that it is provided that the person acquitted is to be kept in "custody for treatment and cure." The fatal infirmity in the statute is that the power to commit is vested in the court to be exercised "in its discretion." No provision is made for notifying the person whose liberty is involved, nor is the court required to make any investigation either by itself, by the examination of witnesses, by calling to its aid medical experts, or otherwise. The order of his honor expressly recites in the language of the act that "it is therefore ordered and adjudged by the court in the exercise of its discretion." We approve the language of the court in *People ex rel. Ordway v. St. Saviour's Sanitarium*, 34 App. Div. 363, 56 N. Y. Supp. 431: "No matter what may be the ostensible or real purpose in restraining a person of his liberty, whether it is to punish for an offense against the law or to protect the person from himself or the community from apprehended acts, such restraint cannot be made permanent or of long continuance unless by due process of law." It is not necessary to discuss the question what is "due process of law," or to adopt any of the various definitions thereof. There is here, in no possible aspect, anything approaching the essential requirements of due process of law. An examination of the testimony in the case sent up as a part of the record and his honor's remarks to the jury show that he strongly and properly disapproved of the verdict. We are quite sure that his honor, in strict compliance with the statute, exercised a

sound discretion; but the difficulty lies in the fatal infirmity of the statute. As is well said: "The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done. The legislature may prescribe the kind of notice, and the mode in which it shall be given, but it cannot dispense with all notice." *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289. Doubtless the legislature, in its effort to deal with a difficult and embarrassing condition existing in the state respecting the care for that class of persons called criminal insane, and looking to legislation in other states upon the subject, enacted the statute without due regard to the constitutional limitations upon its power. The court, in *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633, thus accounts for a similar statute enacted by the general assembly of Michigan: "It is a result of the dangers which have been multiplied by the absurd lengths to which the defense of insanity has been allowed to go under the fanciful theories of incompetent and dogmatic witnesses. . . . No doubt many criminals have escaped justice by the weight foolishly given by credulous jurors to evidence which their common sense should have disregarded. But the remedy is to be sought by correcting false notions, and not by destroying the safeguards of private liberty." It may be that the wisdom of the legislature will find, within constitutional limitations, a remedy for the objectionable features of the statute. We do not wish to be understood as saying that a person acquitted of a grave crime upon the ground of insanity may not be detained for a reasonable time, so that by some appropriate proceedings the condition of his mind may, either under the direction of the judge presiding or some other judicial officer or commission, be examined into for the purpose of ascertaining whether his own safety and that of other persons or the public generally requires that he be committed to the hospital for treatment and care. It is well settled that it is not necessary that a jury trial be had; it is sufficient if the inquiry be had in some way and by some tribunal conforming to the constitutional requirement of due process of law. *Black Hawk County v. Springer*, 58 Iowa, 417, 10 N. W. 791; 16 Am. & Eng. Enc. Law, p. 599; *Nobles v. Georgia*, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87.

There is, however, another and equally fatal objection to the statute. Section 67 provides that a person acquitted of a capital felony and committed to the hospital cannot be released except by an act of the

legislature. It is a fundamental principle that every person restrained of his liberty is entitled to have the cause of such restraint inquired into by a judicial officer. The judicial department of the government cannot by any legislation be deprived of this power or relieved of this duty. It must afford to every citizen a prompt, complete, and adequate remedy by due process for every unlawful injury to his person or property. This is absolutely essential to a constitutional government. The legislature may make laws, prescribe rules of action, and provide remedies not provided by the Constitution; the judiciary alone can administer the remedy. It is inconceivable to the mind of an American citizen at all familiar with the fundamental principles of our system of government how it can be possible that a person restrained of his liberty must await the action of the legislature before he can have the cause thereof inquired into. *Doyle's Petition*, 16 R. I. 537, 5 L. R. A. 359, 27 Am. St. Rep. 759, 18 Atl. 159, the court held that a statute which permitted a person to be committed to an insane asylum and detained until discharged by a commission appointed by a justice of the supreme court was invalid. The principle upon which the decision is based is thus stated: Such commission, however, is to be appointed, not at the instance of the person confined, but only on application of some other person. . . . Inasmuch as the person confined cannot himself initiate the proceeding, or take any part in it when initiated by another, the effect of the act is to deprive the person of his liberty without due process of law. Notwithstanding the express provisions of the act, the court granted the writ of habeas corpus. The supreme court of Michigan, commenting upon a somewhat similar statute, says: "It practically leaves the liberty of the person confined to depend upon the uncontrolled pleasure of the inspectors." It will be observed that no duty is imposed upon the legislature to inquire into the mental condition of persons confined under the statute, or to take any notice of or action in regard to them. While this provision is invalid, and does not prevent the application for or relieve the judge of the duty to issue the writ of habeas corpus for the purpose of inquiring into the cause of the detention of the petitioner, it does not follow that he would be entitled to his discharge if committed in accordance with a valid law. Notwithstanding the invalidity of the statute under which the petitioner is committed, if it appeared from the return of the superintendent of the hospital or the evidence before the judge hearing the cause upon the re-

turn of the writ that the petitioner was then insane, and that he was a fit subject for restraint in the asylum or hospital, it would be his duty to direct his detention for a reasonable time, to the end that proceedings should be had before the clerk of the superior court, as prescribed by § 15, chap. 1, p. 6, of the Laws of 1899. Whatever power the courts may have possessed to deal with insane persons under their general chancery jurisdiction is now regulated by statute, and we find no authority for the admission of insane persons into the state hospitals otherwise than as prescribed by the statute. There can be no doubt of the duty and power of the court to issue the writ of habeas corpus when applied for in accordance with statutory provisions. *Buswell, Insanity*, 30; *Palmer v. Buck*, 83 Mich. 528, 47 N. W. 355; *Re Le Donne*, 173 Mass. 552, 54 N. E. 244. The judge does not find any fact in regard to the mental condition of the petitioner at this time. He sends to this court the affidavit of Dr. Rogers, the physician in charge of the Hospital for the Dangerous Insane, in which he says that he has made a careful study and examination of the petitioner, and that in his opinion he is now sane. In this condition of the record the cause should be remanded to his honor Judge Ferguson, with direction to ascertain the mental condition at this time of the petitioner. If he shall find, upon an examination, that his mental condition is such that he should be confined in the hospital, he will certify the same to the clerk of the superior court of Lenoir county, who will proceed, after notice to the petitioner, and inquiry made as provided by § 15, chap. 1, p. 6, of the Acts of 1899, to make such orders as shall be proper in the premises. *Buswell, Insanity*, p. 30, says: "In cases where a person, whether sane or insane, is detained or confined as a lunatic without authority of law, it appears that such person is entitled to be brought into court upon a writ of habeas corpus, in order that the question of the legality of his detention may be inquired into. But it is necessary that the affidavit should show that the detained person is not a dangerous lunatic, and that he is in a fit state to be removed; and the court may, if necessary, enlarge the time for making the return." If his honor shall find it more convenient, he may transfer the cause to the judge holding the courts of this district, who will proceed in the cause as herein directed. Let this order be certified to his honor Judge Ferguson and to J. S. Mann, Esq., superintendent of the Hospital for the Insane.

Remanded to judge for further findings.

J. H. LE ROY
v.
H. JACOBOSKY *et al.*

(136 N. C. 443.)

1. A guardian who is tenant in common of certain real estate with his wards is not personally liable as upon his own contract for breach of a contract to convey their interest, made without authority, where, in contracting to sell the whole tract, he signs the contract to convey personally, and also as guardian for the wards.
2. An agent who signs a contract to convey his principal's land thereby warrants his authority to make the contract, and is liable in damages to the other contracting party in case the authority does not in fact exist.
3. The measure of damages for breach by an agent who signs a contract to convey his principal's land and so warrants his authority to make the contract, is what the other contracting party loses by reason of the false assertion of authority, or the amount of money paid out, or the value of services rendered, or the special damages sustained.
4. The measure of damages for breach of a contract to convey real estate is the difference between the contract price and the market value of the property.
5. The liability of one, who, being tenant in common with his wards, contracts to sell the common property without authority to bind them for breach of his contract to convey his own interest and for breach of his warranty of authority to sign the contract on their behalf, cannot be tried upon one issue.
6. One contracting with an agent knowing that he has no authority to bind his principal upon the contract cannot hold him liable for the damages in case the principal refuses to carry out the contract.
7. A contract by a guardian to sell his wards' land in advance of legal authority is contrary to public policy and void.
8. The proceeds of a judicial sale of lands, confirmed by the court, which are held subject to the immediate demand of the party entitled to them, are subject to attachment by his creditors in the hands of the clerk of court.
9. Proof of the signatures of nonresident parties to a contract who are alive may be made by one of the parties thereto.
10. One who signed an option contract to convey land after the expiration of

the option and without any consideration moving to him is not bound thereby.

(November 15, 1904.)

CROSS APPEALS from a judgment of the Superior Court for Pasquotank County in an action brought to recover damages for refusal to convey real estate; plaintiff appealing from so much of the judgment as denied a portion of the damages claimed: defendants Jacobosky appealing from so much as sustained an attachment; and defendant Weisel appealing from so much as held him bound by the contract. *Affirmed on plaintiff's and defendants Jacobosky's appeal. Reversed on defendant Weisel's appeal.*

Statement by Connor, J.:

Plaintiff's Appeal.

The defendants H. Jacobosky, A. Jacobosky, and S. H. Weisel were, on March 13, 1903, the owners, as tenants in common with Rebecca Weisel and Sadie Weisel; the last three being infants, and the said H. Jacobosky being their general guardian, residing in the state of Virginia. On the said 13th day of March, 1903, the said H. and A. Jacobosky, under the firm name and style of Jacobosky Brothers, and the said H. Jacobosky, as guardian of the said wards, entered into a written agreement with the plaintiff, as follows:

Portsmouth, Va., March 13, 1903.

In consideration of Twenty-five Dollars paid to us, we hereby agree to sell to J. H. Le Roy, the property and wharf on Water St. in Elizabeth City, N. C., known as the "Weisel property" for the sum of \$22,500, leaving a balance due us of \$22,475. This option holds good from this date until April 13, 1903. Said property cannot be delivered to purchaser until present leases expire which are known to Mr. Le Roy.

[Signed] Jacotosky Bros.,
 H. Jacobosky,
Gd'n. of Simon, Fannie, and Sadie Weisel.
 J. H. Le Roy,
 S. H. Weisel.

The said S. H. Weisel reached his majority prior to April 23, 1903, on which day he signed the agreement. After the execution of the agreement, the parties, tenants in common, the adults in their own behalf and the infants appearing by their next friend, filed their petition in the superior court of Pasquotank county, asking for an order for a sale of the property. After proper proceedings had in the premises, the land was brought to public sale by the com-

NOTE.—For another case in this series as to personal liability of guardian on contract made for ward, see *Andrus v. Blazzard*, 54 L. R. A. 354.

As to personal liability generally of one who contracts as agent without authority to do so, see *Farmers' Co-op. Trust Co. v. Floyd*, 12 L. R. A. 346, and cases in note thereto; also *Kansas Nat. Bank v. Bay*, 54 L. R. A. 408.
67 L. R. A.

missioner duly appointed, and bought by B. F. White and J. B. Flora at the price of \$25,000. The sale was confirmed and title made to the purchasers. The defendants having refused to convey to the plaintiff, who duly tendered the amount of the contract price within the time named, he brought this action for the purpose of recovering damages for the breach of the contract. The court submitted the following issues to the jury: "(1) Are the defendants H. and A. Jacobosky indebted to the plaintiff on breach of contract, and, if so, in what sum? (2) Is the defendant H. S. Weisel indebted to the plaintiff, and, if so, in what amount?" The plaintiff introduced the contract. He testified that he was present at the time the contract was signed, and that he knew nothing of the ages of the infants, except that it was signed as guardian for them: that he gave a check for \$25, and as he went out of the front door of the defendants' store after the check was given the defendant H. Jacobosky said that the Weisels were minors, and it would be necessary to obtain an order of court to make title, and that he would get the order. He also said, if anyone raised the price, he would buy it in and make the title. The plaintiff testified that he tendered the money. The defendants H. and A. Jacobosky said that they admitted that the witness had offered to comply with this contract, but that S. H. Weisel had since become of age, and refused to carry it out. Certain letters were put in evidence tending to show a demand of the plaintiff and refusal of the defendants to comply with the contract. The court charged the jury that, if they believed the evidence, they should answer the first issue, "Yes; twelve twenty-sevenths of \$25,000 and \$25" (that being the interest of the defendants H. and A. Jacobosky). The plaintiff excepted, claiming the entire damage, or difference in the contract price and the amount for which the property sold. From a judgment on the verdict the plaintiff appealed.

Mr. E. F. Aydlett for plaintiff.

Messrs. Ward & Thompson for defendants.

Connor, J., delivered the opinion of the court:

The only question presented upon the plaintiff's appeal is whether the defendant H. Jacobosky is personally liable on the contract in respect to the interests or shares of his wards, Sadie and Rebecca Weisel. It will be well to bear in mind the fact that the action is on the contract and for breach thereof; that the issues are directed to the inquiry of the indebtedness arising

from a breach of the contract. The brief of the plaintiff's counsel maintains and cites authorities to show that the defendant guardian is personally liable in the same manner and to the same extent as he is on the contract in respect to his own share or interest in the land. He concedes that there can be no decree for specific performance as against the infants. The defendant concedes that he had no authority, as guardian, to enter into any contract to sell the real estate of his wards. He says that this was well known to the plaintiff, and that by his signature as guardian the plaintiff knew that he was contracting only in his representative capacity, and not personally. The plaintiff says that, conceding this to be true, the law, without regard to the intention of the parties, fixes the defendant with a personal liability; that someone was to be bound, and, if the infants were not bound by the contract, the guardian must be so personally, or there was no contract. It has been said by quite a number of judges that when, by reason of the absence of authority, the principal is not bound upon the contract, the agent must be. *Ellsworth, J.*, in *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429, says: "We are aware that it is not unfrequently laid down as a rule of law that, if an agent does not bind his principal, he binds himself; but this rule needs qualification, and cannot be said to be universally true or correct." *Mr. Mechem* says: "The rule sometimes asserted that, whatever the agent fails to create a right of action against his principal upon the contract, he makes himself liable thereon, cannot, therefore, be sustained as a general rule." *Mechem, Agency*, § 550. Referring to the cases holding this doctrine. *Selden, J.*, says: "The authority of these cases has been somewhat shaken, . . . and in England as well as in several of the United States the principle upon which they rest, if they are supposed to present the only ground of liability of the agent, has been substantially repudiated. . . . If it were necessary, in disposing of the present case, to decide the question whether, as a general principle, one entering into a contract in the name of another without authority is to be himself holden as a party to the contract, I should hesitate to affirm such a principle. By that rule courts would often make contracts for parties which they neither intended nor would have consented to make." *White v. Madison*, 26 N. Y. 117. Approved in *Taylor v. Nostrand*, 134 N. Y. 103, 31 N. E. 246; *Wallace v. Bentley*, 77 Cal. 19, 11 Am. St. Rep. 231, 18 Pac. 788; *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146; *Duncan v. Niles*, 32 Ill. 532, 83 Am. Dec. 293; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am.

Rep. 240. "Some of the authorities hold that in all written contracts, except specialties, if the pretended agent has so worded the instrument as to make it appear that he is acting for or on behalf of another, and not himself,—having no authority to do so,—he binds himself personally, and will be liable in an action on the contract itself, for the reason that he must have intended to bind someone; and, if he was unauthorized to bind the principal, he is estopped to deny that he intended to bind himself, as in that case no one whatever would be bound. But the objection to this doctrine is that it would require the court to make a new contract for the parties, or one into which they have not themselves entered; and the courts now generally repudiate it. While the decisions are not uniform, the great weight of modern authority is that the agent is not personally bound on the contract itself, and cannot be held liable in an action thereon." Reinhard, Agency, § 307; Clark, Contr. 274; *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64. The same view has been held by this court in *Delius v. Cawthorn*, 13 N. C. (2 Dev. L.) 90. The defendant executed a note payable to the plaintiff in the name of one Johnson by himself as agent. The action was upon the bond. It was shown that the defendant had no authority to sign Johnson's name. The court held that the action could not be maintained; that it was not the bond of the agent. Toomer, J., says: "It is believed the elementary writers, in speaking of the personal liability of the agent because he has no responsible principal, do not mean to convey the idea that the instrument becomes the deed of the agent when it had been signed, sealed, and delivered in the name of the principal, who was bound on its face, merely because the agent had exceeded his authority, or had acted without authority. But they intend simply to declare his personal responsibility, which may be enforced by bill in equity on the ground of fraud, or by special action on the case." The learned judge cites a number of cases to sustain the conclusion reached by him. Judges Henderson and Hall wrote concurring opinions. In *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146, the action was upon a promissory note signed by the defendant as "agent for David Perry," and the court held that an action could not be maintained against him on the bond, but that he would be responsible in a special action on the case. This opinion was written by Parker, Ch. J., and has been followed by the Massachusetts court. In *Russell v. Koonce*, 104 N. C. 237, 10 S. E. 256, Smith, Ch. J., says: "The defendant does not become individually liable because his

authority to bind his principal is disowned by the latter, unless the consideration is received by the agent, out of which arises an implied promise to pay. . . . In such case the agent may become personally answerable upon the contract, but otherwise the action must be for damages for his false assumption of authority to act;" citing *Delius v. Cawthorn*, 13 N. C. (2 Dev. L.) 90. The cases cited by the plaintiff in which the guardian has been held personally liable upon promissory notes executed by him in his representative capacity show that he received the consideration, or that some service was rendered; as in *Fessenden v. Jones*, 52 N. C. (7 Jones, L.) 14, 75 Am. Dec. 445, where the plaintiff was a physician, and was called to attend the slaves of the defendant's ward, and the guardian was held personally liable in an action of assumpsit. Of course he could reimburse himself out of the estate of his ward. In *McKay v. Royal*, 52 N. C. (7 Jones, L.) 426, the plaintiff rendered service to the executor as attorney in the settlement of the estate. He was held personally liable, the court saying: "If the disbursement be a proper one, she will be allowed a credit in the settlement of her account with the estate." *Kessler v. Hall*, 64 N. C. 61. In *McLean v. McLean*, 88 N. C. 396, Ashe, J., says: "It is well settled by the almost unvarying current of authorities that the promissory note of an administrator or executor, founded upon the consideration of forbearance or the possession of assets, will be binding upon him in his individual capacity, although he should sign the note as 'administrator or executor.'" It will be observed that the note must be founded upon sufficient consideration "as of assets or forbearance." This court, in *Morehead Bkg. Co. v. Morehead*, 122 N. C. 318, 30 S. E. 331, followed the early cases, and held the executrix liable personally upon a note executed in her representative capacity in consideration of the surrender of a note against her testator and the extension of time for payment. The decision was put upon the fact that she had assets and obtained forbearance. The first case in our Reports is *Sleigheter v. Harrington*, 6 N. C. (2 Murph.) 332. Ruffin, J., rests the decision of that case upon the fact that the executor had assets applicable to the payment of the debt surrendered, saying that the debt "must be such as the creditor would be entitled to recover if he were then suing the executor in his representative capacity for his debt. The executor is the mere holder, as it were, of money which is in justice and conscience the money of another person." The question was again before the court in *Williams v. Chaffin*, 13 N. C. (2 Dev. L.)

336, when the same eminent judge said that, if there were no other consideration, and the executor had no assets applicable to the debt, the promise was void. How far the doctrine has been modified by the change in the law by which the status of the creditor of a deceased person is fixed in respect to assets it is not necessary to inquire. It must be conceded that the authorities are not uniform. In *Taylor v. Davis*, 110 U. S. 330, 28 L. ed. 163, 4 Sup. Ct. Rep. 147, and *Mason v. Caldwell*, 10 Ill. 196, 48 Am. Dec. 330, it is held that the person making the contract in his representative capacity without authority is bound upon the contract. After reviewing the cases which had been then decided, Ellsworth, J., in *Ogden v. Raymond*, 22 Conn. 379, 58 Am. Dec. 429, says: "The question in these cases will be found to be one of construction of the language and meaning of the person who attempts to act for another, and is a question often attended with very great difficulty and doubt; but, when the intention is ascertained, that intention should ever be the rule for deciding whose contract it is. The cases are exceedingly conflicting and unsatisfactory, though they contain some general principles universally acquiesced in." All of the authorities concur in holding that the court will ascertain the intention by reference to the written contract and the surrounding circumstances. Referring to those cases in which the court has rejected the words showing that the contract is signed as agent, or, as in this case, "Guardian of Simon, Sadie and Rebecca Weisel," and holding the agent liable personally upon the contract, Mr. Mechem says: "This, however, as has been well said, is rather to make a new contract for the parties than to construe the one which they have made for themselves. Where, however the agent in undertaking, without authority, to bind another, has used apt words to bind himself, there is abundant reason and justice in holding him liable upon the contract itself as made. . . . The agent is only liable on the contract in those cases in which he has used apt words to bind himself, or has expressly pledged his personal responsibility, or in which the credit was given to him personally." Mechem, Agency, § 550. We do not think that the word "guardian," etc., can be rejected as surplusage, or treated as *descriptio personarum*.

It will be noted that the property belonged to the defendant and his wards as tenants in common. The contract was signed "Jacobosky Bros." first, and "H. Jacobosky, Guardian," etc., next, and then by the plaintiff. He must have thereby known that the defendant was making the contract in a dual capacity. He accepted it with this

knowledge. In a few moments after signing, and before he left the store, the defendant called his attention to the fact that, as the Weisel children were infants, it would be necessary to obtain an order of the court to make a perfect title. The plaintiff certainly did not expect the defendant as guardian to make a deed. He would not have been under any obligation to accept such a deed. The conduct of the parties shows clearly that they expected and intended that an order of sale should be obtained. The defendant promptly employed learned and able counsel to procure the order. No other construction can be reasonably put upon the contract than that the defendant was acting in respect to the interests of his wards, in his representative capacity. To do otherwise would be to misinterpret the language and conduct of the parties. The language of Judge Toomer is very much in point. In *Delius v. Cauthorn* he says: "The present action can only be sustained by making the instrument the deed of the defendant. Is there any principle of law which can so entirely defeat the intentions of the parties and prevent the truth of the transaction as to change the nature and character of the instrument and make it the deed of the defendant?" Ruffin, J., in *Fowle v. Kerchner*, 87 N. C. 56, says: "The legitimate aim of all interpretation is, not to make a contract for the parties, or to modify the one they have made for themselves, but simply to ascertain their intentions and give them effect if not inconsistent with some policy of the law; and in the effort to arrive at their intentions it is always proper for the court to consider, not only the precise terms of the instrument, but the circumstances under which it was made, the situation of the parties, and the manner in which they have borne themselves with reference to it." After citing authorities showing the trend of judicial opinion upon the subject, the learned justice says: "In other words, the courts now regard the particular form of executing a contract, not under seal, by an agent, as being wholly immaterial, provided the context of the instrument and the circumstances under which it was executed show that it was a ministerial act on his part."

We are of the opinion that the defendant H. Jacobosky is not personally liable on the contract in respect to the shares of his infant wards. It does not follow, however, that, because an agent, or one acting in a representative capacity, is not liable on the contract as made, a party who is misled, or who parts with something of value, or otherwise acquires legal rights, is without remedy. As is said by the court in *Delius v. Cauthorn*, *supra*, in a special action on

the case under the former system of pleading and practice, or under our present system in a civil action either upon an implied assumpsit, when he has received the consideration, or for damages, he has an ample remedy. Seiden, J., in *White v. Madison*, 26 N. Y. 117, says: "Whenever a person enters into a contract as agent for another, he warrants his own authority, unless very special circumstances or express agreement relieve him from that responsibility. . . . An action upon such warranty must always be appropriate where personal liability attaches to an agent in consequence of his contracting without authority." Parker, Ch. J., in *Taylor v. Nostrand*, 134 N. Y. 108, 31 N. E. 246, referring to this case, says: "In a carefully considered opinion by Judge Selden in *White v. Madison* the conclusion was reached that the liability of the agent rests on the ground that he warrants his authority, not that the contract is to be deemed his own; and on the question of damages it was held that the agent's liability is not necessarily measured by the contract, but embraces all injury resulting from his want of power, which was held to include the costs of an unsuccessful action against the alleged principal." *Russell v. Koonce*, 104 N. C. 237, 10 S. E. 256. The measure of damages is what the plaintiff lost by reason of the false assertion of agency or of authority, or the amount of money paid out, or the value of the service rendered, or such special damages sustained by the plaintiff by reason of the defendant's wrong in undertaking to act for another without authority. *Hall v. Crandall*, 20 Cal. 507, 89 Am. Dec. 64. If the plaintiff had set out in his complaint the contract, with a statement of the facts out of which his cause of action accrued, he would have been entitled to have had appropriate issues submitted to the jury presenting the several phases of his case; but he simply alleges that the defendants contracted with the plaintiff in writing to sell and convey to him that certain piece of property, etc. In making his proof he introduces the contract, by which it appears that, in respect to the shares of the infants, the defendant H. Jacobosky contracted as guardian. He did not ask permission to amend his complaint, but rested his right to recover upon the theory that the entire contract was the personal obligation of the defendant. There was no allegation upon which he could recover damages of the defendant upon this view of the case. His measure of damages in the action upon the contract as against Jacobosky Brothers is the difference between the contract price and the market value of the land, ascertained by a public sale. In an action against H. Jacobosky 67 L. R. A.

for representing himself as having authority to make the contract to sell the infants' share or interest entirely different questions in regard to damages were involved. The action in one respect was for breach of contract; in the other for asserting that he had authority to make the contract for his wards. These separate and distinct actions could not be tried upon one issue, and, upon the pleadings, but one issue could have been submitted. This is not a mere matter of form, but of substance, affecting the substantive rights of both parties. We are, however, of the opinion that in any aspect of the case his honor correctly instructed the jury. Mr. Reinhard, in his work on Agency, § 308, says: "If the party with whom the agent has contracted knew that the agent had no authority, or was cognizant of all the facts upon which the assumption of authority was based,—as, for example, where both parties labored under a mistake of law with reference to the liability of the principal,—the agent is not liable either in tort or upon the contract." *Newport v. Smith*, 61 Minn. 277, 63 N. W. 734; *Baltzen v. Nicolay*, 53 N. Y. 467. In *Michael v. Jones*, 84 Mo. 578, the justice writing for the court says: "But I am satisfied that under the best considered modern decisions the principle invoked by the plaintiff cannot be carried to such an extent. The true rule, I think, is . . . that where all the facts are known, to both parties, and the mistake is one of law as to the liability of the principal, the fact that the principal cannot be held is no ground for charging the agent with liability." *Ruffin, J., in Fowle v. Kerchner*, 87 N. C. 56, says: "The general rule is that, whenever a party assumes to act as agent for another if he have no authority, or if he exceed his authority, he will be held to be personally liable to the party with whom he deals, for the reason that, by holding himself out as having authority, he misleads the other party into making the engagement. But this rule is founded upon the supposition . . . that the want of authority is unknown to the other party, or, if known, that the agent undertakes to guarantee a ratification of the act; and when the want of authority is known, and it is clear that the agent did not undertake to guarantee a ratification, it results that the agent is not personally bound." Of course, for manifest reasons, there is no suggestion that the guardian undertook to guarantee the ratification of his wards. "In the absence of all agreement, express or implied, to be personally bound, there can be found no case, we apprehend, in which an agent has been held responsible who has not been guilty of fraud either actual or constructive." There

can be no fraud when the person with whom the agent deals knows that he has no authority to bind his principal, or knows the character and extent of his agency. An examination of the many cases cited by the authors of works on agency discovers an absence of uniformity upon this question. It may be traced to the effort of the judges to escape from the early decisions holding that the agent acting without or in excess of authority becomes liable upon the contract, discarding the intention of the parties, and other considerations. The liability rests upon other, and, we think, more scientific, principles. The remedy for the injured party is ample.

The defendant also calls our attention to authorities holding that "a contract by a guardian to sell the ward's real estate, in advance of any legal authority, is contrary to public policy, and void." 15 Am. & Eng. Enc. Law, 2d ed. p. 57; *Zander v. Feely*, 47 Ill. App. 659. The law expressly provides the manner and purpose for which a guardian may sell his ward's real estate. The facts of this case show the danger of permitting a guardian to enter into a contract otherwise than is provided by law. After the defendant made this contract it was to his interest to prevent the land bringing more than the contract price, and, although he did not do so, and the commissioner obtained more than the price agreed upon, it may be easily seen how, if so disposed, he may have suppressed the bidding. We think the principle is founded upon reason and sound policy. Of course, if the contract was void for the reason assigned, the court would not enforce or give damages for a breach of it, but leave the parties as it found them. *York v. Merritt*, 77 N. C. 213.

The judgment must be affirmed.

Defendant Jacobosky's Appeal.

The main facts in this appeal are similar to those in that of the plaintiff, and, in addition thereto, the following will be sufficient to show the grounds of the defendants' exceptions: The defendants moved to dismiss the attachment proceedings upon the ground set out in their affidavits. Judge Council, who presided at the previous term of the court, found the facts in regard thereto, and refused the motion, and the defendants entered their exception. They further contend that the attachment should not be levied upon the money in the hands of the clerk of the superior court, and his honor refused to dismiss for that reason. The defendants objected to the introduction of the contract, for that the same had not been properly probated. The record shows that the execution of the contract was proved as

to Jacobosky Brothers and H. Jacobosky, guardian for Simon, Fannie, and Sadie Weisel, upon the oath and examination of J. H. Le Roy, one of the parties thereto, and as to him the execution thereof was acknowledged; that as to S. H. Weisel the execution was acknowledged before a notary public in Norfolk, Virginia, whose certificate was afterwards submitted to the clerk of the superior court of Pasquotank county. and the instrument ordered to be recorded. There also appears in the record an affidavit bearing date March 21, 1903, made by J. H. Le Roy before the clerk of the superior court, to the effect that he knew the handwriting of Jacobosky Brothers and H. Jacobosky, having often seen them write; and, further, that the names of Jacobosky Brothers and H. Jacobosky are in the handwriting of H. Jacobosky and Jacobosky Brothers, and that both were present when H. Jacobosky signed the same, and both adopted the signature. His honor admitted the contract, and the defendants excepted.

We concur with Judge Council in his conclusions, both of law and fact, upon the motion to dismiss. There were no antagonistic relations on the part of counsel. We also concur in the conclusion that the money proceeds of the sale of the land in the hands of the clerk were subject to attachment. The sale had been confirmed, and the cash payment made to the commissioner, who had paid it to the clerk. He held it subject to the immediate demand of the defendants. The question is expressly so decided in *Gaither v. Ballew*, 49 N. C. (4 Jones, L.) 488, 69 Am. Dec. 763, and the authorities reviewed, overruling *Alston v. Clay*, 3 N. C. (2 Hayw.) 171, and *Overton v. Hill*, 5 N. C. (1 Murph.) 47; *Williamson v. Nealy*, 119 N. C. 341, 25 S. E. 953. We see no valid objection to the probate of the contract. There being no witness to the instrument, and the parties, except Le Roy, being nonresidents, it was proved as prescribed by § 1246 (9) of the Code. All the parties being alive, we can see no good reason why this proof may not be made by Le Roy, a party to the instrument. *Clark v. Hodge*, 116 N. C. 761, 21 S. E. 562. We do not find any merit in either of the exceptions in regard to the admission of the contract. His honor correctly held that the measure of the plaintiff's damage was the difference between the contract price and the value of the land. *Nichols v. Freeman*, 33 N. C. (11 Ired. L.) 99; *Sedgw. Damages*, § 1006; 2 *Warvelle, Vendors*, p. 959; *Joyce, Damages*, § 1758. The defendants, having sold the land at public auction and received the proceeds, are liable for the difference between the contract price and the amount received by them. That the con-

tract is enforceable, and therefore that an action for damages for breach thereof may be maintained, is well established. *Rodman v. Robinson*, 134 N. C. 503, 65 L. R. A. 682, 101 Am. St. Rep. 877, 47 S. E. 19.

There is no error in the judgment against Jacobosky Brothers. *Affirmed*.

Appeal of Defendant S. H. Weisel.

The defendant S. H. Weisel insists that he was not a party to the contract when it was executed, and signed it without consideration after the option had expired, and that he is not bound thereby. It will be noted that the option expired April 23, 1903, and the contract was signed by Weisel April 28th. As to him it is without any consideration. He promised, on April 28th, to convey to the plaintiff the land on the 23d of April of the same year, which is an impossibility. We cannot see how it is possible for him to commit a breach of such an agreement. The contract made by Weisel was impossible of performance, and, of course, there could never be a breach of it. "Physical impossibility means here practical impossibility according to the state of knowledge of the day; as, for example, a promise to go from New York to London in one day, or to discover treasure by magic, or to go around the world in a week." 9 Cyc. Law & Proc. p. 326. "If one promises to do what cannot be done, and the impossibility is not only certain, but perfectly obvious to the promisee as if the promisee were to build a common dwelling house in one day,—such a contract must be void for its inherent absurdity." 2 Parsons, Contr. 9th ed. 673. "An agreement may be impossible of performance at the time when it is made, and this in various ways. It may be impossible in itself,—that is, the agreement itself may involve a contradiction; as, if it contains promises inconsistent with one another, or with the date of the agreement." Pollock, Principles of Contr. p. 398. "Obvious and absolute physical impossibility, apparent upon the face of the promise, and thus known to the parties, renders the promise void. Thus, a charter-party executed on the 15th of March, covenanting that the ship would proceed from where she then lay on or before the 12th of February, was held void." Beach, Modern Law of Contracts, § 222. The execution of the contract was not a ratification of his guardian's agreement, and could not be, for the reason that the time within which the guardian had promised to sell was past, and for the further reason that his agreement, being against public policy, was void. The exception of the defendant Weisel must be sustained, and a new trial ordered as to him.

New trial.

67 L. R. A.

E. M. REDD, Appt.,

v.

EDNA COITTON MILLS.

(136 N. C. 342.)

1. The blowing of whistles at factories to regulate and direct the order of work is not a nuisance *per se*.
2. Equity will not enjoin the blowing of a whistle at a factory, where it is not satisfied that it amounts to a nuisance, until the fact of nuisance has been established by action at law.

(November 15, 1904.)

A PPEAL by complainant from a judgment of the Superior Court for Rockingham County in favor of defendant in a suit to enjoin the blowing of a whistle by the defendant in such a manner as to constitute a nuisance. *Affirmed*.

The facts are stated in the opinion.

Messrs. Watson, Buxton, & Watson for appellant.

Messrs. Scott & Reid and Glenn, Manly, & Hendren, for appellee:

From the singular and nervous temperament of plaintiff it was clear that he was and is abnormal, and that noises which disturb him are not of such character as the court will restrain, or would be declared public or private nuisances, and thus controlled by the court.

Rogers v. Elliott, 146 Mass. 349, 4 Am. St. Rep. 319, 15 N. E. 768; *Powell v. Bentley & G. Furniture Co.* 34 W. Va. 804, 12 L. R. A. 53, 12 S. E. 1085; *Baltimore v. Fairfield Improv. Co.* 87 Md. 352, 40 L. R. A. 494, 67 Am. St. Rep. 350, 39 Atl. 1081; *Dittman v. Repp*, 50 Md. 516, 33 Am. Rep. 327.

For any of those acts which are in the nature of a public nuisance, no individual is entitled to an action, unless he has received extraordinary and particular damage not common to the rest of the community.

Gordon v. Baxter, 74 N. C. 470.

And the special injury must differ, not

NOTE.—For another case in this series as to injunction to restrain blowing of factory whistle, see *Hill v. McBurney Oil & Fertilizer Co.* 52 L. R. A. 398.

As to right to injunction or damages for discomfort caused by noise generally, see in this series, *Gainesville, H. & W. R. Co. v. Hall*, 9 L. R. A. 298; *Wylie v. Elwood*, 9 L. R. A. 726; *Powell v. Bentley & G. Furniture Co.* 12 L. R. A. 53, and note; *Jones v. Erie & W. Valley R. Co.* 17 L. R. A. 758; *Austin v. Augusta Terminal R. Co.* 47 L. R. A. 755; *Chicago G. W. R. Co. v. First M. E. Church*, 50 L. R. A. 488; *Louisville & N. Terminal Co. v. Jacobs*, 61 L. R. A. 188; and *Froelicher v. Oswald Iron Works*, 64 L. R. A. 228.

merely in degree, but likewise in kind, from that sustained by the general public.

14 Enc. Pl. & Pr. pp. 1095, 1145; 21 Am. & Eng. Enc. Law, 2d ed. pp. 713, 714.

The whole matter should be left to a jury.

Atty. Gen. v. Blount, 11 N. C. (4 Hawks) 384, 15 Am. Dec. 526; *Clark v. Lawrence*, 59 N. C. (6 Jones, Eq.) 83, 78 Am. Dec. 241; *Simpson v. Justice*, 43 N. C. (8 Ired. Eq.) 115; *Ellison v. Washington*, 58 N. C. (5 Jones, Eq.) 57, 75 Am. Dec. 430; *Barnes v. Calhoun*, 37 N. C. (2 Ired. Eq.) 199; *Powell v. Bentley & G. Furniture Co.* 34 W. Va. 804, 12 L. R. A. 53, 12 S. E. 1085; 14 Enc. Pl. & Pr. pp. 1131, 1132; *Irwin v. Dirion*, 9 How. 10, 13 L. ed. 25; *Shields v. Arndt*, 4 N. J. Eq. 235.

Unless the nuisance has been previously established at law, it must be "a strong and mischievous case of pressing necessity" to entitle the party to an injunction.

St. James Church v. Arrington, 36 Ala. 546, 76 Am. Dec. 332; *Nelson v. Milligan*, 151 Ill. 462, 38 N. E. 239; *Atty. Gen. ex rel. Eason v. Perkins*, 17 N. C. (2 Dev. Eq.) 38.

Private rights must yield to public convenience.

Daughtry v. Warren, 85 N. C. 137; *Dorsey v. Allen*, 85 N. C. 361, 39 Am. Rep. 704.

Town dwellers must take the good with the bad, and this includes noise, dust, smoke, etc.

Hyatt v. Myers, 73 N. C. 232.

Montgomery, J., delivered the opinion of the court:

This action was brought by the plaintiff against the defendant for the recovery of damages alleged to have been sustained by means of a nuisance maintained by the defendant, and to have the nuisance abated by injunctive process. The injury for which damages are claimed is alleged to be to the health of the plaintiff's family and himself, and the nuisance the blowing of a steam whistle at the early hours of 4:30, 5:30, and 5:50 o'clock A. M., for the space of from two to seven minutes duration. The whistle is attached to the engine of the defendant company, and its blasts are declared to be "long, shrill, shrieking, discordant, startling, terrific, awakening the plaintiff and his family, disturbing his and their sleep, and seriously interfering with the reasonable enjoyment of their home, and seriously impairing their health. Before the defendant had answered, the plaintiff served a notice upon defendant that a motion would be made before the judge of the district for an order restraining the defendant from blowing the whistle of its engine between the hours of 9 P. M. and 6:30 A. M. Upon the plaintiff's complaint and affidavits and the defendant's affidavits 67 L. R. A.

the motion was denied, and the plaintiff appealed.

From the plaintiff's complaint and affidavits there was evidence going to show that for years the defendant's whistle had been blown at 4:30, 5:30, and 5:50 o'clock A. M.; that the blasts were from two to seven minutes long; that they were shrill, startling, shrieking, and terrific; that the night's rest of the plaintiff and several other families was broken up by the blasts of the whistle, the plaintiff's health impaired, and numbers of other families affected with nervousness. The evidence of the plaintiff further tended to show that the property of the plaintiff and others, situated as his and theirs was in respect to the mill, had depreciated in value by reason of the blowing of the whistle. The evidence afforded by the affidavits of the defendant tended to show that the blowing of the whistle did not disturb the sleep of the affiants, or produce discomfort in their homes; that the blasts of the whistle were useful to the defendant in the conduct of its business; that the property in the neighborhood had not been impaired in value; that the evidence contained in plaintiff's affidavits was that of his friends and kinspeople, and that his health had not been affected by the blasts of the whistle, but was due to other causes, he being an extremely nervous and excitable man. We think his honor was right in refusing to grant the injunction. The blowing of whistles at factories to regulate and direct the order of work may be necessary to the proper conduct of business; certainly it is not a nuisance *per se*. Such sounds and noises as these whistles are capable of making can become nuisances, however, and the protecting arm of the law can be invoked to prevent such. Injury to health and destruction of the comforts of one's home can be accomplished by frightful noises just as well as by means of noxious and offensive odors. *Dorsey v. Allen*, 85 N. C. 358, 39 Am. Rep. 704. But the courts are always slow to interfere by injunction in the conduct and management of business enterprises. Of course, where a nuisance is established by the evidence, no private enterprise for the mere purpose of bringing gain to its owner can be allowed to destroy one's home or to impair his health. Both are irreparable injuries, and no damage can compensate a man for the destruction of his home or for the undermining of his health. *Clark v. Lawrence*, 59 N. C. (6 Jones, Eq.) 83, 78 Am. Dec. 241; *Barnes v. Calhoun*, 37 N. C. (2 Ired. Eq.) 199. In the present case, however, the evidence does not satisfy us that the blowing of the whistle by the defendant amounted to a nuisance. In such a

case under the old practice—that is, where the court of equity was not satisfied upon all the evidence that the thing complained of was a nuisance—there would be no interference or action until the fact of nuisance had been established by law. *Simpson v. Justice*, 43 N. C. (8 Ired. Eq.) 115. So here we think the jury, by their verdict, ought to pass upon the evidence, and find, under the instructions of the judge, whether or not the manner in which the whistle is blown was a nuisance; that is, whether or not the plaintiff's health and home have been impaired and injured by the blowing of the whistle.

No error.

Willie Hall GREEN, by Next Friend, *Appt.*,
v.

WESTERN UNION TELEGRAPH COMPANY.

(136 N. C. 489.)

1. Failure of a telegraph company to deliver a message properly addressed, which requests the sendee to meet a train to arrive on the night of the transmission of the message, until it is called for by the sendee at company's office on the following day, raises a presumption of negligence.
2. Negligence in the transmission of a telegram is shown by the making of such a change in the name of the sendee that a person answering to the substituted name cannot be found.
3. A telegraph company may be held liable for damages for mental anguish where, by reason of its failure to deliver a telegram, friends fail to meet a sixteen-year-old girl who arrives after midnight in a strange city and is compelled to drive two miles in company with a strange driver in search of their residence.

(November 15, 1904.)

A PPEAL by plaintiff from a judgment of the Superior Court for Halifax County in favor of defendant in an action brought to recover damages for failure promptly to deliver a telegram. *Reversed.*

Statement by Douglas, J.:

The material facts are thus briefly stated

by the defendant: This is the plaintiff's appeal from a judgment sustaining the defendant's demurrer. The complaint states that the plaintiff was a girl of 16, living in Weldon, the daughter of Isaac E. Green. That the defendant telegraph company maintained offices at Weldon and Columbia, and on September 23, 1903, she left Weldon to go to Spartanburg, S. C., via Columbia, and that it was necessary for her to remain over in Columbia during the night. That the agent of the defendant company at Weldon was acquainted with the young lady and her father, and the father informed the agent that he greatly desired some one to meet his daughter in Columbia. That, immediately after the train on which the young lady was traveling left Weldon, her father, Dr. Green, delivered the following message to the defendant's agent in Weldon, directed to: "Mrs. Jno. B. Lee, 2010 Main Street, Columbia, S. C.: Willie leaves here on Coast Line train 39 to-day. Meet her. [Signed] I. E. Green." This message was taken in Columbia as addressed to "Mrs. Knoblee, 2010 Main street," and was not delivered until the next morning, when Mrs. John B. Lee inquired for it at the telegraph office at Columbia. The plaintiff, Miss Willie Green, arrived in Columbia about 12 o'clock the same night, and found no one to meet her. She was naturally disturbed and anxious. The conductor put her in charge of the colored matron at the station in Columbia, the matron secured a hack, and after some delay she was driven to the house of her friend Mrs. Lee. That, by reason of this negligence upon the part of the defendant, the plaintiff suffered mental anguish. Upon this the defendant demurred to the complaint, for that it did not state facts sufficient to constitute a cause of action which, under the circumstances set forth, entitled the plaintiff to recover damages for so-called mental anguish, and that the disappointment and annoyance which the plaintiff calls "mental anguish," arising under the circumstances set out in the complaint, is not a legal ground for damages for mental anguish. His honor sustained the demurrer, and the plaintiff appealed.

NOTE.—For conflicting authorities as to right to recover damages for mental anguish on account of default of telegraph company, see *note* to *Western U. Teleg. Co. v. Rogers*, 13 L. R. A. 859.

For subsequent cases in this series sustaining the right, see also in this series *Mentzer v. Western U. Teleg. Co.* 28 L. R. A. 72; *Cashlon v. Western U. Teleg. Co.* 45 L. R. A. 160; *Gray v. Western U. Teleg. Co.* 56 L. R. A. 301; *Western U. Teleg. Co. v. Crocker*, 59 L. R. A. 398; *Cowan v. Western U. Teleg. Co.* 64 L. R. A. 545, and *Barnes v. Western U. Teleg. Co.* 65 L. R. A. 666.
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For cases denying the right, see *Willcox v. Richmond & D. R. Co.* 17 L. R. A. 804; *Connell v. Western U. Teleg. Co.* 20 L. R. A. 172; *Western U. Teleg. Co. v. Wood*, 21 L. R. A. 706; *International Ocean Teleg. Co. v. Saunders*, 21 L. R. A. 810; *Francis v. Western U. Teleg. Co.* 25 L. R. A. 406; *Morton v. Western U. Teleg. Co.* 32 L. R. A. 735; *Peay v. Western U. Teleg. Co.* 39 L. R. A. 463; *Western U. Teleg. Co. v. Robinson*, 34 L. R. A. 431; *Western U. Teleg. Co. v. Ferguson*, 54 L. R. A. 846; *Connelly v. Western U. Teleg. Co.* 56 L. R. A. 663, and *Robinson v. Western U. Teleg. Co.* 57 L. R. A. 611.

Messrs. W. E. Daniel, Murray Allen, and Day & Bell, for appellant:

The true view which seems to sustain the right of action is one which elevates the question above the plane of mere privity of contract, and places it where it belongs—upon the public duty which a telegraph company owes to any person beneficially interested in the message, whether the sender or his principal where he is agent, or the receiver or his principal where he is agent.

Thompson, *Electricity*, § 427; *Cashion v. Western U. Teleg. Co.* 124 N. C. 459, 45 L. R. A. 160, 32 S. E. 746; *Landie v. Western U. Teleg. Co.* 124 N. C. 528, 32 S. E. 886; *Western U. Teleg. Co. v. Mellon*, 96 Tenn. 70, 33 S. W. 725; *Gray v. Western U. Teleg. Co.* 108 Tenn. 39, 56 L. R. A. 311, 91 Am. St. Rep. 706, 64 S. W. 1063.

Damages which are caused solely by mental anguish by reason of the neglect of a telegraph company to transmit a message are recoverable in an action against such company for its neglect.

Young v. Western U. Teleg. Co. 107 N. C. 370, 9 L. R. A. 669, 22 Am. St. Rep. 883, 11 S. E. 1044; *Bright v. Western U. Teleg. Co.* 132 N. C. 317, 43 S. E. 841.

Such damages are compensatory.

Mentzer v. Western U. Teleg. Co. 93 Iowa, 752, 28 L. R. A. 72, 57 Am. St. Rep. 294, 62 N. W. 1.

Whether the injurious consequences may have been reasonably expected to follow from the commission of the act is not at all determinative of the liability of the person who committed the act to respond to the person suffering therefrom.

Mentzer v. Western U. Teleg. Co. 93 Iowa, 752, 28 L. R. A. 72, 57 Am. St. Rep. 294, 62 N. W. 1; *Cooley, Torts*, §§ 646, 647; *Gray, Communication by Telegraph*, §§ 81, 82; *Wharton, Neg.* § 767; *Sutherland, Damages*, § 980; *Cowan v. Western U. Teleg. Co.* 122 Iowa, 379, 64 L. R. A. 545, 101 Am. St. Rep. 268, 98 N. W. 281; *Shearm. & Redf. Neg.* § 605; *Young v. Western U. Teleg. Co.* 107 N. C. 373, 9 L. R. A. 669, 22 Am. St. Rep. 883, 11 S. E. 1044.

Mental suffering, as an element of compensatory damages, is not peculiar to actions against telegraph companies.

Shepard v. Chicago R. I. & P. R. Co. 77 Iowa, 54, 41 N. W. 564; *Terwilliger v. Wands*, 17 N. Y. 54, 72 Am. Dec. 420; *Fisher v. Hamilton*, 49 Ind. 341; *Stewart v. Maddox*, 63 Ind. 51; *Craker v. Chicago & N. W. R. Co.* 36 Wis. 657, 17 Am. Rep. 504; *Young v. Western U. Teleg. Co.* 107 N. C. 384, 9 L. R. A. 669, 22 Am. St. Rep. 883, 11 S. E. 1044; *Cowan v. Western U. Teleg. Co.* 122 Iowa, 379, 64 L. R. A. 545, 101 Am. St. Rep. 268, 98 N. W. 281; 67 L. R. A.

Landie v. Western U. Teleg. Co. 124 N. C. 528, 32 S. E. 886.

Recovery for mental suffering is not limited to cases in which the telegram relates to sickness or death.

Young v. Western U. Teleg. Co. 107 N. C. 370, 9 L. R. A. 669, 22 Am. St. Rep. 883, 11 S. E. 1044; *Shearm. & Redf. Neg.* § 605; *Thompson v. Western U. Teleg. Co.* 107 N. C. 449, 12 S. E. 427; *Sherrill v. Western U. Teleg. Co.* 116 N. C. 655, 21 S. E. 429; *Havener v. Western U. Teleg. Co.* 117 N. C. 540, 23 S. E. 457; *Sherrill v. Western U. Teleg. Co.* 117 N. C. 352, 23 S. E. 277; *Cashion v. Western U. Teleg. Co.* 123 N. C. 267, 31 S. E. 493, 124 N. C. 450, 45 L. R. A. 160, 32 S. E. 746; *Lynne v. Western U. Teleg. Co.* 123 N. C. 129, 31 S. E. 350; *Landie v. Western U. Teleg. Co.* 124 N. C. 528, 32 S. E. 886; *Kenyon v. Western U. Teleg. Co.* 126 N. C. 232, 35 S. E. 468; *Laudie v. Western U. Teleg. Co.* 126 N. C. 431, 78 Am. St. Rep. 668, 35 S. E. 810; *Darlington v. Western U. Teleg. Co.* 127 N. C. 448, 37 S. E. 479; *Sparkman v. Western U. Teleg. Co.* 130 N. C. 447, 41 S. E. 881; *Lefler v. Western U. Teleg. Co.* 131 N. C. 355, 50 L. R. A. 477, 42 S. E. 819; *Bright v. Western U. Teleg. Co.* 132 N. C. 317, 43 S. E. 841; *Efrd v. Western U. Teleg. Co.* 132 N. C. 267, 43 S. E. 825; *Higdon v. Western U. Teleg. Co.* 132 N. C. 726, 44 S. E. 558; *Meadows v. Western U. Teleg. Co.* 132 N. C. 40, 43 S. E. 512; *Bryan v. Western U. Teleg. Co.* 133 N. C. 603, 45 S. E. 938; *Bowers v. Western U. Teleg. Co.* 135 N. C. 504, 47 S. E. 597.

Messrs. F. H. Busbee & Son and R. C. Strong for appellee.

Douglas, J., delivered the opinion of the court:

The defendant in its brief thus states the question intended to be presented: "This case baldly presents the question, which it has been apparent would soon arise, whether the barriers are to be thrown down, and every disappointment, annoyance, or vexation which may arise from a delay or a misdirected telegram can be the subject of an action for mental anguish. In other words, whether any annoyance, disappointment, vexation, or anxiety on account of a missing friend at the station, or from other cause, can be dignified by the name of 'mental anguish,' and adjudged to rank in the same class with the poignant grief arising from a failure to reach the bedside of a dying wife in time to receive her last adieus." We are fully aware of the importance of the question thus presented, and have given it the careful consideration which it deserves. We do not desire to impose any additional burdens upon telegraph compa-

nies or require any unnecessary restrictions, but we cannot ignore the essential purposes or their creation. A telegraph company is a quasi public corporation—private in the ownership of its stock, but public in the nature of its duties. It has all the powers of a private corporation, such as a separate legal existence, perpetual succession, and freedom from individual liability, and possesses, also, in addition thereto, the extraordinary privileges which under our Constitution can be exercised only by such corporations as are organized for a public purpose, and then only when necessary for the proper fulfillment of such purpose. Among the extraordinary privileges enjoyed by such corporations is the condemnation of private property, which can never be taken for a private purpose. The acceptance of such privileges at once fixes upon the corporation the indelible impress of a public use. A telegraph company is essentially public in its duties. Without such public duties there would be neither reason for its creation, nor excuse for its continued existence. In fact, being the complement of the postal service, it is one of those great public agencies so important in its nature and far-reaching in its application that some of our wisest statesmen have deemed its continued ownership in private hands a menace to public interests. Hence it follows, both upon reason and authority, that the failure of a telegraph company to promptly and correctly transmit and deliver a message received by it is a breach of a public duty imposed by operation of law. In the words of a great English judge: "A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it." This has been expressly held by this court in *Cashion v. Western U. Teleg. Co.* 124 N. C. 459, 45 L. R. A. 160, 32 S. E. 746; *Landie v. Western U. Teleg. Co.* 124 N. C. 528, 32 S. E. 886; and *Cogdell v. Western U. Teleg. Co.* 135 N. C. 431, 47 S. E. 490.

The demurrer admits all the facts alleged in the complaint, construed in the light most favorable to the plaintiff. It is therefore admitted that the message was received by the defendant, and not delivered until the following day, when called for by the sendee. This of itself raises the presumption of negligence. *Sherrill v. Western U. Teleg. Co.* 116 N. C. 655, 21 S. E. 429; *Hendricks v. Western U. Teleg. Co.* 120 N. C. 304, 78 Am. St. Rep. 658, 35 S. E. 543; *Laudie v. Western U. Teleg. Co.* 126 N. C. 431, 78 Am. St. Rep. 668, 35 S. E. 810; *Rosser v. Western U. Teleg. Co.* 130 N. C. 251, 41 S. E. 378; *Hunter v. Western U. Teleg. Co.* 130 N. C. 602, 41 S. E. 796; *Cogdell v. Western U. Teleg. Co.* 135 N. C. 431, 47 S. E. 490.

Teleg. Co. 135 N. C. 431, 47 S. E. 490. Aside from this presumption we think the facts alleged clearly tend to prove negligence on the part of the defendant. The telegram was addressed to Mrs. Jno. B. Lee, 2010 Main street. The name of the sendee was changed in transmission to Mrs. Knoble. The defendant urges in excuse for such negligence the similarity between the telegraphic "J" and "K." This is no legal excuse. *Cogdell v. Western U. Teleg. Co.* 135 N. C. 431, 47 S. E. 490. If the defendant adopts a code intrinsically liable to such mistakes, it should exercise the greater care in preventing them. The defendant's agents could at least have inquired at the street address given in the telegram. Such inquiry would doubtless have resulted in ascertaining the identity of the sendee. Such was the result when Mrs. Lee called for the telegram on the following day. The plaintiff alleges that she suffered mental anguish, and this is also admitted by the nonsuit. Aside from this, we think the circumstances in which she was placed may well have caused it. A girl 16 years of age finds herself after midnight in a strange city, riding two miles in a carriage with an unknown driver. It is true, she suffered no insult or physical injury; but the question is, What would be the natural effect upon the mind and nervous system of a child of her age? Nature offers no flower more tender or more fair than budding womanhood, and around it every protection will be thrown by the hand of the law. The defendant was informed of the full purpose of the telegram, and the importance of its immediate delivery. It therefore remains only to consider whether, under the admitted facts, the plaintiff is entitled to recover compensatory damages for the mental anguish she may have suffered as the direct result of the defendant's negligence. We see no reason why she cannot, and we find no authority in this state to the contrary.

It is said by the defendant that "it does not require to be pointed out that if the barriers are once thrown down, and any disappointment, annoyance, or unnecessary alarm occasioned by a delayed telegram shall be allowed to be the subject of damages, every barrier which the law has erected in the limitation of actions for damages will be thrown down, and the waters will be out in deluge." We do not think that any such result will follow our decision in this case, but such a possibility should not deter us from giving to the plaintiff the full measure of justice to which she is entitled. The defendant, in its brief, quotes the following extract from the decision of this court in *Chappell v. Ellis*, 123 N. C., on page 263, 68 Am. St. Rep. 822, 31 S. E. 709, which we may here repeat: "But it is

urged that the principle of the *Cashion Case*, if carried out to its fullest extent, would directly lead to the recovery of damages for all kinds of mental suffering. It may be, but we feel compelled to carry out a principle only to its necessary and logical results, and not to its furthest theoretical limit, in disregard of other essential principles. . . . We do not feel at liberty to adopt any one principle as the sole guide of our decisions, and to carry it out to extreme and dangerous limits, regardless of other great principles of justice and of law so firmly established by reason and precedent." As we have already said, we are now considering the question of damages resulting from the breach of a public duty by a quasi public corporation. How far this principle may in the future be extended to other corporations or to other circumstances, we cannot tell; and, in the absence of any matter before us involving its further consideration, we have neither the right nor the wish to limit or extend its application, as a pure matter of legal speculation. As the cases come up, we will decide them as best we may. In the meantime we will try to confine our opinion to the facts of this case, and others identical therewith. We may, however, say that there seems a material difference between an incidental tort by an individual or a private corporation, and the breach by a quasi public corporation of a public duty relating to the essential object of its creation. The exact nature of this difference it is difficult and at present unnecessary to determine.

It is true, no case has been called to our attention in which this court has allowed damages for mental anguish arising from the failure to deliver a telegram, except in cases relating to sickness or death. On the other hand, we are not aware of any case in which this court has drawn any such distinction either in the allowance or disallowance of damages. The nearest approach to any such limitation that the diligence of the learned counsel for the defense, aided by our own research, has been able to find, is *Chappell v. Ellis*, 123 N. C. 259, 68 Am. St. Rep. 822, 31 S. E. 709, in which a poor old woman, against whom a writ of possession had been issued, was thrown out upon the highway. In that case the eviction was lawful, and it was merely the unlawful taking of certain personal property, nearly all of which was soon after returned, that could be considered in the assessment of damages. It is true, this court, in distinguishing that case from *Cashion's Case*, says: "Our opinion in *Cashion's Case* was hinged on the solemn fact of death, and the associations inseparable from the final severance of all earthly ties by an immortal spirit. The anguish of a mother bending over the body of

her child, every lock of whose sunny hair is entwined with a heart string, and kissing the cold lips that are closed forever, cannot come within the range of comparison with any mental suffering caused by the loss of a pig." This language, correctly describing the facts in *Cashion's Case*, was used to more fully and forcibly distinguish it from *Chappell's Case*, and not as a limitation upon the general doctrine. Its purpose and application is apparent from the following language of the court in the same case: "The doctrine of mental suffering or 'mental anguish,' as we prefer to call it, as indicating a higher degree of suffering than arises from mere disappointment or annoyance, contemplates purely compensatory damages, and, as far as we are aware, has never been applied to cases like that at bar. This case would come under the rule of exemplary, punitive, or vindictive damages, as they are variously denominated. Such damages, which look not only to the loss sustained by the plaintiff, but still more to the conduct of the defendants, can be allowed only where there is shown, on the part of the defendants, malice, wantonness, oppression, brutality, insult, gross negligence, or certain cases of fraud. . . . We are not insensible to the pitiable condition of the plaintiff, thrown upon the highway without shelter and with but little to eat; but we must remember that her shelterless condition, which probably caused the greater part of her distress, was the result of a lawful eviction. Charity would have dictated a different course, but that great virtue is not enforceable in a court of law." Both before and since that opinion was rendered this court has recognized the doctrine in cases merely of sickness. While one may lead to the other, there is a vast difference between sickness and death, and there seems no reason why principles recognized in the former should not apply to kindred cases of equal strength and importance. While we find no direct decision of the question in any of our cases, we think that their line of reasoning tends to recognize the legal existence of mental suffering apart from sickness and death. This is especially so in *Young v. Western U. Teleg. Co.* 107 N. C. 370, 9 L. R. A. 669, 22 Am. St. Rep. 883, 11 S. E. 1044; *Morton v. Western U. Teleg. Co.* 130 N. C. 299, 41 S. E. 484; *Bright v. Western U. Teleg. Co.* 132 N. C. 317, 43 S. E. 841; and *Bryan v. Western U. Teleg. Co.* 133 N. C. 603, 45 S. E. 938. In *Cashion v. Western U. Teleg. Co.* 123 N. C. 267, 31 S. E. 493, this court quotes as follows from *Shearman & Redfield on Negligence*, § 605: "In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic mat-

ters, we do not think that the company in fault ought to escape with mere nominal damages, on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings which cannot be easily estimated in money, but for which a jury should be at liberty to award fair damages." This same language is quoted with approval in *Young v. Western U. Teleg. Co.* 107 N. C., on page 373, 9 L. R. A. 669, 22 Am. St. Rep. 883, 11 S. E. 1044.

In neither *Bright's* nor *Cashion's Case* was the plaintiff the sendee of the message, nor was she deprived of the satisfaction of attending the death or burial of the deceased. In both cases she sued on account of the absence of a relative to whom she looked for consolation and assistance. The death of the deceased was the occasion, rather than the cause, of the anguish for which she recovered. In cases where great stress is laid upon the fact of sickness or death, it is with the view of fixing the defendant with notice of the importance of the message where it has received no special information, like those cases where near relationship is relied on simply to raise the presumption of suffering. In *Lyne v. Western U. Teleg. Co.* 123 N. C. 129, 31 S. E. 350, this court says, on page 133, 123 N. C., page 351, 31 S. E.: "The same contention [that the relation of the parties was not disclosed] was made in that case that the defendant makes in this, and the court say, among other things, 'that the rule insisted on by appellant is too restricted to be safely applied to communications sent by the electric telegraph. . . . When such communications relate to sickness and death, there accompanies them a common-sense suggestion that they are of importance, and that the persons addressed have in them a serious interest.'" In *Cashion v. Western U. Teleg. Co.* 124 N. C. 459, 45 L. R. A. 160, 32 S. E. 746 (second appeal), this court says on page 464, 124 N. C., page 162, 45 L. R. A., and page 747, 32 S. E.: "The telegram in question stated that Mr. Cashion had been killed while at work, and, on its face, suggested that it was of unusual importance to somebody. The defendant knew that somewhere there was a vacant chair; that some one the lonely death watch was keeping. Who or where, it mattered not to the defendant, as it had no more right to wrong one person than another."

Another significant fact is the growing tendency of judicial opinion to allow compensatory damages for mental suffering even when disconnected with any physical suffering. This is forcibly illustrated in 67 L. R. A.

the case of *Osborn v. Leach*, 135 N. C. 628, 66 L. R. A. 648, 47 S. E. 811, where this court holds that in cases of libel, where the statute forbids punitive damages, actual damages may be allowed for mental suffering alone. This court says on page 633, page 351, 66 L. R. A., and page 813, 47 S. E.: "This being an action upon a libel *per se*, the plaintiff has a right to recover compensatory damages. Newell, Slander & Libel, 43; Hale, Damages, p. 99. Compensatory damages include all other damages than punitive, thus embracing not only special damages, as direct pecuniary loss, but injury to feelings, mental anguish, and damages to character or reputation. 18 Am. & Eng. Enc. Law, 2d ed. pp. 1082 *et seq.*; Hale, Damages, 106 and 99. Actual damages are synonymous with compensatory damages. . . . Newell, Slander & Libel, 839; 18 Am. & Eng. Enc. Law, 2d ed. pp. 1081 *et seq.* Damages for mental suffering are actual or compensatory. They are not special nor punitive, and are given to indemnify the plaintiff for the injury suffered. 1 Am. & Eng. Enc. Law, 2d ed. p. 602. The law infers actual or compensatory damages for injury to the feelings and reputation of the plaintiff from a libel calculated to humiliate him or injure his reputation or character."

Of course, in cases merely of slander or libel there could be no physical pain except as the reaction of mental suffering. The mere fact that a shock to the feelings which goes directly to the mind, without ever touching the body, may produce such reaction upon the physical system as even to endanger life itself is *per se* the surest proof of the existence of actual suffering, and the strongest argument for the allowance of compensatory damages. If such suffering actually results directly from the wrongful act of the defendant, it would seem to make but little difference what were the collateral circumstances.

The case at bar was ably and elaborately argued, orally and by brief, on both sides; and, in the end, we find ourselves compelled to decide the question upon the reason of the thing, rather than any weight of decided authority. Of course, we could not look for precedents where the doctrine of mental anguish is not recognized; and, even where it is, the facts of the respective cases generally fall short of direct application. With few exceptions, as in our own state, the element of death or sickness appears directly or indirectly in the case; but, as with us, we find no decision containing any such limitation of the doctrine. The cases most nearly in point are those of *Western U. Teleg. Co. v. Procter*, 6 Tex. Civ. App. 300, 25 S. W. 811, and same plaintiff in error v. *Taylor* (Tex. Civ. App.) 81 S. W. 69. In

the latter case, filed April 13, 1904, and reaffirmed by the denial of a rehearing on June 1, 1904, it was held (quoting the headnote) that: "Where a wife telegraphed to her husband to meet her, but owing to the telegraph company's negligence, the message was not delivered, and she arrived at the railroad station at night, and went to a hotel, where she failed to secure lodging, owing to its crowded condition, and from which, after a delay, she voluntarily went, escorted by a stranger, who treated her with courtesy, in a search for her husband, to a second hotel, where she found him, she was not entitled to damages from the telegraph company for mental suffering accruing from the time she reached the first hotel until she found her husband." We do not very clearly understand the reasoning of this case, nor do we see the force of the apparently arbitrary distinction between the mental suffering incurred between the depot and the first hotel, and that between the first hotel and the second. The latter seems to have been based upon the belief of the appellate court that in fact there was no such suffering. The point pertinent to the case at bar is that the plaintiff was allowed to recover compensatory damages for mental suffering disconnected from any physical pain or attending circumstances of sickness or death.

In *Procter's Case* the court held (quoting headnote) that: "R. eloped with plaintiff's daughter, aged 15 years, going towards the county seat to procure license and be married. Plaintiff at once telegraphed the county clerk, stating the girl's age and forbidding the issuance of license; but, through negligent delay in the delivery of the message, it did not reach the clerk until after the license had been issued and the parties married. Held, that plaintiff was entitled to recover of the telegraph company damages for the loss of his daughter's services up to the age of 18, and also for the mental distress involved." In that case the court, on page 304, 6 Tex. Civ. App., page 813, 25 S. W., says: "We think, also, that he was entitled to recover for the mental distress involved. We cannot distinguish this case, in principle, from the case of *Stuart v. Western U. Teleg. Co.* 66 Tex. 584, 59 Am. Rep. 623, 18 S. W. 351 [relating to sickness and death], and that line of decisions. The solicitude of a parent for the welfare of an only daughter of tender years, committed to his care both by nature and law, is certainly not less substantial than the affection of one brother for another."

Although not a telegraphic case, we are much impressed with the reasoning of the court in *Missouri P. R. Co. v. Kaiser*, 82 Tex. 144, 18 S. W. 305, where a girl 16 years of 67 L. R. A.

age, accompanied only by a girl companion, was ejected from the train at a small town where she was a stranger, and where she remained an hour before she was discovered by friends. The court therein says: "It is contended that the court erred in refusing a special charge asked by the defendant to the effect that plaintiff could not recover for mental suffering arising from any supposed or anticipated danger, because there was no aggravation attending her leaving the train, nor in the action of the conductor, and that, such being the case, she could only recover for inconvenience, loss of time, labor, and expense of reaching her destination. We do not think that this charge should have been given. We do not think that the mental condition of the plaintiff can be properly considered as arising 'from a supposed or anticipated danger.' The circumstances of two inexperienced girls, unaccustomed to traveling, suddenly ejected from a train at a small railroad station, where they were entire strangers, and contrary to provisions made for their safety by their careful parents, were well calculated to rouse in their minds feelings of insecurity and danger that would not have been properly characterized by referring to them in a charge as merely 'supposed or anticipated.'" This language singularly fits the case at bar.

In the recent case of *Gillespie v. Brooklyn Heights R. Co.* 178 N. Y. 347, 66 L. R. A. 618, 102 Am. St. Rep. 503, 70 N. E. 857, decided April 26, 1904, the court of appeals of New York in an able and learned opinion, held that a passenger on a street car can recover from the company for injuries to her feelings caused by the insulting language of the conductor; and that such damages are compensatory and not exemplary. The opinion quotes with approval the following language from *Thompson on Negligence*, § 3288: "Damages given on the footing of humiliation, mortification, mental suffering, etc., are compensatory, and not exemplary damages. They are given because of the suffering to which the passenger has been wrongfully subjected by the carrier. The quantum of this suffering may not, and generally does not, depend at all upon the mental condition of the carrier's servant,—whether he acted honestly or dishonestly, with or without malice." Further on in the opinion the court uses the following language: "Humiliation and indignity are elements of actual damages, and these may arise from a sense of injury and outraged rights in being ejected from a railroad train without regard to the manner in which the ejection was effected, though only done through mistake." The court also says: "The relation between a carrier and its passenger is more than a mere contract relation, as it may exist in the absence of any

contract whatsoever. Any person rightfully on the cars of a railroad company is entitled to protection by the carrier, and any breach of its duty in that respect is in the nature of a tort, and recovery may be had in an action of tort as well as for a breach of the contract." We have quoted from this opinion because it unequivocally asserts the principle that a plaintiff can recover in tort compensatory damages for purely mental suffering, without any physical pain whatever, resulting from the breach of public duty by a common carrier. Telegraph and railroad companies are in their nature essentially similar, as being quasi public corporations organized for a public purpose, and fixed with a public use. For the breach of a public duty they are both liable in tort, and we see no reason why similar injuries arising from such breach of duty should not be governed by similar principles. That it is well settled in railroad cases is abundantly shown by the authorities cited in the last-named case, and we think that those authorities are applicable by analogy to the case at bar. For this reason, we have not deemed it necessary to cite the decisions allowing compensatory damages for mental suffering, without any physical pain, in such cases as seduction, breach of promise, slander and libel, malicious arrest and prosecution, false imprisonment, criminal conversation, and kissing a female against her will.

The defendant apparently relies upon the case of *McAllen v. Western U. Teleg. Co.* 70 Tex. 243, 7 S. W. 715, where the plaintiff sent a telegram to his father, who lived 75 miles from a railroad, to send the family carriage to take him home. The message was not delivered, and the carriage was not sent, whereupon the plaintiff took up the idea that "some dreadful calamity had befallen his father." He thereupon took passage in a "jerkey" and on a buckboard, and subsequently sued the telegraph company for mental anguish as well as physical suffering. The court held that neither the imaginary death of his father, nor the bouncing of the buckboard, was within the contemplation of the parties. That case has no application to the one at bar, coming clearly within the rule laid down in *Bowers v. Western U. Teleg. Co.* 135 N. C. 504, 47 S. E. 597.

We are struck with the phrase so often used—notably by Joyce on Electric Law—"Telegrams as to sickness, death, or the like." The meaning of the last three words is not defined, but there is an unwelcome suggestion, upon which the mind refuses to dwell, of what might happen to a defenseless girl in the deserted streets of a city at midnight, that may well be likened to death itself.

In this connection we have endeavored to

ascertain the latest decisions of the courts of the different states upon this subject. When we remember that this doctrine of mental anguish in telegraph cases is of recent origin, having theretofore been deemed contrary to the principles of the common law, and has made constant progress in opposition to the preconceived ideas of courts and jurists, it seems that it must possess much inherent strength and merit. This is especially evident from the actions of certain courts, some of them of the highest reputation, which, while denying the doctrine in telegraph cases that damages for mental suffering may be recovered in the absence of physical pain or injury, allow it in cases of a kindred nature, such, for instance, as insulting or humiliating a passenger. The following is the present status of the doctrine in the different states, as far as we have been able to ascertain.

Its history in the state of Texas, where it was first specifically announced, may be briefly stated as follows: The first case in that court is the celebrated one of *So Relle v. Western U. Teleg. Co.* 55 Tex. 308, 40 Am. Rep. 805. There it was held that there could be a recovery in such cases. The next cases were *Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269, and 59 Tex. 563, 46 Am. Rep. 278. These cases were construed by the profession as in some respects modifying the doctrine in the first case. The question again arose in *Stuart v. Western U. Teleg. Co.* 66 Tex. 580, 59 Am. Rep. 623, 18 S. W. 351, and the rule announced in *So Relle's Case* was followed. That case was very thoroughly considered, and the decision then made has settled the law in that state upon the main question. Its reports show some 50 cases since in which the doctrine has been followed without question.

In Tennessee the doctrine was first announced in *Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 695, 6 Am. St. Rep. 864, 8 S. W. 574, and has been reaffirmed in *Western U. Teleg. Co. v. Mellon*, 96 Tenn. 72, 33 S. W. 725, and *Gray v. Western U. Teleg. Co.* 108 Tenn. 39, 56 L. R. A. 301, 91 Am. St. Rep. 706, 64 S. W. 1063.

In Alabama the doctrine was expressly recognized in *Western U. Teleg. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419, but seems to have been somewhat modified in the more recent case of *Western U. Teleg. Co. v. Crumpton*, 138 Ala. 632, 36 So. 517, which appears to be the latest decision upon the subject.

In Kentucky the leading case in which such damages are allowed is *Chapman v. Western U. Teleg. Co.* 90 Ky. 265, 13 S. W. 880. The doctrine is affirmed in the later cases of *Western U. Teleg. Co. v. Van Cleave*, 107 Ky. 464, 92 Am. St. Rep. 366, 54 S. W.

827, and *Western U. Teleg. Co. v. Fisher*, 107 Ky. 513, 54 S. W. 830.

In Iowa damages for mental anguish unaccompanied by physical pain are allowed. The leading case is *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 752, 28 L. R. A. 72, 57 Am. St. Rep. 294, 62 N. W. 1, a carefully considered case, which has been widely cited. This case stood as the only expression of that court upon the subject until the recent case of *Cowan v. Western U. Teleg. Co.* 122 Iowa, 379, 64 L. R. A. 545, 101 Am. St. Rep. 268, 98 N. W. 281.

In Louisiana such damages are allowed. The leading and most recent case is *Graham v. Western U. Teleg. Co.* 109 La. 1069, 34 So. 91.

In South Carolina they are also allowed. At first the doctrine was denied in *Lewis v. Western U. Teleg. Co.* 57 S. C. 325, 35 S. E. 556. This case was followed by an act of the legislature (23 Stat. at L. 748; Civil Code 1902, vol. 1, § 2223) permitting damages in such cases. This statute was held to be constitutional in *Simmons v. Western U. Teleg. Co.* 63 S. C. 429, 57 L. R. A. 607, 41 S. E. 521, which has subsequently been uniformly followed.

In Nevada the doctrine has been recently adopted in the case of *Barnes v. Western U. Teleg. Co.* 27 Nev. 438, 65 L. R. A. 666, 76 Pac. 931, in an able and learned opinion by Fitzgerald, J.

In Washington there does not appear to be any decision upon a telegraph case, but the principle is fully recognized in *Davis v. Tacoma R. & Power Co.* 35 Wash. 203, 66 L. R. A. 802, 77 Pac. 209, in which telegraph cases are cited with approval.

The doctrine is denied in the following states, as is shown by the most recent cases:

Florida: *International Ocean Teleg. Co. v. Saunders*, 32 Fla. 434, 21 L. R. A. 810, 14 So. 148, apparently the only case upon the subject in that state.

Georgia: *Chapman v. Western U. Teleg. Co.* 88 Ga. 763, 17 L. R. A. 430, 30 Am. St. Rep. 183, 15 S. E. 901; *Giddens v. Western U. Teleg. Co.* 111 Ga. 824, 35 S. E. 638.

Illinois: *Western U. Teleg. Co. v. Haltom*, 71 Ill. App. 63. The question does not appear to have come before the supreme court of that state.

Indiana: *Western U. Teleg. Co. v. Fergus*, 67 L. R. A.

son, 157 Ind. 64, 54 L. R. A. 846, 60 N. E. 674, 1080.

Kansas: *West v. Western U. Teleg. Co.* 39 Kan. 93, 7 Am. St. Rep. 530, 17 Pac. 807, appears to be the latest telegraph case in that state involving the question; but that case has been reaffirmed in *Kansas City, Ft. S. & M. R. Co. v. Dalton*, 65 Kan. 661, 70 Pac. 645.

Minnesota: *Francis v. Western U. Teleg. Co.* 58 Minn. 252, 25 L. R. A. 406, 49 Am. St. Rep. 507, 59 N. W. 1078, which is the only case in that state.

Mississippi: *Western U. Teleg. Co. v. Rogers*, 68 Miss. 748, 13 L. R. A. 859, 24 Am. St. Rep. 300, 9 So. 823. This case has apparently been doubted in one or two subsequent cases, which, however, are not directly in point.

Ohio: *Morton v. Western U. Teleg. Co.* 53 Ohio St. 431, 32 L. R. A. 735, 53 Am. St. Rep. 648, 41 N. E. 689, seems to be the only case in that state involving the question.

West Virginia: *Davis v. Western U. Teleg. Co.* 46 W. Va. 48, 32 S. E. 1026.

Wisconsin: *Summerfield v. Western U. Teleg. Co.* 87 Wis. 1, 41 Am. St. Rep. 17, 57 N. W. 973.

Virginia: *Connelly v. Western U. Teleg. Co.* 100 Va. 51, 56 L. R. A. 663, 93 Am. St. Rep. 919, 40 S. E. 618. In this state a statute was passed upon the subject, which apparently failed of its purpose.

In the following states there have been no decisions in telegraph cases upon the question, so far as we have been able to ascertain: Arizona, California, Colorado, Connecticut, Delaware, Idaho, Maine, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, and Wyoming.

As the primary doctrine of mental anguish in telegraph cases has been too long and firmly settled by this court to be now called in question if decided cases stand for aught, and as we feel impelled by both reason and authority to apply these principles to the case at bar, *the judgment of the court below is reversed*, and the demurrer overruled.

Connor, J., concurs in the result.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Third Quarter of the Judicial Year Beginning with October 1, 1904, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS.
- IV. DOMESTIC RELATIONS.
- V. FIDUCIARY RELATIONS.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS; WILLS; LIENS; DEEDS.
- VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

Statutes; time for introduction of bill.

A bill which is introduced into the legislature within the time designated by the Constitution is held properly to become a law, although the constitutional authority for such legislation is not granted until after the expiration of the time when bills might constitutionally be introduced for passage at the pending session of the legislature. (Mich.) 965.

Municipal corporations.

That a defect in a street is part of the original plan of construction is held not to relieve the city from liability for injuries to travelers, caused by it. (Wash.) 253.

A provision in a contract for a municipal improvement that the contractor shall receive assessment certificates against the abutting property in full compensation for his labor, without recourse to the municipality, is held not to relieve the city from liability in case it makes an assessment which is invalid and unenforceable. (Iowa) 408.

A municipal corporation which turns into a stream flowing through it surface water falling within its watershed, and, for the maintenance of the public health, has cleaned its bed, is held not to be liable to a riparian owner for failure to remove obstructions placed in the stream by another riparian owner, so that the water is dammed back to the injury of the former. (Mich.) 931.

Ordinances.

An ordinance declaring it unlawful to hold public meetings in the streets of the city without the consent of the municipal authorities is held not to be unconstitutional as curtailing the liberty of speech, or making an arbitrary discrimination in favor of some persons against others. (Ga.) 803.
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An ordinance providing that it shall be unlawful for any person maintaining any saloon, barroom, or drinking shop, or any apartment thereto attached, to permit females to enter their said place of business, is held to be unconstitutional. (Idaho) 808.

Highways.

See also *supra*, *Municipal corporations*.

The right of the owner of the fee of a country highway to remove gravel from a gravel bed within the limits thereof, where this causes no injury to the highway, and the gravel is not required for grading or improving the same, is sustained. (Minn.) 901.

Voters and elections.

A statute prohibiting the printing of the name of a candidate for office in more than one column of the official ballot is held to be, as to the candidate who is the nominee of a single political party and the nominee of electors by petition, a reasonable regulation of the manner of exercising the right of suffrage. (N. D.) 473.

That faction of a county convention which assembles at the place designated by the chairman and a majority of the county committee, organizes, and proceeds to nominate candidates, is held to be necessarily regarded as the regular representative of the party, in the absence of anything which justifies delegates in refusing to attend at the place selected. (S. D.) 331.

Taxes.

Opportunity for contesting, in the ordinary course of justice, a charge imposed upon property where cigarettes are sold, is held to be sufficient to uphold the tax as against the owner of the property, without notice to him of its assessment, although he

may not be directly engaged in the business. (Iowa.) 624.

The constitutional requirement of uniformity in taxation is held not to be violated with respect to a tax upon credits by imposing it upon those which are solvent only, leaving the debts due by insolvent persons untaxed. (Wis.) 200.

A poll tax for street purposes upon male inhabitants between the ages of twenty-one and fifty, except members of voluntary fire departments, is held to contravene a constitutional provision authorizing the legislature to empower municipal corporations to levy taxes which shall be equal and uniform in respect to persons within the jurisdiction of the body levying them. (Wash.) 280.

The amount of capital employed by a corporation, and not its share stock, is held to be considered under a statute imposing a franchise tax upon corporations, to be computed upon the basis of the amount of capital stock employed within the state. (N. Y.) 960.

The furnishing of trading stamps by merchants to their customers at the time of making purchases, in consideration of a cash payment, is held not to be a business which may be separated from the business of selling the merchandise, and taxed under a municipal charter authorizing the classification and taxation of business, trades, and professions carried on within the city. (Ga.) 795.

Public money.

The appropriation of public money for use by a private corporation organized to care for destitute children is held not to be prevented by a constitutional provision forbidding the giving or loaning of the state's credit to any corporation. (Ky.) 815.

Courts; mandamus.

The right of a court of appeals to issue a writ of mandamus in the exercise of, and in aid of, its appellate jurisdiction, without a prior invocation of that jurisdiction by appeal or writ or error, is held sustained. (C. C. A. 8th C.) 761.

Compulsory vaccination.

The right of the legislature, in the exercise of its police power, to authorize the health authorities of a municipal corporation to require, under penalty, all citizens to be vaccinated, when, in their discretion, it is necessary for the public health and safety, is sustained. (Mass.) 935.

Intoxicating liquors.

Furnishing liquor to a minor as an act of hospitality in one's home is held not to be a violation of a provision making it unlawful for any person to give such liquor to a
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minor, which is embraced within a statute the title to which states that it is to provide for the taxation and regulation of the business of selling, furnishing, and giving liquors. (Mich.) 424.

Conferring upon a municipal corporation power to require licenses for the sale of intoxicating liquors within 4 miles of its corporate limits is held not to deprive citizens of their constitutional property rights, or of the privileges and immunities protected by the Federal Constitution. (Ind.) 613.

Husband and wife.

See also *infra*, IV.

The right of the legislature to empower the court, in its discretion, to authorize a married woman to convey her real estate by separate deed, in jurisdictions where the common law, giving the husband a freehold right in the property, is in force, is denied. (Vt.) 969.

Incompetent persons.

Empowering the court, in its discretion, to commit one acquitted of murder because of insanity to an asylum for treatment, from which he cannot be released without an act of the legislature, without notice to him, or giving him an opportunity to be heard, or any provisions for investigation as to his present mental state, is held to deprive him of his liberty without due process of law. (N. C.) 972.

Game laws.

The right of a state to forbid a nonresident landowner to take fish and game upon his property within the state, while according such privileges to resident landowners, is denied. (Ark.) 773.

Anti-trust law.

The Kansas anti-trust law of 1897, making unlawful any combination to create or carry out restrictions on trade, to control the prices of any article or commodity or the rates of insurance, or to prevent competition, is held to be a valid exercise of legislative power. (Kan.) 903.

Statute as to breaking contract to work.

A statute making it a misdemeanor for one under contract to labor, or work land, to break his contract and enter into another with a different person, without the consent of his employer, and sufficient excuse, to be adjudged by the court, and without giving notice of his contract to the person with whom he makes the new one, is held to violate the constitutional guaranties of life, liberty, and property, and to abridge the privileges and immunities of citizens. (Ala.) 286.

Changing period of limitation.

A period of three months within which to bring an action upon a judgment rendered in another state, against a bona fide resident of the state establishing such period, upon a cause of action which accrued more than six years before the action upon the judgment is brought, is held to be unreasonably

short, and to render the statute providing it invalid. (C. C. A. 8th C.) 558.

A right fully matured under existing law, to defeat a debt by a plea of the statute of limitations, is held to be neither a vested right, nor a property right, and to be subject to be taken away at the will of the legislature. (N. M.) 438.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

Contracts; validity.

A lease by a corporation, engaged in the business of generating and furnishing electricity for public and private use, to a rival corporation in the city, for a period of ten years, of machinery and appliances used in generating electricity, by which it obligates itself not to engage in such business in the city during such period, and not to dispose of any of its property, machinery, or appliances retained by it for producing or generating in such city electric light and power, is held to be in contravention of public policy, and not sufficient to sustain an action to recover rents by the lessor or its assignee. (Kan.) 61.

Checks.

A check on an open bank account is held not to constitute an assignment of the fund, or take precedence of a subsequent attachment levied on the fund before the check is presented for payment or brought to the notice of the bank, if such presentment is not made, or notice given, within a reasonable time. (Ind. Terr.) 617.

Options.

An acceptance in writing of a formal and carefully prepared option of sale of land, within the time allowed by it for acceptance, using the formal words, "according to terms of the option given me," to which there is added, by the conjunction "and," a request for a departure from its terms as to the time and place of performance, is held to be unconditional, and to convert the option into an executory contract of sale. (W. Va.) 853.

An agreement, without consideration, giving an option to purchase real estate, is held to be revocable at any time before it is accepted; and a revocation is held to be effected by a sale and conveyance of the property to a stranger. (Wyo.) 571.

Telephones.

That a patron of a telephone company has broken his agreement not to make use of the lines of a rival company is held to give the former no right to refuse to grant him further service. (S. C.) 111.

A telephone company is held not to be
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required to furnish service to a bawdy house. (N. C.) 251.

Carriers.

In case of a breach of a carriage contract in a state whose Constitution prohibits the carrier from contracting to limit its common-law liability, it is held that the carrier cannot, in the courts of that state, have the benefit of a contract valid where made in another state limiting such liability. (Ky.) 412.

Delay by the initial carrier in the transportation of goods at a season when weather conditions would naturally produce deterioration in their quality, which may have aided in causing the damaged condition in which they were delivered to the consignee, is held to render it liable for the loss, unless it shows that its delay did not produce the injury in whole or in part, although delay by a connecting carrier is also shown, which might have caused, or contributed to, the injury. (Ark.) 555.

The right of a carrier to limit, by special contract, his common-law liability, and thereby to exempt himself from liability for any loss resulting otherwise than by the negligence or misfeasance of himself or his servants, is sustained. (N. J. Err. & App.) 433.

A carrier transporting freight on platform cars to a station where it maintains a freight house, but no agent, is held to be obliged to place the freight in the house in order to relieve itself from liability for freight lost through theft, unless it shows that it is not able to do so. (Wash.) 271.

Conditions on the back of a void pass are held to be without effect upon the rights of the person who is attempting to use it for transportation. (N. C.) 227.

Papers pertaining to the business of an insurance agent, and belonging to his employer, are held not to be baggage; and, therefore, it is held that, in case they are placed in a trunk which is checked as baggage, an action cannot be maintained for the benefit of the employer for loss caused by delay in their transportation. (Miss.) 646.

Insurance.

See also *infra*, VIII.

That a creditor has an insurable interest in the life of his debtor is held; and the issue or pledge of a policy upon his life as collateral security for the payment of his debt is held to be valid. (C. C. A. 8th C.) 550.

Acceptance of the policy tendered, and waiver of the fraud in tendering one not in accordance with the expectation of the applicant and representations of the agent, are held to be effected by receiving the policy and retaining it for several months without complaint, in ignorance of the fraud, because of failure to examine the policy, where the substitution is plainly apparent on its face. (Wis.) 705.

A Pott's fracture consisting of the breaking of one bone of the lower leg between the knee and ankle joints, and a severance of the malleolus process of the other one so as to effect a complete solution of the continuity of both bones, is held not to be covered by a policy providing for indemnity in case of the breaking of the shafts of both bones between the knee and ankle joints. (Iowa) 631.

Recovery on an accident-insurance policy upon a person whose occupation is stated as "cattle dealer or broker visiting yards," the duties of which require him to ride on trains of cattle cars from place to place in the freight yards, is held not to be prevented by the fact that a clause in the policy provides that it shall not cover accidents received while being in any part of a car not provided for occupation by passengers. (S. D.) 175.

Want of knowledge of the policy by one of two mine operators for whose benefit insurance against liability for accidents to employees has been effected by the other, and want of knowledge of the accident by the latter, are held not to excuse failure to comply with the requirement in the policy that immediate notice of an accident be given to the insurer. (Wash.) 275.

The right of one issuing an accident insurance policy to stipulate that it shall not cover injuries received while assured is insane is sustained. (Cal.) 793.

A clause in an insurance policy relieving the insurer from liability in case death is caused by violation of any criminal law is held not to be applicable where insured was shot while attempting in good faith to escape from a personal difficulty, although he had begun it by assaulting his opponent with a weapon capable of producing great bodily harm, if not death. (Ark.) 770.
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A statute requiring an insurer to fix the insurable value of the property insured, and to state such value in the policy, the measure of damages in case of total loss to be the amount so fixed, and in case of partial loss such proportion of the amount upon which premiums are paid as the damage sustained is of the insurable value as fixed by the agent; and providing that the insurer shall be estopped to deny that the property insured was worth at the time of insuring the amount so fixed, and that the agent soliciting the insurance shall be held to be the agent of the insured,—is held to be valid. (Fla.) 518.

A policy of insurance on the furniture of a house is held to be void *in toto* if a large part of the furniture has been purchased on the instalment plan, and is not paid for, and the policy provides that it shall be void if the interest of the insured is other than unconditional and sole ownership. (R. I.) 479.

Where a policy of insurance for \$2,500 on two buildings contained a clause providing that the entire policy, unless otherwise provided by agreement indorsed thereon, should be void if the insured had, or should thereafter procure, any other contract of insurance on the property; and attached to the policy was a slip of the same date as the policy, containing a description of the property insured with the amount of insurance written thereon, and a clause that 2,500 total concurrent insurance was permitted,—it is held that the last clause, construed in connection with the language of the entire policy, permitted other concurrent insurance not to exceed \$2,500. (Fla.) 581.

Principal and surety.

Ratification of an unauthorized signing of their names to a renewal note by the maker is held to be effected where the sureties on a note which is past due, upon receiving notice from the payee that a new note has been substituted for the old one with their names attached as sureties, neglect to repudiate the transaction, and fail to notify the payee of their nonliability until after the insolvency and death of the maker. (Ind. Terr.) 812.

Sale f. o. b.

A sale of goods to be delivered "f. o. b. cars" is held to impose on the seller the duty of procuring the cars to carry out the contract, in the absence of clear and satisfactory evidence of a custom to the contrary, known to both parties to the transaction at the time of making the contract. (Wis.) 756.

III. CORPORATIONS.

See also *supra*, I., *Taxes*.

Where the same five persons compose both the directorate and the body of the stockholders of a corporation, it is held that two of these persons cannot, by joining with a third, enter into contracts with the corporation, or fix their own salaries, or vote allowances to themselves, over the protest of their two other associates. (La.) 76.

A written transfer of a certificate of shares of stock in a corporation, made in good faith, and for value, and possession taken thereof as a pledge for the payment of a private debt of the assignor, is held to have preference over a subsequent at-

tachment thereof in favor of a creditor of the assignor, although the transfer was not entered on the proper books of the corporation. (Idaho) 656.

Unregistered transfer of shares.

An unregistered transfer of shares of corporation stock, for which no certificate has been issued, if made for a valuable consideration and without fraud, is held to vest in the transferee a title to the shares superior to the claims of a subsequent attaching creditor of the transferrer. (W. Va.) 670.

IV. DOMESTIC RELATIONS.

Husband and wife.

See also *supra*, I.

A parol gift of a note is held not to be within the meaning of a constitutional provision requiring a man's written consent to make valid his wife's conveyance of her property, since the word "conveyance" has reference to the transfer of such property as must be transferred by written instruments. (N. C.) 461.

Infants.

That a guardian appointed for an infant

by a court in one state will not, on the ground of comity, be given custody of the child against its best interests by the courts of another state, into which the child has been taken, is held although the child was removed from the state where the guardian was appointed contemporaneously with, and possibly for the purpose of escaping the effect of proceedings for, the guardian's appointment. (Wyo.) 860.

V. FIDUCIARY RELATIONS.

One who accepts an agency to take charge of a house and lot belonging to his principal, collects the rents, pays taxes, and sees to repairs, and gives advice as to the value of the principal's unimproved farm lands, is held thereby to assume a fiduciary and

confidential relation, and to have no right to purchase such farm lands for himself without making full disclosure of all facts bearing on their value, material for the principal to know in order to act intelligently. (N. D.) 288.

VI. TORTS; NEGLIGENCE; INJURIES.

See also *supra*, I., *Municipal Corporations*; *infra*, VII., *Waters*.

Proximate cause.

Placing an electric light in close proximity to a trolley wire at a curve is held not to be the proximate cause of an injury to one struck by glass falling from the globe when shattered by a trolley leaving the wire, since failure to keep the trolley on the wire is *prima facie* negligence, and is the act of a responsible person intervening between the placing of the light and the injury. (R. I.) 116.

Telegrams.

A telegraph company receiving a message for transmission is held to be bound to 67 L. R. A.

notify the sender, in case the line is obstructed so that the message cannot be sent within a reasonable time, so as to give him an opportunity to avail himself of other modes of conveying the desired information to the sendee. (C. C. A. 7th C.) 153.

Change of the stated price in a telegram intended to notify a purchaser of the market price of mules, so as apparently to quote them at \$10 a head less than their market price, which results in the sendee's directing the purchase of a certain number on his account, is held to render the telegraph company liable for the difference in the price paid and that stated in the telegram as delivered. (S. C.) 481.

Injury to servant; vice principals.

Persons engaged in the service of a master, who are intrusted by him with the management or direction of his general work, or with some particular part thereof, are held not to be fellow servants with subordinate employees, but vice principals, for whose negligence, resulting in the injury of employees, the master is liable. (Utah) 508.

A railroad conductor, in signaling the engineer to back the engine for the purpose of effecting a coupling, is held to act in his capacity as representative of the master, and not as a fellow servant of the brakeman, who is attempting to prepare the cars for the coupling; so that the master will be liable in case he acts negligently to the injury of the brakeman. (Tenn.) 340.

Failure of a master to take precautions to prevent electric wires in process of being strung on telephone poles from reels from coming in contact with a trolley-feed wire charged with a powerful current, or to supply his employees with rubber gloves or other devices to prevent the communication to them of a serious shock in case the wires become charged, is held to render him liable for injury to employees attending the reels, who receive a severe shock by reason of one or more of the telephone wires coming in contact with the trolley-feed wire because of their sagging or breaking. (N. J. Err. & App.) 956.

Injury to volunteer.

One into whose service another volunteers without his assent, express or implied, is held not to be under the duties of a master toward a servant, or required to anticipate or discover the peril of such volunteer, but only to be bound to use care not to injure him after notice of his peril. (Ga.) 701.

Assault by servant.

The appointment of one as cashier of a railway station, with power to collect money, give receipts, sell tickets, take care of the money received, and forward it to the treasurer of the company, is held not to empower him to arrest persons whom he suspects of having stolen money which has come into his possession, so as to render the railroad company liable in case he causes the arrest of an innocent person. (N. C.) 455.

Injury to boy by torpedo.

Injury to a boy from a torpedo which he picks up near a railroad track is held not to make the company liable merely upon evidence that a brakeman tossed it to a flagman, who threw it back, and, upon the brakeman's failure to catch it, and letting it fall to the ground, no attempt was made to recover and remove it to a safe place. (Mass.) 422.

Fire set by engine; railroad company's right to insurance.

A clause in a statute making a railroad company liable for losses by fire set out by its engines, which gives it the benefit of any insurance on the property, is held to apply only to cases where the liability is imposed by the statute, and not to those where it is liable because of its own negligence. (Me.) 418.

Killing dog by street car.

A street railway company is held not to be liable in damages for the killing of a dog by one of its cars, unless the killing is done wilfully, wantonly, or recklessly. (N. C.) 470.

Electric shock.

A corporation which contracts to light a building by electricity is held to undertake thereby to protect its occupants from injury by the electrical current, so far as it can do so by exercising the highest degree of care, skill, and diligence in the construction and maintenance of its plant. (Pa.) 475.

Standing on platform of interurban car.

The law of negligence governing the standing on a platform of a moving street car in a municipality is held not to be applicable to the case of standing on such platform of a moving interurban car in the open country; but the rule governing such a case is held to be the same as that in the case of steam cars. (Ohio) 637.

Hiring another's servant.

One who employs a person in ignorance of the fact that he is under a time contract to work for another, in violation of which he has left the latter's service, is held not to be liable in damages to the former employer because, when informed of the servant's breach of contract, he fails to discharge him, where, though offering to release his new employer, he expresses his determination not to return to the one whose service he has abandoned. (La.) 65.

VII. PROPERTY RIGHTS; WILLS; LIENS; DEEDS.

Homestead.

Merely raising a few vegetables on a vacant lot is held not to be such occupancy as entitles one entirely insolvent, without ability L. R. A.

ity sufficient to earn her own support, and without any prospect of getting money to erect a building thereon, to hold the land indefinitely as a homestead. (Mich.) 313.

Fraudulent conveyance.

See also *infra*, VIII., *Estoppel*.

The legal title to property alleged to have been transferred with intent to defraud creditors is held to be in the fraudulent grantee, where the fraudulent character of the transfer does not appear on its face; and the title is held to continue in such grantee notwithstanding a sale of the property by a creditor on execution against the grantor, until the fraud is exposed, and the transfer set aside in some judicial proceeding. (Minn.) 865.

Waters.

The right of a public corporation organized to provide a drainage system, to contest its liability to make compensation for injuries done to riparian owners by taking water from a navigable stream to supply its ditch, upon the ground that incidentally it has created a navigable channel, and that the public is not liable for injuries to riparian owners in consequence of the improvement of navigation, is denied. (Ill.) 820.

The owner of lands through which a natural water course flows is held to have the right to accumulate surface waters falling upon lands adjacent thereto, and cast the same into such stream, without becoming liable to a lower riparian owner for damages, so long as the natural capacity of the stream is not exceeded. (Kan.) 642.

Grant of water power.

Maintenance for nearly fifty years, with the knowledge and acquiescence of the canal commissioners, of flumes to take water from a canal feeder, under a contract by which the commissioners granted the right to take it, the bottoms of which are level with the bottom of the feeder, so that whenever the grantee was entitled to take water he would receive it under a head, is held to be a practical construction of the rights of the parties which will prevent the commissioners from subsequently placing weirs in the flumes so that no water can be received until it has reached a certain height in the feeder. (Ill.) 369.

Fixtures.

Machinery and other appliances necessary for the prosecution of the work, placed on land by a lessee under a lease for oil and gas purposes, by which it is agreed that he shall have the privilege at any time to remove therefrom all machinery and fixtures placed thereon, are held not to become parts of the freehold, and to be removable by the lessee within a reasonable time after the forfeiture of the lease because of nonpayment of the rental. (W. Va.) 694.

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The insertion in a renewal lease of a clause giving the tenant the right to remove trade fixtures is held not to be necessary to enable him to remove, before the termination of the extended period, fixtures which he might have removed before the expiration of the original term. (Pa.) 359.

Mortgage.

An affidavit of a renewal of a chattel mortgage in favor of a corporation after it is received and filed by the register of deeds of the county is held not to be void, so as not to impart constructive notice of the lien of the mortgage, by reason of the fact that the affidavit is sworn to before a notary public, who is an officer and stockholder in said corporation. (Kan.) 851.

Wills.

That a will may pass title to after-acquired real estate is decided under a statute providing that every person may, by last will, devise "all his estate, real, personal, and mixed." (Mo.) 648.

A clause in a will forbidding the sale of testator's real estate during the lifetime of the life tenant is held to be void as against public policy. (N. C.) 444.

Under a will giving real estate to testator's wife for life, and providing that at the expiration of the life estate "that which is given to her for life shall be equally divided between all my children, share and share alike, the representatives of such as may have died to stand in the place of their ancestors," it is held that no estate vests in the children until the widow's death, and that, therefore, a child dying before the widow has no interest which will pass by its will. (N. C.) 440.

A codicil directing trustees, who, under the will, are to hold the residue of the estate during the lifetime of the testator's youngest two children, paying annuities to all the children during their lives, and dividing the property at their termination, to hold the share of another child during her lifetime upon the happening of a certain contingency, paying her an annuity during her life, and dividing the principal among her children at her death, is held to be void as suspending the period of alienation beyond two lives in being at the testator's death. (N. Y.) 146.

A devise to certain persons named, "and to their heirs and assigns forever," is held not to be cut down, either expressly or by implication, from a fee simple to a fee tail by a subsequent declaration that, if either should die without "issue," his share should go over to others. (Mo.) 97.

A residuary devise to testator's widow is held not to pass title, as against his chil-

dren, to a burial lot upon which members of his family are buried. (R. I.) 118.

The marriage of a testator, whether or not it is followed by the birth of a child, is held to revoke an antenuptial will. (N. M.) 315.

Liens.

Explosives consumed in grading a roadbed or driving a tunnel for a railroad company are held to be within the provisions of a statute giving a lien to contractors and material men for materials furnished for grading the roadbed, constructing culverts, lay-

ing tracks, or erecting buildings. (Tenn.) 487.

Deeds; rule in Shelley's Case.

A fee in the first taker is held not to be created by the rule in *Shelley's Case* by a conveyance to one for her natural life with provisions for forfeiture in case of attempt to encumber, or nonpayment of taxes, "and at her death to her children or to their lineal descendants;" and it is held to be immaterial that, under the forfeiture clause, in case of compliance with the conditions the land was to pass to the lineal descendants of the life tenant. (Iowa) 629.

VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.

Where an insurer, who has paid part of the loss caused by a fire negligently set out, and been subrogated to the rights of the property owner, joins with the latter in a suit to recover the entire loss caused by the negligence, it is held that the suit should be at law, and not in equity. (Or.) 161.

Statutes providing a summary remedy for a landlord to obtain possession of leased premises are held not to deprive equity of jurisdiction of a suit to determine the rights of the parties under a clause in the lease giving a right to renewal at a rental to be fixed by arbitrators, since the remedy provided by them is not adequate. (Pa.) 353.

A guardian who is tenant in common of certain real estate with his wards is held not to be personally liable as upon his own contract for breach of a contract to convey their interest, made without authority, where, in contracting to sell the whole tract, he signs the contract to convey personally, and also as guardian for the wards. (N. C.) 977.

Who may sue.

To entitle the sendee to sue for failure promptly to transmit and deliver a telegram, it is held that the telegraph company must know, or be chargeable with notice, that the message is for his benefit. (Or.) 319.

Parties.

Officers of a corporation who secure subscriptions to its stock by fraud are held to be properly joined in an equitable suit against the corporation to enjoin collection of the amount unpaid, and to secure the return of what has been paid upon the subscription. (N. Y.) 126.

Judgment as to infant's custody; conclusiveness.

The judgment of a court in a habeas corpus proceeding as to the custody of a child is held not to prevent another court from afterwards making a different order, where the welfare of the child requires it. 67 L. R. A.

even though no material change of circumstances is shown. (Kan.) 783.

An unreversed judgment of a court of competent jurisdiction in a habeas corpus proceeding for the custody of a child is held to be binding upon the parties, while the facts are unchanged, and to bar independent proceedings in another court, even though it be one of higher jurisdiction. (Ill.) 787.

Remittitur.

The power of an appellate court to require a remittitur of excessive damages, instead of reversing the judgment, and to affirm the judgment for the smaller amount in case the plaintiff assents to it, is sustained. (Tenn.) 495.

Conspiracy.

An attempt to break up the business of loan agents, and to secure their custom, by a rival, by statements that they are inattentive and neglectful, and have been guilty of fraudulent conduct for which their principal has taken the business from them, and that they are insolvent, is held to give them a right of action for the injuries thereby inflicted upon them. (Tex.) 195.

Injunction.

The right to an injunction to restrain the blowing of a whistle at a factory is denied where it is not clear that it amounts to a nuisance, until the fact of nuisance has been established by action at law. (N. C.) 983.

Under a constitutional provision requiring compensation in case property is damaged for public use, it is held that injunction will not lie to stay the improvement of a public street, according to a grade lawfully adopted by the municipal corporation, until the damages are paid to the complaining property owner, where none of the property is taken, but is merely subjected to consequential injuries. (Mo.) 362.

Attachment of wages.

Wages due by a corporation, which, although having its domicile of origin in one

state, has acquired a domicile for business purposes by adoption in another one, where its property is located, to a salesman whose services are rendered in still another state, where he resides, are held to be subject to attachment for the debt of the salesman in favor of a creditor residing in the state of the latter's domicile at the adopted domicile of the corporation, under a statute providing that an action may be brought against a foreign corporation by a plaintiff not a resident of the state when the cause of action shall have arisen, or the subject of the action shall be situated, within the state. (N. C.) 209.

Presumption as to law of other state.

In the absence of proof as to the law of another state by which a contract is to be enforced, it is held that the common law, and not the statute law, of the state where the suit is brought will be applied. (Mass.) 33.

Estoppel.

An alleged fraudulent grantee is held to be estopped from setting up, in an action by a judgment creditor to set aside the conveyance as fraudulent, any defense that might have been interposed by his grantor in the original action. (Minn.) 590.

A widow who offers for probate, and undertakes to carry out as administratrix

with the will annexed, the will of her husband, which devises to her her own land for life with remainder to their children, and an additional sum of money, is held to be estopped to assert her absolute title to the real estate. (N. C.) 449.

Damages.

The fact that a person other than the wrongdoer, as a mere gratuity, pays to one injured as the result of his negligence a sum equal to the amount he would have earned had he been able to work during the period of his disability, is held not to mitigate the damages due by the wrongdoer to the injured party for lost time. (Ga.) 87.

The right to recover damages for mental anguish from a telegraph company is sustained where, by reason of its failure to deliver a telegram, friends fail to meet a sixteen-year-old girl, who arrives after midnight in a strange city, and is compelled to drive 2 miles in company with a strange driver in search of their residence. (N. C.) 985.

Writ and process.

Service of summons by publication is held not to confer jurisdiction to compel a non-resident to perform his contract to convey real estate located within the state. (Mont.) 940.

IX. CRIMINAL LAW AND PRACTICE.

Taking up court records from the place where they have been laid, and walking away with them with intent to destroy them, are held to render one guilty under a statute making the unlawful removal of such records a crime, although they were taken from the place where they had been put by authority of the district attorney for the purpose of detecting defendant in the commission of the crime. (N. Y.) 131.

Homicide.

The right of a man to champion the cause of a woman with whom he is maintaining improper relations, and to defend her against the simple assaults of her brother, so as to give him the benefit of the rule as to self-defense in case he kills the brother during the altercation, is denied. (Ky.) 529.

Where it appeared on the trial for murder that the victim was shot and wounded by one person using a shotgun and another using a pistol, and that one of the wounds inflicted by the pistol was certainly mortal, and that probably one or more of the wounds inflicted by the shotgun were so, it is held that, in order to convict the person using the shotgun of murder in such a case, 67 L. R. A.

the evidence must be such as to authorize the jury to find that death actually ensued as the result of the act of the defendant on trial, in the absence of any conspiracy between the parties doing the shooting. (Ga.) 426.

An officer who kills a person whom he is attempting to arrest for misdemeanor, by striking him on the head with a billy, is held not to be guilty of murder if he uses no more force than is necessary in case of an ordinary person, although it proves fatal in the particular case because of the thinness of the prisoner's skull, of which the officer has no knowledge. (Iowa) 292.

Robbery.

The ownership of money in a cash drawer, of which a clerk has possession with the right to make change therefrom and place receipts from sales therein, is held to be properly laid in such clerk as against one who, in the absence of the proprietor, by exhibiting a deadly weapon, compels the clerk to permit him to take the money from the drawer, although the clerk claims no personal interest in the money, and is not held accountable for its loss, where the statutes

permit an indictment for robbery for taking money from the clerk or agent. (Mo.) 343.

Assault.

To excuse a person for assaulting another under the belief that he is a third person, upon whom an assault would be justified, it is held that he must exercise the highest degree of care practicable under the circumstances to ascertain whether or not the person whom he is about to strike is in fact the one whom he believes him to be. (Ky.) 565.

Mandamus to compel arrest.

The right to a writ of mandamus to compel the arrest without warrant of certain designated persons for the alleged commission of a misdemeanor is denied. (Or.) 166.

Evidence; confessions.

The judge who convened a grand jury which is investigating a crime is held not to be permitted to give in evidence a confession made to him by a witness called before such jury, who is subsequently indicted and placed on trial, where the witness, being unable to obtain advice from a lawyer in whom he had confidence, went to the judge, and, upon stating his difficulty, was told by the judge that he could give him no advice, but that he should tell the truth, whereupon the witness made the confession. (Mich.) 923.

Burden of proving insanity.

The burden of proving insanity as a defense to a criminal prosecution is held to be upon the accused; and it is held not to be sufficient merely to raise a reasonable doubt as to sanity, but that the evidence upon that point must preponderate in his favor, or be sufficient to satisfy the jury of that fact. (R. I.) 322.
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Wife as witness.

The right of the state to place on the stand the wife of one on trial for a crime, and ask her questions as to the commission of the crime, for the purpose of forcing defendant to object to her testimony against him in order to prejudice his case, by supporting the theory that he married her to suppress her testimony under a statute making her incompetent to testify against him, is denied. (Tex. Crim. App.) 499.

Motion in arrest; amendment to cure defect.

A supreme court which has arrested a judgment of conviction in a criminal case because of a fatal defect in the indictment as presented to it, is held to have the power, even after the close of the term, to grant the state an opportunity to correct the record so as to show that the alleged defect did not exist, and proceed to hear the appeal upon the corrected record. (N. C.) 179.

Habeas corpus.

The sufficiency of the evidence before a grand jury to warrant an indictment is held not to be subject to inquiry on habeas corpus proceedings to obtain the release of accused from custody consequent upon the indictment, although by statute the evidence offered before the grand jury may be taken down, and a copy of it delivered to the accused, so that the proceedings before that body are no longer incapable of proof. (Cal.) 406.

Extradition.

A joinder in one indictment of several counts charging distinct offenses is held not to prevent the rendition of accused as a fugitive from justice,—at least if, under the laws of the state where the indictment was found, it was sufficient to support a conviction under one of the counts. (N. H.) 946.

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AGREED CASE.

The exercise of the power of a trial court to permit parties to withdraw from written stipulations waiving a jury and submitting the cause upon an agreed statement of facts to the court rests in its discretion, and such power is properly exercised where the application is made before the court has decided the cause under the written submission, and the party applying has discovered other pertinent facts since the submission was entered into, which the other party declines to embrace in the agreed statement; and the fact that, by the exercise of due diligence, the omitted facts might have been discovered before the submission was entered into, does not deprive the court of the power to grant the application to withdraw. Hartford F. Ins. Co. v. Redding (Fla.) 518

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Negligence of Street Railroad in Killing Dog, see NEGLIGENCE.

ANNUITY.**NOTES AND BRIEFS.**

Annuity; effect to suspend power of alienation; assignability of; right to create trust to pay. 148

ANTI-TRUST LAW.**NOTES AND BRIEFS.**

Anti-trust law; constitutionality of. 905

APPEAL AND ERROR.**Objections, exceptions, and record.**

1. A supreme court which has arrested a judgment of conviction in a criminal case because of a fatal defect in the indictment as presented to it may, even after the close of the term, grant the state the opportunity to correct the record so as to show that the alleged defect did not exist, and proceed to hear the appeal upon the corrected record. *State v. Marsh* (N. C.) 179

2. A reviewing court cannot consider cases and statutes for the purpose of determining what is the law of another state by which the contract in suit is alleged to be governed, where they were not mentioned in the bill of exceptions, and it is apparent that they were not considered by the trial court. *Cherry v. Sprague* (Mass.) 33

Questions not raised below.

3. A motion for arrest of judgment for defect in the indictment in a criminal case may be made for the first time in the appellate court. *State v. Marsh* (N. C.) 179

Review.

4. The question whether a witness has such special knowledge or experience as to qualify him to give opinion evidence is a question of fact for the determination of the trial court, whose finding is not reviewable on writ of error if there be any legal evidence to support it. *Burns v. Delaware & A. Teleg. & Teleph. Co.* (N. J. Err. & App.) 956

5. The court of appeals cannot review the decision of the comptroller when based on sufficient evidence and affirmed by the appellate division of the supreme court as to the capital employed within the state upon which a corporation is subject to a franchise tax. *People ex rel. Commercial Cable Co. v. Morgan* (N. Y.) 960

6. A ruling that, because of its character, property alleged to be employed within the state by a corporation sought to be subjected to a franchise tax cannot in fact be made the basis of the assessment, presents a question of law reviewable by the court of appeals. *Id.*

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Ground for reversal.

7. When the penalty for violation of a statute or ordinance is left to the discretion of the trial judge, within certain fixed limits, his judgment will not be disturbed upon the ground that the sentence was excessive, if the penalty imposed does not exceed the limit provided. *Fitts v. Atlanta* (Ga.) 803

8. Errors without injury are not ground for reversal. *Hartford F. Ins. Co. v. Redding* (Fla.) 518

9. The exclusion of general evidence as to the past life of one accused of murder and the condition of his father, offered as a foundation for the inference that he was suffering from delirium tremens at the time of the homicide, is not error if evidence is subsequently admitted showing his condition and habits within a reasonable time of the commission of the crime. *State v. Quigley* (R. I.) 322

Rehearing.

10. In a criminal case, if the accused has actually overlooked an error in the original submission which might have misled the jury in reaching their verdict, the court will correct it on rehearing. *State v. Phillips* (Iowa) 292

Judgment.

11. If a judgment in an equity case or an action at law tried by the court be reversed on appeal to the supreme court, and there is an unsolved question of fact that must be determined before final judgment can be rendered, and there are conflicting reasonable inferences as to how such issue should be solved, rendering it doubtful which way is the right of the matter, lest injustice may be done by the exercise of jurisdiction to decide the issue here as an original matter, the court will remand the cause to the trial court to determine such issue and then to apply the law to the case as directed. *Bostwick v. Mutual L. Ins. Co.* (Wis.) 705

12. An appellate court may, instead of reversing a judgment for damages in an action for tort in which the verdict is so excessive as to evince passion, prejudice, or caprice, require the prevailing party to remit the portion which it deems excessive upon penalty of a reversal for refusal to comply, and affirm the judgment for the smaller amount in case the plaintiff assents to it. *Alabama G. S. R. Co. v. Roberts* (Tenn.) 495

Second appeal.

13. A decision on appeal that the possession of a note by the maker raises a presumption of payment does not preclude the raising upon a subsequent appeal of the question as to the legal effect of the in-

dorsement and transfer of the note by the payee. *Vann v. Edwards* (N. C.) 461

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Right to take advantage, on appeal, of error apparent upon face of record; where no bill of exceptions has been reserved. 66

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NOTES AND BRIEFS.

Arrest; when officer justified in striking or killing accused. 293

Liability of master for unlawful arrest by servant. 457

ASSAULT AND BATTERY.

Exemplary Damages, see DAMAGES, 11.

1. A property owner who, having removed from his premises an intoxicated person, strikes and injures a stranger who is attempting to enter the premises, under the belief, after exercising the highest care practicable under the circumstances to ascertain the facts, that it is the same person whom he has just ejected returning, is excused from liability for the assault on the ground of self-defense and apparent necessity, if belief in the identity of the persons is based on reasonable grounds, and, if, in the exercise of a reasonable judgment, he further believes that it is necessary to strike the ejected person to defend himself, and uses no more force than is, or appears to be, necessary for the purpose. *Crabtree v. Dawson* (Ky.) 565

2. To excuse a person for assaulting another under the belief that he is a third person, upon whom an assault would be justified, he must exercise the highest degree of care practicable under the circumstances to ascertain whether or not the person whom he is about to strike is in fact the one whom he believes him to be. *Id.*

NOTES AND BRIEFS.

Assault; homicide in resisting. 532, 541
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ASSIGNMENT.

Bank Check as Constituting an Assignment of the Funds, see CHECKS.

Estoppel to Question Validity of Assignment of Insurance Policy, see ESTOPPEL.

Of Insurance Policy, see INSURANCE.

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Assignment; of choses in action; necessity of notice of, to person from whom debt is owing. 619

ASSUMPTION OF RISK.

See MASTER AND SERVANT.

ATTACHMENT.

See also GARNISHMENT, NOTES AND BRIEFS.

1. The proceeds of a judicial sale of lands, confirmed by the court, which are held subject to the immediate demand of the party entitled to them, are subject to attachment by his creditors in the hands of the clerk of court. *Le Roy v. Jacobosky* (N. C.) 977

2. An attachment by a creditor of a stockholder of stock which has been pledged and transferred by indorsement and delivery as security for the payment of a debt, but the transfer of which was not entered on the books of the corporation, is valid only against the interest of the assignor therein after the debt has been paid. *Mapleton Bank v. Standrod* (Idaho) 656

3. In the absence of fraud and statutory regulations, a creditor proceeding by execution or attachment obtains only such rights in the property seized as his debtor had at the time of the seizure. *Lipscomb v. Condon* (W. Va.) 670

4. An unregistered transfer of shares of corporation stock, for which no certificate has been issued, if made for a valuable consideration and without fraud, vests in the transferee a title to the shares superior to the claim of a subsequent attaching creditor of the transferor. *Id.*

5. In a proceeding by the creditor of a shareholder to subject his shares to the payment of his debt, the corporation in which the shares are held should be made the garnishee. *Id.*

6. Shares of corporation stock are included in the terms "personal property, choses in action, and other securities," as used in W. Va. Code 1899, chap. 106, § 9, giving the plaintiff in an attachment proceeding a lien on the personal property of the debtor from the time of the levying of the attachment, or serving a copy thereof on the garnishee, on all the personal property, choses in action, and other securities

of the defendant in the hands of the garnishee, and on any real estate of the debtor levied on by virtue thereof, from the suing out of the same, *Id.*

7. Wages due by a corporation, which, although having its domicile of origin in one state, has acquired a domicile for business purposes by adoption in another one where its property is located, to a salesman whose services are rendered in still another state, where he resides, are subject to attachment for the debt of the salesman in favor of a creditor residing in the state of the latter's domicile at the adopted domicile of the corporation, under a statute providing that an action may be brought against a foreign corporation by a plaintiff not a resident of the state when the cause of action shall have arisen, or the subject of the action shall be situated, within the state. *Goodwin v. Clayton (N. C.)* 200

8. The debt owing by the garnishee to the principal debtor at the time of his appearance and answer, and not that due at the time of service of summons, may be applied in satisfaction of the claim of the attaching creditor, under a statute providing that judgment shall be entered for all sums of money due to the principal debtor from him. *Id.*

9. Taking personal judgment against the principal debtor and the garnishee does not waive the lien of the attachment, where the statute contemplates personal judgment against the garnishee, and the judgment against the principal debtor is void for lack of jurisdiction. *Id.*

10. A written transfer of a certificate of shares of stock in a corporation, made in good faith and for value, possession being taken thereof as a pledge for the payment of a private debt of the assignor, and the transfer of which is not entered on the proper book of the corporation, has preference over a subsequent attachment thereof in favor of a creditor of the assignor or transferrer of the stock. *Mapleton Bank v. Standrod (Idaho)* 656

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Effect of, as against prior bona fide purchaser of chattels; of shares of stock previously transferred; failure to enter transfer on books of company. 673

ATTORNEYS' FEES.

1. The provision for the recovery of attorneys' fees in certain cases against fire and life insurance companies, made by Fla. act approved June 2, 1893, chap. 4173, p. 101, is not repugnant to any provision of the state or Federal Constitution. *L'Engle v. Scottish Union & N. Ins. Co. (Fla.)* 581

2. An act authorizing the recovery of attorneys' fees in certain cases against insurance companies is constitutional. *Hartford F. Ins. Co. v. Redding (Fla.)* 518

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Attorneys' fees; provision for, in promissory note. 36

Right to recover in insurance case. 584

BAGGAGE.

See CARRIERS, 9.

BANKRUPTCY.

See also JUDGMENT, NOTES AND BRIEFS.

A trustee in bankruptcy is entitled to maintain an action to set aside a conveyance alleged to be fraudulent as to a judgment creditor where the estate of the judgment debtor is in the bankrupt court, and the claim of the creditor has been filed. *Schmitt v. Dahl (Minn.)* 590

BANKS.

See also CHECKS.

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Banks; check on open account as assignment of fund. 619

BAR.

Of Judgment, see JUDGMENT.

BILL OF EXCEPTIONS.

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BILLS AND NOTES.

See also CHECKS; CONFLICT OF LAWS.

1. A third person placing his name on the back of a promissory note before delivery to the payee is an original promisor or maker, not entitled to demand or notice of nonpayment, and, as to him, no consideration need be proved. *Cherry v. Sprague (Mass.)* 33

2. The character of an instrument as a promissory note is not destroyed by the addition to the promise of payment of clauses providing for additional interest after maturity, and for payment of at-

torneys' fees in case suit is necessary to collection. Id.

NOTES AND BRIEFS.

Bills and notes; effect on promissory note of "additional substantive agreement;" indefiniteness of amount; third person placing name on back as maker; what law governs when executed in one state and delivered to payee in another; presumption of consideration. 34

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Breach of peace; homicide in attempting to prevent. 535

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BURIAL LOT.

See CEMETERIES, NOTES AND BRIEFS.

BUSINESS.

Right of Action for Injuries to, see CASE.

CANALS.

Practical Construction of Contract by Acts of Parties, see CONTRACTS, 10.

1. The opening of canals for dockage purposes, leading out of a navigable river, and maintaining them for a period of twenty years, selling lots abutting upon them, establish a prescriptive right to use the water of the river to fill them; so that the level of the water in the river cannot be drawn down for purposes of public drainage in such a manner as to impair the value of such canals for dockage purposes without making compensation, under a constitution requiring compensation to be made in case private property is taken or damaged for public purposes. *Beidler v. Sanitary District* (Ill.) 820

2. Canal commissioners who have contracted to permit a riparian owner to take water from its feeder in consideration of the right to take the water of the river to 67 L. R. A.

supply their canal will not be permitted to place weirs intended to restrict him to the quantity to which he is entitled, in such a manner as to deprive him of a portion of the water to which he is entitled under his contract. *Merrifield v. Canal Commissioners* (Ill.) 369

3. Under a contract giving the right to withdraw a certain quantity of water from a canal feeder, with the proviso that the water shall not be drawn so that "during the season of navigation" the water in the canal shall be reduced to less than a specified depth, the canal commissioners have no right to place weirs in the flumes by which the water is taken from the feeder, so as to maintain the water in the feeder, at all times, of a depth requisite to maintain the specified depth in the canal, even after the close of navigation, and at times when water from the feeder is not necessary to maintain the specified depth in the canal. Id.

CARRIERS.

Conflict of Laws as to Validity of Contract Limiting Liability, see CONFLICT OF LAWS, 6.

Presumption of Negligence, see EVIDENCE.

Reasonable Time for Consignee to Remove Freight, see TRIAL, 9.

Rates and discrimination.

1. A railroad company renders itself liable to the penalty provided by a statute for making unjust discrimination in rates for transportation over its road, not by making a contract for free transportation, but by actually transporting a person without charge or for an inadequate consideration. *McNeill v. Durham & C. R. Co.* (N. C.) 227

2. The giving of passes in consideration of the publication of railroad time-tables in a newspaper is within the prohibition of a statute making it unjust discrimination for a common carrier to receive from any person a greater or less compensation for transportation than is demanded or received from any other person by means of any special rate, rebate, drawback, or other device. Id.

Carriage of passengers.

3. Conditions on the back of a void pass are without effect upon the rights of the person who is attempting to use it for transportation. Id.

4. A person riding on the cars of a railroad company with its consent without any contract between him and the company may hold it liable for injuries inflicted upon him by the negligence of the company or its servants. Id.

5. The acceptance of free transportation,

which a railroad company is prohibited, under penalty, from granting, does not deprive one of the character of a bona fide passenger, or the protection to which he is entitled as such. Id.

6. While interurban railroad companies are subject to the same regulations and have all the powers of street railroad companies, so far as applicable, the law of negligence governing the standing on a platform of a moving street car in a municipality is not applicable to the case of standing on such platform of a moving interurban car in the open country. *Cincinnati, L. & A. Electric Street R. Co. v. Lohe* (Ohio) 637

7. In a contract for safe carriage, there is an implied agreement that the passenger will obey the reasonable rules of the carrier; and where the passenger purposely violates such rule, and is thereby injured, he cannot recover damages from the carrier in an action on the contract. Id.

8. The law of negligence governing the standing on a platform of a moving interurban car outside of a municipality is the same as in the case of steam cars; and where a rule of the company prohibits passengers from standing on the platform, and notice thereof is properly posted, or where the passengers, upon request, refuse to enter the car, there being in either case vacant seats, they remain on the platform at their peril. Id.

Baggage.

9. Papers pertaining to the business of an insurance agent and belonging to his employer are not baggage, and therefore, in case they are placed in a trunk which is checked as baggage, an action cannot be maintained for the benefit of the employer for loss caused by delay in their transportation. *Yazoo & M. V. R. Co. v. Blackmar* (Miss.) 646

Carriage of freight.

10. A carrier must place freight carried on platform cars to a station where it maintains a freight house, but no agent, in the house, to relieve itself from liability for freight lost through theft, unless it shows that it is not able to do so. *Normile v. Northern P. R. Co.* (Wash.) 271

11. Written notice of the arrival of a consignment of freight need not be given to a consignee if he has actual notice thereof. Id.

12. Mailing notice of the arrival of the consignment of freight to the consignee at the place of its destination is sufficient. Id.

13. A consignee of freight loaded on a flat car which is placed on a side track at a station where no agent is maintained by the company is not guilty of laches when. 67 L. R. A.

after receiving notice of the arrival of the property and communicating with the agent having supervision of the station, insufficient time remains to effect a removal that day, so that his vehicle does not reach the car until the next morning. Id.

14. It is lawful for a carrier to limit, by special contract, his common-law liability, and he may thereby exempt himself from liability for any loss resulting otherwise than by the negligence or misfeasance of himself or his servants. *Russell v. Erie R. Co.* (N. J. Err. & App.) 433

15. A clause inserted without consideration in a carriage contract, fixing the damage, in case of loss of the goods, at their value at the place of shipment rather than of destination, is invalid. *St. Louis, I. M. & S. R. Co. v. Coolidge* (Ark.) 555

16. The presentation of a shipping order signed by a storage company, to a railroad agent by a cartman sent to deliver goods for shipment, was notice to the railroad company that the authority of the cartman was in no sense discretionary, and there was no authority on his part to enter into a contract to exempt the railroad company from liability. *Russell v. Erie R. Co.* (N. J. Err. & App.) 433

17. The agent of a railroad company has no right to assume that a cartman has the authority to alter or modify the terms of the shipping order, where the owner of goods held in storage directed the storage company to send them to him by railroad, and an officer of the storage company sent the box containing the goods by the cartman to the railroad station, accompanied by a complete shipping order. Id.

18. Delay by the initial carrier in the transportation of goods at a season when weather conditions would naturally produce deterioration in their quality, which may have aided in causing the damaged condition in which they were delivered to the consignee, will render it liable for the loss, unless it shows that its delay did not produce the injury in whole or in part, although delay by a connecting carrier is also shown, which might have caused or contributed to the injury. *St. Louis, I. M. & S. R. Co. v. Coolidge* (Ark.) 555

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Of freight; statement of wrong value by shipper; estoppel to claim greater amount; who are common carriers of live stock; necessity of alleging and proving negligence to render carrier liable: contract limiting liability; what law governs; valuation clauses as limitation of common-law liability. 413

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Liability for loss due to vice or defect inherent in goods; presumption that injury to goods passing over lines of connecting carriers occurred while in hands of last carrier; validity of contract fixing value of goods in case of loss; sufficiency of consideration for relinquishment of common-law liability. 556

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Interurban electric road as; measure of care toward passenger; rules governing conduct of passengers; negligence in riding on platform; of steam car; of street car. 639

Delay in delivering baggage; what constitutes baggage. 647

CASE.

Statements that loan agents are inattentive and neglectful, and have been guilty of fraudulent conduct, for which their principal has taken the business from them, and that they are insolvent, made for the purpose of breaking them up in business and securing their custom, give them a right of action for the injuries thereby inflicted upon them. *Brown v. American F. L. M. Co. (Tex.)* 195

CEMETERIES.

Residuary Devise as Including Burial Lot, see WILLS, 16.

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Character of estate or property of owner in burial lot:—(I.) Introductory; (II.) easement; (III.) license; (IV.) devise; (V.) cemetery dedicated to a class; (VI.) when held in common; (VII.) right to mortgage; (VIII.) power of cemetery authorities; (IX.) trespass on lot owner's possession; 67 L. R. A.

(X.) ejectment; (XI.) effect upon, of legislative act or municipal ordinance closing cemetery. 118

CERTIORARI.

1. Points made in a petition for certiorari, not verified by the answer of the trial judge, present nothing for determination either by the superior or the supreme court. *Fitts v. Atlanta (Ga.)* 803

2. An assignment of error on petition for certiorari, that the trial court erred in overruling objections to the testimony of certain witnesses upon designated subjects, without setting forth, either literally or in substance, the testimony to which the objections were made, is not well taken. Id.

NOTES AND BRIEFS.

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CHattel MORTGAGE.

See MORTGAGE.

CHECKS.

A check on an open bank account does not constitute an assignment of the fund, or take precedence of a subsequent attachment levied on the fund before the check is presented for payment or brought to the notice of the bank, if such presentment is not made, or notice given, within a reasonable time. *Love v. Ardmore Stock Exchange (Ind. Terr.)* 617

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Check; as assignment of open bank account. 619

CHOSE IN ACTION.

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Chose in action; as property subject to tax; right to seize or sell on execution at common law. 201

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COLLUSION.

See JUDGMENT, NOTES AND BRIEFS.

COMBINATIONS.

NOTES AND BRIEFS.

Combinations; validity of; when tending to suppress competition or fix prices. 904

COMMON LAW.

1. The common law of England at the time of its adoption by Wyoming had no relation to the master's liability for injuries to his servants and decisions by the English courts subsequently rendered are not binding in determining the question of the liability of the master for injuries occurring within that state. *Johnson v. Union P. Coal Co. (Utah)* 506

2. The term "common law of England," as used in a statute adopting such law as a rule of decision in a state, does not include judicial decisions of English courts rendered subsequently to the independence of America. *Id.*

COMPLAINT.

See PLEADING.

CONDITIONAL SALE.

Validity of Insurance on Property, see INSURANCE, 22.

CONFLICT OF LAWS.

1. A promissory note payable in the state where the payee receives it through the mail is a contract of that state, and not of the one where the maker resides, and where the instrument was executed. *Cherry v. Sprague (Mass.)* 33

2. In the absence of proof as to the law of another state by which a contract is to be enforced, the common law, and not the statute law, of the state where the suit is brought, will be applied. *Id.*

3. The right to exemption from execution is subject to the law of the forum. *Goodwin v. Claytor (N. C.)* 209

4. A debtor cannot claim the benefit of the exemption law of the state of his domicile, even against his creditor residing there, with respect to a debt due him by a corporation, located and doing business in another state, which is also the situs of the debt, and which debt has been attached by the creditor at the domicile of the corporation. *Id.*

5. The courts of one state will not enforce the provisions of a contract made in another state as to the time in which actions shall be brought on it, which are contrary to the provisions of the local statute of limitations. *Adams Exp. Co. v. Walker (Ky.)* 412

6. In case of a breach of a carriage contract in a state whose Constitution prohibits the carrier from contracting to limit its common-law liability, the carrier cannot, in the courts of that state, have the benefit of a contract valid where made in another state limiting such liability. *Id.* 67 L. R. A.

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CONSTITUTIONAL LAW.

Validity of Provision for Recovery of Attorneys' Fees, see ATTORNEYS' FEES.

See also STATUTES.

1. A statute which may constitutionally operate upon certain persons or in certain cases is not to be held unconstitutional merely because there may be persons to whom or cases in which it cannot constitutionally apply; but it is to be construed not to apply to such persons or cases. *State v. Smiley (Kan.)* 903

2. An ordinance declaring it unlawful to hold public meetings in the streets of a city without the consent of the municipal

authorities is not unconstitutional, either because it curtails or restricts the liberty of speech, or makes an arbitrary discrimination in favor of some persons against others, or because the city has no legal power to enact it; nor is such ordinance void upon the ground that it is an unreasonable and oppressive exercise of police power. *Fitts v. Atlanta* (Ga.) 803

3. The legislature cannot assume the right to pass upon the question of the release of one committed to a hospital for criminal insane, and thereby deprive the courts of their jurisdiction to inquire into the legality of his restraint. *Re Boyett* (N. C.) 972

4. The Kansas anti-trust law of 1897 making unlawful any combination to create or carry out restrictions on trade or commerce, to control the prices of any article or commodity or the rates of insurance, or to prevent competition in the manufacture, transportation, sale, or purchase of merchandise, produce, or commodities, does not conflict with the guaranty of the Federal Constitution of the right to acquire property by lawful contract, and is a valid exercise of legislative power. *State v. Smiley* (Kan.) 903

5. A right, fully matured under existing law, to defeat a debt by a plea of the statute of limitations, is neither a vested right nor a property right, and may be taken away at will by the legislature. *Orman v. Van Aredell* (N. M.) 438

Equal protection of the laws.

6. The taxation by a state of debts due by solvent debtors is not forbidden by the clause of the amendment to the Federal Constitution forbidding any state to deny to any person the equal protection of the laws, although no tax is laid on debts due by insolvents. *Kingsley v. Merrill* (Wis.) 200

7. A state cannot forbid a nonresident landowner to take fish and game upon his property within the state while according such privilege to resident landowners, in view of the provisions of the Federal Constitution forbidding denial of the equal protection of laws, and the deprivation of property without due process of law. *State v. Mallory* (Ark.) 773

8. Exemption of minors and persons under guardianship from the penalty imposed by a statute for refusal to be vaccinated does not render the statute unconstitutional as working an inequality. *Com. v. Pear* (Mass.) 935

Privileges and immunities of citizens.

9. A statute making it a misdemeanor for one under contract to labor, or work land, to break his contract and enter into 67 L. R. A.

another with a different person, without the consent of his employer, and sufficient excuse, to be adjudged by the court, and without giving notice of his contract to the person with whom he makes the new one, violates the constitutional guaranties of life, liberty, and property, and abridges the privileges and immunities of citizens of the United States. *Toney v. State* (Ala.) 286

10. Conferring power upon a municipal corporation to require licenses for the sale of intoxicating liquors, within 4 miles of its corporate limits, does not deprive citizens of their constitutional property rights, or of the privileges and immunities protected by the Federal Constitution. *Jourdan v. Evansville* (Ind.) 613

Due process of law.

11. The legislature cannot empower the court, in its discretion, to authorize a married woman to convey her real estate by separate deed, in jurisdictions where the common law, giving the husband a freehold right in the property, is in force, since it would deprive him of his property without due process of law. *Hubbard v. Hubbard* (Vt.) 969

12. Empowering the court, in its discretion, to commit one acquitted of murder because of insanity to an asylum for treatment, from which he cannot be released without an act of the legislature, without notice to him or giving him an opportunity to be heard, or any provisions for investigation as to his present mental state, deprives him of his liberty without due process of law. *Re Boyett* (N. C.) 972

13. Opportunity for contesting in the ordinary courts of justice a charge imposed upon property where cigarettes are sold is sufficient to uphold the tax as against the owner of the property without notice to him of its assessment, although he may not be directly engaged in the business. *Hodge v. Muscatine County* (Iowa) 624

14. An assessment for construction of a sewer upon a strip of property fronting on the street, which is only 8 feet deep, at the same front-foot rate as is applied to full-sized lots, is so manifestly unequal and unjust that it violates the constitutional provisions against taking property without due process of law. *Iowa Pipe & Tile Co. v. Callanan* (Iowa) 408

Police power.

15. The police power does not warrant an arbitrary discrimination between individuals in regulating the sale of intoxicating liquors, although as between liquor selling and other callings less harmful to the public the former may be discriminated against. *State ex rel. Galle v. New Orleans* (La.) 70

16. The legislature may, in the exercise of its police power, authorize the health authorities of a municipal corporation to require, under penalty, all citizens to be vaccinated when, in their discretion, it is necessary for the public health and safety. *Com. v. Pear* (Mass.) 935

17. The constitutional requirement that police powers shall be wholesome and reasonable does not justify the court in setting aside a statute upon a subject in regard to which the legislature is authorized to act because the opinion of the judge differs from that of the legislators on the question whether it will be for the good and welfare of the state. *Id.*

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Delegation of police power to municipalities. 832

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Provisions of, not directory; constitutional limitations as to time for introduction of bills in legislature. 965

CONTINUANCE.

A refusal to continue a case against one who violated a municipal ordinance for the previously announced purpose of testing its constitutionality, merely to give his counsel time to investigate the constitutional questions claimed to be involved therein, is not error. *Fitts v. Atlanta* (Ga.) 803
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Validity of Contract Limiting Liability, see CARRIERS, 14.

Between Corporation and Stockholders or Directors, see CORPORATIONS, 13-16.

Measure of Damages for Breach of, see DAMAGES, 4-8.

Parol Evidence Affecting, see EVIDENCE.

Fraud in Inducing Execution of, see FRAUD.

See also CONFLICT OF LAWS; INSURANCE; VENDOR AND PURCHASER.

1. One accepting free transportation which a railroad company is forbidden, under penalty, to grant, is not precluded, on the ground that he is *in pari delicto*, from holding the carrier liable to him for injuries due to its negligence, since he is not *in pari delicto* with a railroad company, and, if he is so with respect to the carriage contract, it does not extend to the negligence causing the injury. *McNeill v. Durham & C. R. Co.* (N. C.) 227

2. Mere ignorance of the contents of a paper, by one who becomes a party thereto under a mistake as to its import, will not enable him to avoid his act. *Bostwick v. Mutual L. Ins. Co.* (Wis.) 705

3. A mere request by one of the parties thereto for an alteration or modification of a fully accepted proposed contract, which by acceptance has been wrought into a binding contract, is not a breach thereof, giving right of rescission or action; neither does it effect such alteration, unless assented to by the other party. *Turner v. McCormick* (W. Va.) 853

4. A person who, in a business deal with another, signs a written instrument, is conclusively presumed, as to that other and all persons claiming under him through such instrument, to know the contents thereof, no fraud or deceit being used by such other or by anyone for whose conduct he is responsible, reasonably calculated to, and which does, induce such person to become a party to such instrument without reading it. *Bostwick v. Mutual L. Ins. Co.* (Wis.) 705

Consideration.

5. A lease with the affirmative covenants of the lessee is sufficient consideration for a contract giving him a right to purchase the property during the continuance of the lease, so that the option cannot be withdrawn by the lessor during that time. *Frank v. Stratford-Handcock* (Wyo.) 571

6. One who signed an option contract to convey land after the expiration of the option and without any consideration moving to him is not bound thereby. *Le Roy v. Jacobosky* (N. C.) 977

Validity.

7. A contract by a guardian to sell his wards' land in advance of legal authority is contrary to public policy and void. *Id.*

8. A contract by a patron of a telephone company not to engage service from a rival company is void as contrary to public policy. *Gwynn v. Citizens' Teleph. Co. (S. C.)* 111

9. A lease by a corporation, engaged in the business of generating and furnishing electricity for public and private use, to a rival corporation in the same city, for a period of ten years, of machinery and appliances used in generating electricity, by which it obligates itself not to engage in the business of furnishing electric light and power to public or private consumers in the city during said period, and not to dispose of any of its property, machinery, or appliances retained by it for producing or generating in such city electric light and power, is in contravention of public policy, and no action to recover rents can be maintained thereon by the lessor or its assignee. *Keene Syndicate v. Wichita Gas, E. L. & P. Co. (Kan.)* 61

Construction.

10. Maintenance for nearly forty years, with the knowledge and acquiescence of the canal commissioners, of flumes to take water from a canal feeder, under a contract by which the commissioners granted the right to take it, the bottoms of which are level with the bottom of the feeder, so that whenever the grantee was entitled to take water he would receive it under a head, is a practical construction of the rights of the parties which will prevent the commissioners from subsequently placing weirs in the flumes so that no water can be received until it has reached a certain height in the feeder. *Merrifield v. Canal Commissioners (Ill.)* 369

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Contracts; tending to suppress competition or fix prices; validity; liberty to contract. 904

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tion contracts; withdrawal of option; necessity of literal performance by party to whom offer made, to entitle him to demand performance by other. 571

Binding effect of written contract; right to rescind; duty to exercise within reasonable time. 713

Right to recover on illegal contract which has been executed; in partial restraint of trade; validity; between quasi-public corporations; as affecting commodity of common utility; refusal of courts to enforce void contract. 61

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CONVEYANCE.**NOTES AND BRIEFS.**

Conveyance; parol gift as. 461

CORPORATIONS.

Parties to Suit to Enjoin Collection of Subscriptions, see ACTION OR SUIT, 3.

Attachment of Stock by Creditor of Stockholder, see ATTACHMENT.

Attachment of Wages Due by Foreign Corporation, see ATTACHMENT, 7.

Execution against Shares of Stock, see LEVY AND SEIZURE.

Franchise Tax, see TAXES.

1. The books and papers of a private corporation under the laws of this state are not public, but private, records and documents. *Lipscomb v. Condon (W. Va.)* 670

Stock.

2. A certificate of stock is not the stock itself, but is evidence of its existence and ownership. *Id.*

3. Though, when issued, a certificate of stock is a muniment of title, it is not essential to the existence of the property represented by it. *Id.*

4. The rights of a creditor respecting shares of corporation stock for which certificates have not been issued, alleged to be the property of his debtor, are the same as in the case of an ordinary chose in action. *Id.*

5. The beneficial interest in shares of corporation stock is assignable by parol, the ownership passing immediately on consummation of the sale, by force of the contract, as in the case of ordinary choses in action, and not by operation of law. *Id.*

6. A sale of shares of stock for which no certificate has been issued may be evidenced by an informal written instrument, executed and delivered by the transferrer to the transferee, without a power of attor-

ney entitling the latter to have the same transferred on the books of the company.

Id.

7. A shareholder may, upon his demand, obtain a certificate of his shares, but, unless demanded by him, it need not be issued; and he may freely transfer the shares without it if they are fully paid up, or security for the balance due on them, satisfactory to the board of directors, be given.

Id.

8. The requirement that corporations keep transfer books and that shares of stock be assigned therein is intended for the protection and convenience of the corporation and its shareholders, and does not affect the rights of one to whom shares are transferred without an entry in the transfer book.

Id.

9. Shares of stock in a corporation are personal estate and a species of incorporeal property.

Id.

10. A certificate is not necessary to a sale of shares of corporate stock.

Id.

11. That provision of Idaho Rev. Stat. § 2611, which provides that a transfer of stock, made by indorsement and delivery of the certificate, is not valid, except between the parties thereto, until the same is entered upon the books of the corporation, was not intended as a protection to creditors of a stockholder, but was intended to protect the corporation, its members, and its creditors. *Mapleton Bank v. Standrod* (Idaho) 656

Dividends.

12. On complaint of the minority stockholders, and on proper showing, the court will order the board of directors of a corporation to declare a dividend. *Crichton v. Webb Press Co.* (La.) 76

Transactions between corporation and stockholders, or directors.

13. Where the same five persons compose both the directorate and the body of the stockholders of a corporation, two of these persons cannot, by joining with a third, enter into contracts with the corporation, or fix their own salaries, or vote allowances to themselves, over the protest of their two other associates.

Id.

14. Equity will not permit the members of a corporation, whether as directors or as stockholders, to vote to themselves the money of the corporation over the protest of their associates.

Id.

15. Stockholders who undertake to discharge the functions of directors and conduct the affairs of the corporation become subject to the same trust relation which precludes directors from contracting with

themselves to the detriment of the corporation.

Id.

16. On complaint of minority stockholders the court will intervene to protect their interests, where the majority of the stockholders of a corporation, who were also the sole managers of its business, have gone on, over the protest of the minority, and dealt with themselves; and the court cannot approve the basis upon which the business has been carried on, even though its intervention involves reforming the contract between the corporation and the majority of stockholders, or revising the basis for the apportionment of the profits of the business.

Id.

Foreign corporations.

17. A foreign corporation which has its principal place of business and the bulk of its property in a state with whose laws it has complied for the purpose of obtaining the privilege of doing business there, which subject it to the service of process there, is subject to the jurisdiction of the courts of that state in actions to collect debts due from it either to foreign or domestic creditors, so far as foreign creditors are permitted to maintain actions in the state. *Goodwin v. Claytor* (N. C.) 209

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Corporations; engaged in performing public duties; right to lease or alienate franchise or property. 62

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Right of directors or stockholders to fix amount of royalty on patents, to be paid them as individuals; right of majority to withhold profits earned, or to apply them to unauthorized use; stockholders' right to manage corporate affairs. 77

Validity of pledge or other transfer of stock of corporation when not made on books of company, as against attachments, executions, or subsequent transfers:—(I.) The elements of the problem; (II.) registry not necessary in absence of statute or by-law; (III.) statutes requiring transfer on books; (IV.) by-law requiring transfer on books; (V.) provision of certificate requiring transfer on books; (VI.) requirement of record with county clerk; (VII.) effect of effort to secure transfer; (VIII.) effect of notice to purchaser or creditor; (IX.) persons not entitled to benefit of statutes; (X.) estoppel of pledgee; (XI.) statutory recognition of transfers of certificates. 656

Attachment of shares of stock; superiority over lien of prior pledgee; where transfer to pledgee has not been entered on books of company. 657

Transfer of shares of stock in; attachment by debtor of transferer; effect of failure to enter transfer on books of company. 673

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COURTS.

Encroachment by Legislature upon Judicial Power, see CONSTITUTIONAL LAW, 3.

Jurisdiction to Issue Writs of Mandamus, see MANDAMUS.

Wrongful Removal of Records, see RECORDS.

1. Decisions of the English courts, rendered since the independence of America, are entitled to respect upon the question as to what the common law is, and in particular cases may properly be regarded as conclusive. *Johnson v. Union P. Coal Co. (Utah)* 506

2. In case actions between the same parties and involving the same subject-matter are brought in courts of co-ordinate jurisdiction, and one of the courts secures by proper process the custody or dominion which it is one of the objects of the suit in the other court to subject to its judgment, the latter action should not be dismissed but should be stayed until the proceedings in the court that first obtained jurisdiction of the property are concluded or ample time for their termination has elapsed. *Re Barber Asphalt Pav. Co. (C. C. A. 8th C.)* 761

Federal courts.

3. Wherever the citizens of a state may secure a trial of their controversies by its courts of general jurisdiction either by original process, or by appeal, or by other proceedings, the citizens of different states may obtain the trial of like controversies between them by some appropriate action in the Federal courts. *Id.*

4. The jurisdiction of the Federal courts may not be limited or impaired by state legislation which confers exclusive jurisdiction of litigation upon state courts or 67 L. R. A.

prescribes exclusive methods of invoking that jurisdiction. *Id.*

5. The pendency in a state court of a prior action between the same parties for the same cause furnishes no ground for an abatement or for a stay of proceedings in a subsequent action brought by the same plaintiff in a Federal court, where no conflict arises between the courts over the custody or dominion of specific property. *Id.*

6. A city charter which provides for appeals from the allowance or rejection of claims against that city to a certain state court, and prohibits the payment of such claims while such appeals are there pending, does not restrict the jurisdiction of the Federal courts over claims of citizens of other states, or the power of those courts to enforce their judgments upon such claims; and actions by original process in the Federal courts may be maintained in controversies over such claims without presenting them to the city council. *Id.*

Effect in Federal courts of state decisions.

7. The question whether or not an insurable interest in an assignee is requisite to the validity of the assignment of a policy of life insurance, which was originally issued to one who had an insurable interest, is a question of general law, upon which the decisions of the courts of the state in which the assignment was made are not controlling in the Federal courts. *Gordon v. Ware Nat. Bank (C. C. A. 8th C.)* 550.

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Mandamus to Compel Issuance of Bench Warrants, see **MANDAMUS**.
See also **EXTRADITION**; **HABEAS CORPUS**; **NEW TRIAL**.

1. One who proposes a scheme, and puts in motion the forces by which court records are removed from the files for the purpose of destroying them, is guilty as principal throughout the transaction, although the papers are actually removed by the district attorney under permission of a judge of the court, and placed in the custody of a public officer for delivery to the one who wishes them. *People v. Mills* (N. Y.) 131

2. Punishment by fine of not less than \$25 nor more than \$200, or by imprisonment in the city jail for not less than ten days nor more than sixty days, for violation of an ordinance prohibiting keepers of saloons, barrooms, etc., from permitting females to enter their places of business for immoral purposes, is not unreasonable or oppressive. *State v. Nelson* (Idaho). 808

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Criminal law; what necessary to constitute crime; effect of instigation or consent to crime, when given for purpose of discovering criminals; removing court records with consent of judge and district attorney; sufficiency of mere solicitation to commit crime to justify conviction for attempt. 134

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Presumption of sanity of accused; burden of proof to show insanity; admissibility of evidence of hereditary insanity; sanity as essential element in crime of murder; acquittal required in case of reasonable doubt of sanity. 323

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CUSTODY OF THE LAW.

Attachment of Proceeds of Judicial Sale, see **ATTACHMENT**, 1.

DAMAGES.

Judgment on Appeal Requiring Remission of Excessive Amount, see **APPEAL AND ERROR**, 12.

1. A clause in a statute making a railroad company liable for losses by fire set out by its engines, which gives it the benefit of any insurance on the property, applies only to cases where the liability is imposed by the statute, and not to those where it is liable because of its own negligence; so that in the latter case it is not entitled to the benefit of the insurance on the property. *Dyer v. Main C. R. Co.* (Me.) 416

Measure of damages.

2. Where riparian property has been injured by lowering the level of the water so as to interfere with access between the water and land, the measure of damages is the difference in value of the property before and after the injury was done, and not the cost of charges made to avoid the result of the change in conditions. *Beidler v. Sanitary District* (Ill.) 820

3. The measure of damages for failure to notify one who delivers a message to a telegraph company for transmission, advising the sendee to purchase certain stock, of the fact that it cannot be transmitted because of obstruction of the line, is the difference between what the stock could have been purchased for had the message been promptly sent and what was paid for the stock under the belief that the advice related to conditions at the time the message reached the sendee. *Swan v. Western U. Teleg. Co.* (C. C. A. 7th C.) 153

4. The general rule that the measure of damages in case of breach of an executory contract to sell and deliver goods is the difference between the market value thereof at the time and place of delivery and the contract price, with interest, does not apply where at the time of the breach the buyer could not have obtained like goods at the place of delivery, and in such case the damages recoverable are such as arise naturally from the breach, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. *Vogt v. Shienebeck* (Wis.) 756

5. The proper measure of damages for breach of an executory contract of sale and delivery, where at the time of the breach

similar goods could not be obtained by the buyer at the place agreed upon for delivery but there was a market value for such goods at the point to which they were to be consigned, is the difference between the contract price and such value, less any expense which the buyer, if the contract had been performed, would have been put to in delivering the goods at such place, with interest on the residue at the legal rate, from the date of the breach. Id.

6. In an action to recover damages for the breach of an executory contract to sell and deliver goods, the general rule is that the difference between the market value thereof at the time and place of delivery, and the contract price, with interest from the time of the breach, is the true measure. Id.

7. The measure of damages for breach by an agent who signs a contract to convey his principal's land and so warrants his authority to make the contract, is what the other contracting party loses by reason of the false assertion of authority, or the amount of money paid out, or the value of services rendered, or the special damages sustained. *Le Roy v. Jacobosky* (N. C.) 977

8. The measure of damages for breach of a contract to convey real estate is the difference between the contract price and the market value of the property. Id.

Mitigation of damages.

9. The fact that a person other than the wrongdoer, as a mere gratuity, pays to one negligently injured a sum of money equal to the amount he would have earned had he been able to work during the period of disability, will not mitigate the damages due by the wrongdoer to the injured party for lost time, even though the person making the payment is the employer of the injured party. *Nashville, C. & St. L. R. Co. v. Miller* (Ga.) 87

10. That a telephone company has not the means to supply service to one applying for it may be shown in mitigation of damages for refusal to comply with its duty in that regard, but not in justification thereof. *Gwynn v. Citizens' Teleph. Co.* (S. C.) 111

Exemplary damages.

11. One who recklessly and wantonly strikes a stranger upon the pretext of defending himself against one with whom he has had an altercation is liable for exemplary, as well as compensatory, damages. *Crabtree v. Dawson* (Ky.) 565

12. Belief in the existence of a legal right to refuse telephone service to one applying for it, although erroneous, and refusal to furnish service for the purpose of protecting the rights of the telephone company, will 67 L. R. A.

prevent the imposition of punitive damages for such act. *Gwynn v. Citizens' Teleph. Co.* (S. C.) 111

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Right to recover for act criminal in its nature, but excusable under criminal law. 566

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ELECTIONS.See **VOTERS AND ELECTIONS.****ELECTRICAL USES AND APPLICATIONS.**

A corporation which contracts to light a building by electricity undertakes to protect its occupants from injury by the electrical current, so far as it can do so, by exercising the highest degree of care, skill, and diligence in the construction and maintenance of its plant. *Alexander v. Nanticoke Light Co. (Pa.)* 475

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Electrical uses; measure of care required of company using electricity; when contracting to light building thereby; presumption of negligence where person attempting to turn on light is injured by escape of current; necessity of proving that injury was caused by negligence of company. 475

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Judicial Notice that Lights cannot be Located in Street without Authority of Municipality, see **EVIDENCE**, 5.

Presumption of Negligence where Injury is Caused by Escape of Current from Wire, see **EVIDENCE**, 15.

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EMINENT DOMAIN.

Injunction to Restrain Public Improvement until Compensation is Paid, see **INJUNCTION**, 4.

Lowering the water of a navigable river by drawing it through a drainage ditch so as to obstruct ingress to and egress from abutting property is within a constitutional provision requiring compensation in case private property is damaged for public use, and liability for damages cannot be defeated on the ground that the act was an exercise of the police power for the promotion of the public health. *Beidler v. Sanitary District (Ill.)* 820

EQUAL PROTECTION OF LAWS.See **CONSTITUTIONAL LAW.****EQUITY.**

Tender of a portion of the assessment for a local improvement is not a condition to equitable relief from an invalid assessment if there is nothing to show that some amount at least is due, but it appears that the entire assessment is illegal. *Iowa Pipe & Tile Co. v. Callanan (Iowa)* 408

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Equity; concurrent jurisdiction with courts of law; of suit to recover damages for having been induced by fraud to subscribe to corporate stock. 127

Jurisdiction to fix rent to be paid during renewal term of lease; where arbitrators provided for by contract fail to do so; right to restrain proceedings under landlord and tenant acts. 363

ESTATE.See **REAL PROPERTY.****ESTOPPEL.**Of Insured, see **INSURANCE.**

1. A policy of life insurance which was pledged by the insured to secure an indebtedness having been sold and the proceeds applied to the debt under order of court, in an action by the pledgee against the insured and his wife, the beneficiary, both of whom appeared and admitted the pledge and consented to the trial of the case, the administrator of the estate of the beneficiary is estopped to claim title to the policy on the ground that subsequent assignments of the policy were void because the immediate and remote assignees of the pledgee, who bought the policy on the sale, had no insurable interest in the life of the insured. *Gordon v. Ware Nat. Bank (C. C. App. 8th C.)* 550

2. He who is inexcusably negligent in a business transaction forfeits the right to judicial remedies for relief, and not because

of any favor or indulgence which the law extends to the wrongdoer, but because of failure on the part of the injured person to exercise that care for his own protection which the policy of the law requires as a condition of its protection, such policy being to aid only those who exercise some reasonable care to guard their own interests. *Bostwick v. Mutual L. Ins. Co. (Wis.)* 705

3. Negligence of a person in not asserting his right as against another by whom he has been defrauded in a business transaction, is not a defense, strictly so called, to an action on the former's part for redress, but is evidence of submission to or waiver of the wrong, more or less strong according to the circumstances, and may be conclusive evidence thereof; or it may be so gross as to forfeit such person's right to judicial redress; or, in connection with some injury to the wrongdoer, it may operate to estop such person from claiming redress for the wrong first inflicted. *Id.*

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See also WITNESSES.

1. Proof of the signatures of nonresident parties to a contract who are alive may be made by one of the parties thereto. *Le Roy v. Jacobosky (N. C.)* 977

2. Upon prosecution of one for killing the brother of a woman, with whom he was maintaining improper relations, in an altercation about her, evidence is admissible to show such relation for the purpose of explaining the circumstances of the parties, illustrating their motives, and showing interest on the part of the woman, who has testified on behalf of defendant. *Morrison v. Com. (Ky.)* 529

3. The aggressor who kills his opponent in an altercation cannot show that decedent was a violent and dangerous man, and had made threats to kill him, which had been communicated to him. *Id.*

4. To justify a consideration of the man- 67 L. R. A.

ner in which a particular class of work is usually performed by other employers, in determining whether a particular employer was negligent in its performance, so as to be liable for injuries to a servant, it must be shown that the conditions under which the work is performed by the respective employers are similar. *Johnson v. Union P. Coal Co. (Utah)* 506

Judicial notice.

5. The court will take judicial notice of the fact that an electric lighting company could not locate lights in the street of a city without authority from the city to do so. *Nelson v. Narragansett Electric Light Co. (R. I.)* 116

6. Courts will not take judicial notice of the laws of another state. *Adams Exp. v. Walker (Ky.)* 412

7. Courts take judicial notice that, where one agrees to sell to another property "f. o. b. cars" at the place of shipment, such term means that the seller will, without expense or act of the buyer, deliver to the latter the subject of the sale on cars at such place. *Vogt v. Shienebeck (Wis.)* 756

8. That electricity can be safely conducted and used as an agent for production of light, heat, and power is a matter of judicial notice. *Alexander v. Nanticoke Light Co. (Pa.)* 475

9. Evidence as to what vaccination consists of is not admissible in a prosecution for refusal to obey an order of the board of health to be vaccinated, since it is a fact of common knowledge. *Com. v. Pear (Mass.)* 935

Presumptions and burden of proof.

10. In the absence of proof of the law of a sister state the presumption is that the common law is the same as the local law, but not that the statute law of the two states is the same. *Cherry v. Sprague (Mass.)* 33

11. The burden of proving insanity as a defense to a criminal prosecution is upon the accused; and it is not sufficient merely to raise a reasonable doubt as to sanity, but the evidence upon that point must preponderate in his favor, or be sufficient to satisfy the jury of the fact. *State v. Quigley (R. I.)* 322

12. Negligence on the part of the carrier will be presumed where three dogs are delivered to it for transportation securely crated, and but two reach their destination, without any account being given of the missing one. *Adams Exp. Co. v. Walker (Ky.)* 412

13. Negligence on the part of a railroad company will be presumed when fire is communicated by its engines to property abut-

ting on its right of way. *Dyer v. Maine C. R. Co. (Me.)* 416

14. The presence of a signal torpedo upon the planking where a highway crosses a railroad track is not of itself evidence of negligence on the part of the railroad company in failing properly to care for the torpedo. *Obertoni v. Boston & M. R. (Mass.)* 422

15. Injury to a property owner whose building an electric lighting company has contracted to light by means of an equipment furnished by itself, by the escape of a current from the wires when he attempts to turn on light at a particular lamp, raises a presumption of negligence on the part of the company, and places the burden of rebutting the presumption upon it. *Alexander v. Nanticoke Light Co. (Pa.)* 475

16. Failure of a telegraph company to deliver a message properly addressed, which requests the sendee to meet a train to arrive on the night of the transmission of the message, until it is called for by the sendee at company's office on the following day, raises a presumption of negligence. *Green v. Western U. Teleg. Co. (N. C.)* 985

Parol evidence affecting writings.

17. The rule that where a written contract is made as a mere part execution of an entire verbal contract, that portion not embodied in the paper may be shown by parol, applies only where such portion is in itself a distinct, complete contract, not to mere stipulations in regard to, and varying the terms of, the written contract. *Vogt v. Shienebeck (Wis.)* 756

18. A contract having been reduced to writing, evidence of what occurred between the parties in respect thereto at the time thereof or prior thereto is inadmissible. *Id.*

19. If a written contract is ambiguous or obscure in its terms, so that the contractual intention of the parties cannot be understood from a mere inspection of the instrument, extrinsic evidence of the subject-matter of the contract, of the relations of the parties to each other, and of the facts and circumstances surrounding them when they entered into the contract, may be received to enable the court to make a proper interpretation of the instrument. *L'Engle v. Scottish Union & N. Ins. Co. (Fla.)* 581

Opinion evidence.

20. A question calling for the opinion of an expert witness upon a matter not in issue before a court is properly excluded. *Johnson v. Union P. Coal Co. (Utah)* 506

Admissibility under pleadings.

21. Under an allegation that, by reason of the character of the work and the conditions under which it is done, the letting

down into a mine of cars loaded with rails was dangerous to employees, and resulted in an injury for which the action is brought, evidence is admissible to show the manner of doing the work, although it is not limited to the trip on which the accident occurred. *Id.*

22. An allegation in a petition that the plaintiff "has suffered and will continue to suffer great pain" is sufficient to authorize the admission of evidence that mental pain has been suffered. *Nashville, C. & St. L. R. Co. v. Miller (Ga.)* 87

Weight and sufficiency.

23. That the fender on the car which killed a dog was defective cannot be shown by evidence that witness had measured a fender on one of defendant's cars and found it to be too far from the ground, and that there were different kinds of fenders in use on different cars, without anything to show the condition of the fender on the car which did the injury. *Moore v. Charlotte E. R. L. & P. Co. (N. C.)* 470

24. The contention that the evidence does not show that the death of one insured against accident resulted from external, violent, and accidental means cannot prevail where it is alleged in the complaint and admitted by the answer that assured fell from cars and received injuries from which he died. *Richards v. Travelers' Ins. Co. (S. D.)* 175

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Presumption as to law of other state; presumption of consideration for note. 34

Presumption that plan for constructing street is safe. 254

In criminal prosecution; of hereditary insanity of father of accused; presumption of sanity. 323

Presumption of negligence where fire is set by sparks from engine. 417

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Presumption that injury to goods passing over lines of several carriers occurred while in hands of final carrier. 556

In habeas corpus; to review extradition proceedings; burden of proving that valid indictment exists against relator; presumption as to governor's jurisdiction to issue warrant of removal. 947

Burden of proving assent by shipper to exemption of carrier from liability. 434

Burden of proof on telegraph company to explain delay in sending message. 155

Burden of proof to show alleged agency. 288

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Admissibility in evidence of communications made to persons serving in a judicial capacity. 923

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See also LEVY AND SEIZURE.

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Execution; on corporate stock; effect of pledge or other transfer not made in books of company. 656

EXECUTORS AND ADMINISTRATORS.

See also WILLS.

Specific performance of a contract to sell property devised by will will not be decreed against the protest of the parties, where the result would be to defeat the intention of the testator as manifested in the will. *Wool v. Fleetwood* (N. C.) 444

EXEMPLARY DAMAGES.

See DAMAGES.

EXEMPTION.

Conflict of Laws as to Right to Exemption from Execution, see CONFLICT OF LAWS.

EXPLOSIVES.

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Explosives; as "materials," in statute giving material man's lien. 488

EXTRADITION.

See also HABEAS CORPUS.

1. That one of the crimes for which an alleged fugitive from justice is indicted was committed after his departure from the state, and that in case he is returned to the state, he may be tried on that charge, do not remove him from the class of persons liable to rendition under the Federal Constitution, where the indictment also charges the commission of other crimes before the date of his departure. *State ex rel. Munsey v. Clough* (N. H.) 946

2. A finding that an accused is a fugitive from justice is not precluded by the fact that the indictment shows that the offenses were committed more than six years before the indictment was found. Id.

3. A governor's warrant for the arrest of a fugitive from justice is not void because it describes the offense as uttering forged wills, where the indictment in each count charged the uttering and publication as true of "a
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certain forged instrument purporting to be a will," where, by reference to the indictment, the meaning of the warrant is rendered plain and definite. Id.

4. A clerical error in the affidavit of the clerk of court, to the effect that an indictment was found in 1892, does not preclude the governor from finding that it was in fact found in 1902, for the purpose of upholding a proceeding for the interstate rendition of one accused of crime. Id.

5. The addressing of the governor's warrant for the rendition of a fugitive from justice to a local officer, rather than to the agent of the demanding state, affords no reason for the discharge of the accused from custody, where the statute merely directs that the warrant shall authorize the agent to take and transport the fugitive out of the state without prescribing to whom it shall be addressed. Id.

6. One whose rendition is sought from a sister state as a fugitive from justice is not entitled, as matter of right, to a hearing before the governor upon the question whether or not he is such fugitive. Id.

7. A governor, in determining whether or not one whose rendition is demanded by a sister state is in fact a fugitive from justice, is not precluded from receiving evidence that fails to meet the requirements of legal proof. Id.

8. The governor's order directing the rendition of a person as a fugitive from justice is not nullified by the fact that he acted upon copies of affidavits showing that accused was a fugitive from justice, the originals of which were on file with the governor of the demanding state, rather than requiring the originals to be produced before him. Id.

NOTES AND BRIEFS.

Extradition; right to review proceedings on habeas corpus, and to discharge where evidence not sufficient; sufficiency of warrant; effect of including nonextraditable offense in indictment; conclusiveness of action of governor in issuing warrant of removal; when refusal to comply with requisition is justified. 947

FEDERAL COURTS.

See COURTS.

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FIRE.

Caused by Sparks from Engine, see RAILROADS.

See also RAILROADS, NOTES AND BRIEFS.

FIRE INSURANCE.

See INSURANCE.

FISHERIES.**NOTES AND BRIEFS.**

Fisheries; right to fish in waters on one's own land; right of riparian owner on non-navigable river to fish to thread of stream; grant of right to fish in pond or stream, apart from land; right to fish as appurtenance to land on non-navigable water; compensation to riparian owner deprived of right; right of marine fishing. 773

FIXTURES.

1. What is a reasonable time for the removal of fixtures after the termination of a lease permitting their removal is to be determined from all the facts and circumstances of the case. *Garlan v. Hickman* (W. Va.) 694

2. Under a lease for oil and gas purposes, by which it is agreed that the lessees shall have the privilege at any time to remove therefrom all machinery and fixtures placed on said premises, machinery and other appliances placed on the property by the lessees and necessary for the prosecution of that work do not become parts of the freehold, and, upon forfeiture of the lease for non-payment of rental, the lessees, or the owners of the machinery and fixtures, have a reasonable time after the termination of the lease in which to remove the property from the land. *Id.*

3. The insertion in a renewal lease of a clause giving the tenant the right to remove trade fixtures is not necessary to enable him to remove, before the termination of the extended period, fixtures which he might have removed before the expiration of the original term. *Radey v. McCurdy* (Pa.) 359

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Fixtures; what are trade fixtures; right of tenant to remove; when right may be exercised; making renewal lease without reserving right to remove fixtures. 359

What constitute; trade fixtures; right of tenant to remove after termination of lease; where lease stipulated that tenant should have right to remove fixtures at any time. 694

FOREIGN CORPORATIONS.

See CORPORATIONS.

FOREIGN LAWS.

Judicial Notice as to, see EVIDENCE, 6.
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See JUDGMENT, NOTES AND BRIEFS.

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See JUDGMENT.

FRANCHISE TAX.

See TAXES.

FRAUD AND FRAUDULENT CONVEYANCES.

Suit by Trustee in Bankruptcy to Set Aside Conveyance, see BANKRUPTCY.

1. If a person, by the fraud of another, or of someone for whose conduct he is responsible, becomes a party to a written instrument without reading it or personally knowing the contents thereof, he is not precluded thereby from obtaining judicial redress, in some form of action, for any injury which may be thereby caused to him through such instrument not being what he supposed it to be. *Bostwick v. Mutual L. Ins. Co.* (Wis.) 705

2. The existence of a cause of action at law to recover the consideration parted with upon a contract, on the ground of fraud, presupposes the actual termination of the contract because of the fraud, and that requires a repudiation of such contract by the insured person *in toto*, or so far as justice may require, and an unconditional offer on his part, so far as justice may require, to restore the wrongdoer to his former situation, or a waiver of such offer by such conduct on the latter's part as clearly to indicate that a tender to him of that which he parted with in the transaction would be useless because he would not accept it. *Id.*

3. The doctrine that a person is not inexcusably negligent in signing a paper in a business transaction with another, relying upon positive false statements on the part of that other, or of someone for whose conduct he is responsible, as to its import, applies only where the deceit is practised at the time, and in the transaction, of such signing. *Id.*

4. If a person, in a business transaction with another, is deceived by the latter to his injury, such person may rescind the transaction within a reasonable time after he discovers, or has reasonable opportunity to discover, the fraud, constructive knowledge thereof being just as effective as actual knowledge to set the time for rescission running and to mark its limits. *Id.*

5. In an action by a judgment creditor to set aside as fraudulent a conveyance of property made prior to the entry of the judgment, it is necessary to prove that the claim upon which the judgment is based existed prior to the time of the conveyance, and the judgment itself does not prove such facts.

but it is not required to establish the fact that the claim was lawful. *Schmitt v. Dahl* (Minn.) 590

6. A defrauded creditor may cause property fraudulently transferred to be sold on execution against a fraudulent grantor, and then maintain ejectment to recover the possession of the same, but can recover only upon establishing that the transfer was in fact fraudulent as to him. *Brasie v. Minneapolis Brewing Co.* (Minn.) 865

7. The title of a fraudulent grantee is protected by the statute of limitations, and, unless defrauded creditors effect a cancellation thereof in some appropriate action brought within six years from the discovery of the fraud, his title becomes absolute and unassailable. *Id.*

8. The legal title to property alleged to have been transferred with intent to hinder, delay, and defraud creditors is in the fraudulent grantee, the fraudulent character of the transfer not appearing upon its face; and the title continues in such grantee, notwithstanding a sale of the property by a creditor on execution against the grantor, until the fraud is exposed, and the transfer set aside in some judicial proceeding. *Id.*

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Fraud; of person assuming to give information to other, in concealing facts; of promoters of corporation in securing subscriptions; statements of opinion in bad faith; right of action where person making statements derived no benefit from them; necessity that damages result, to sustain action. 126

Attack by alleged fraudulent grantee on judgment on which action to set aside his conveyance is based. 590

Alleged fraudulent conveyance; action to set aside by judgment creditor; necessity of showing that debt antedated conveyance; action to set aside by trustee in bankruptcy; on what ground alleged fraudulent grantee may attack judgment; false representations as to land. 591

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Misrepresentations by seller; duty of buyer to make inquiry as to truthfulness; fraud in delivering insurance policy different from one agreed upon; right of insured to rescind for. 717

Effect on legal title of a conveyance of land in fraud of creditors:—(I.) Scope of note; (II.) as to creditors: (a) conveyance executed by debtor; (b) land purchased and paid for by debtor, but conveyed to another; (III.) title of fraudulent grantee as 67 L. R. A.

to parties not creditors; (IV.) title of bona fide purchaser from fraudulent grantee; (V.) title conveyed by bona fide purchaser to one having knowledge of the fraud; (VI.) when title is in fraudulent grantee as to his creditors; (VII.) rights of purchaser other than judgment creditor at execution sale; (VIII.) conclusion. 865

Fraudulent conveyance; remedies of judgment creditor seeking relief from; conveyance not void, but voidable; effect on legal title. 867

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FUGITIVE FROM JUSTICE.

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Game laws; right to regulate taking of fish and game on one's own land; discrimination against nonresidents. 773

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Garnishment; where debt garnishable:—(I.) Domicil of garnishing creditor; (II.) domicil of debtor; (III.) state, other than his domicil, where debtor temporarily present; (IV.) state where foreign corporation engaged in business; (V.) conflict of jurisdiction; (VI.) exemptions. 209

Situs of debt for purpose of; in case of debt of foreign corporation; plaintiffs subrogated to position of principal debtor; exemption of wages from; right to waive; garnishee liable only for amount due at time of service of writ. 213

GIFT.

By Wife, Necessity of Consent of Husband, see HUSBAND AND WIFE.

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Parol gift as conveyance. 461

GRAND JURY.

A grand jury which has been adjourned to the next term of court "unless sooner called by the court" may be recalled for the purpose of considering other cases before the termination of the existing term, although the statute provides that the jury shall, on completion of its business, be discharged. *State v. Phillips* (Iowa) 292

GRANT.

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Grant; of water power. 369

GUARDIAN AND WARD.

As to Person Entitled to Custody of Infants, see **INFANTS**.

Validity of Contract Authorizing Sale by Guardian in Advance of Legal Authority, see **CONTRACTS**, 7.

1. A guardian who is tenant in common of certain real estate with his wards is not personally liable as upon his own contract for breach of a contract to convey their interest, made without authority, where, in contracting to sell the whole tract, he signs the contract to convey personally, and also as guardian for the wards. *Le Roy v. Jacobosky* (N. C.) 977

2. A guardian appointed for an infant by a court in one state will not, on the ground of comity, be given custody of the child against its best interests by the courts of another state into which the child has been taken, although the child was removed from the state where the guardian was appointed contemporaneously with, and possibly for the purpose of escaping the effect of proceedings for, the guardian's appointment. *Jones v. Bowman* (Wyo.) 860

NOTES AND BRIEFS.

Guardian and ward; right of guardian to custody of ward; when appointed in state from which infant has been previously taken. 860

HABEAS CORPUS.

1. Failure of the governor's warrant, for the arrest and rendition of an alleged fugitive from justice, to state that the person whose arrest is directed is a fugitive from justice, does not require his release in habeas corpus proceedings, where the written evidence required by law for the issuance of the warrant is before the court, and is legally sufficient to support a finding of such fact. *State ex rel. Munsey v. Clough* (N. H.) 946

2. The finding of the governor that an alleged fugitive from justice is such, and should be returned to the state from which he fled, is subject to review by the courts in a habeas corpus proceeding to obtain his release from custody under the governor's warrant. *Id.*

3. An unreversed judgment of a court of competent jurisdiction in a habeas corpus proceeding for the custody of a child is, while the facts are unchanged, binding upon the parties, and will bar independent proceedings in another court, even though it be one of higher jurisdiction. *Cormack v. Marshall* (Ill.) 787

4. The sufficiency of the evidence before a grand jury to warrant an indictment cannot be inquired into by habeas corpus proceedings. 67 L. R. A.

ceedings to obtain the release of accused from custody consequent upon the indictment, and it is immaterial that, by statute, the evidence offered before the grand jury may be taken down and a copy of it delivered to the accused, so that the proceedings before that body are no longer incapable of proof. *Re Kennedy* (Cal.) 406

5. The judgment of a court in a proceeding in habeas corpus with regard to the custody of a child will not prevent another court from afterwards making a different order, where the welfare of the child requires it, even though no material change of circumstances is shown. *Re King* (Kan.) 783

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Habeas corpus; in case involving custody of children; right of successive applications for writ; decree as *res judicata*. 783, 787

Determination of proceedings as final order upon which appeal may be predicated. 860

Review of extradition proceedings by: right to discharge if charge of "fleeing" is not sustained by record evidence. 947

HEALTH.

Protection of, as a Proper Exercise of Police Power, see **CONSTITUTIONAL LAW**, 16.

1. The testimony of experts that the effects of vaccination are injurious and dangerous does not, in view of facts of history, warrant a court in holding a statute requiring citizens to be vaccinated unconstitutional. *Com. v. Pear* (Mass.) 935

2. The views of an individual do not entitle him to be exempted from the operation of an order of the board of health requiring the vaccination of all citizens of the municipality. *Id.*

3. The theoretical possibility of an injury from vaccination in an individual case does not show that a statute requiring the vaccination of all citizens is unreasonable. *Id.*

NOTES AND BRIEFS.

Health; validity of compulsory vaccination law; of quarantine. 936

HIGHWAYS.

Constitutionality of Ordinance Forbidding Public Meetings in Streets, see **CONSTITUTIONAL LAW**, 2.

Judicial Notice that Lights Cannot be Located in Street without Authority of Municipality, see **EVIDENCE**, 5.

1. The owner of the fee of a country highway may remove gravel from a gravel bed within the limits thereof where this

causes no injury to the highway and the gravel is not required for grading or improving the same. *Glencoe v. Reed* (Minn.) 901

2. That a defect in a street is part of the original plan of construction does not relieve the city from liability for injuries to travelers, caused by it. *Stone v. Seattle* (Wash.) 253

3. The location of an electric light in a street at the place designated by the proper municipal authorities is not wrongful as against pedestrians, so as to render its owner liable to such a person injured by glass falling from the globe when shattered by a trolley pole leaving the wire. *Nelson v. Narragansett Electric Light Co.* (R. I.) 116

NOTES AND BRIEFS.

Highways; municipal liability for defective plan of street construction as distinguished from other defects:—(I.) General principles; (II.) plan must be formally adopted; (III.) injury to property rights: (a) interference with rights in street; (b) interference with streams; (c) injury by surface water; (d) the Missouri cases; (IV.) injury to travelers: (a) defective streets; (b) defective walks; (c) defective bridges; (a) courts denying liability. 253

Defect in, from failure to repair; liability of municipality for injury caused by; injury by defect in original plan of construction; negligence in following proper plan. 254

Change of grade; recovery of damages for; what necessary to justify; injunction to restrain change until damages are paid; in favor of one not an abutting owner. 363

Right of owner of fee to remove gravel from. 901

HOMESTEAD.

Merely raising a few vegetables on a vacant lot is not such occupancy as entitles one entirely insolvent, without ability sufficient to earn her own support, and without any prospect of getting money to erect a building thereon, to hold the land indefinitely as a homestead. *Ware v. Hall* (Mich.) 313

NOTES AND BRIEFS.

Homestead; what constitutes; liberal construction of homestead laws; effect of absence to destroy; what occupancy necessary to constitute. 314

HOMICIDE.

Admissibility of Evidence in Prosecution for, see EVIDENCE.

1. A man is not entitled to champion the cause of a woman with whom he is maintaining improper relations, and defend her against the simple assaults of her brother, 47 L. R. A.

so as to give him the benefit of the rule of self-defense in case he kills the brother during the altercation. *Morrison v. Com.* (Ky.) 529

2. An officer cannot be convicted of murder for killing a person whom he is attempting to arrest for misdemeanor by striking him on the head with a billy, if he uses no more force than is necessary in case of an ordinary person, although it proved fatal in the particular case because of the thinness of the prisoner's skull, of which the officer had no knowledge. *State v. Phillips* (Iowa) 292

3. Proof of absolute necessity is not necessary to justify an officer in killing a person whom he is attempting to arrest for misdemeanor, where the statute requires him to employ no more force in effecting the arrest than to him, acting as an ordinarily prudent person would, under the circumstances, seem reasonably and apparently necessary to effect the result. Id.

4. A person having been shot and wounded with a shot gun by one on trial for murder, and by another person using a pistol, one of the pistol wounds being certainly mortal and probably one or more of the inflicted by the shot gun being so, accused cannot be convicted of murder unless the evidence shows that the wounds inflicted by him were the immediate cause of death. *Walker v. State* (Ga.) 426

NOTES AND BRIEFS.

Homicide; necessity of sanity of accused to justify conviction. 323

By official action or by officers of justice:—(I.) Scope; (II.) homicide by authority of law or under official direction: (a) in execution of death sentence; (b) in discharge of ordinary official duty; (c) in the discharge of military duty; (III.) effect of official character and action in case of arrest; (IV.) general rules as to use of force in making arrest: (a) in case of felony; (b) in case of misdemeanor; (V.) checking flight: (a) in case of felony; (b) in case of misdemeanor; (VI.) meeting actual physical resistance; (VII.) preventing escape or rescue: (a) in case of felony; (b) in case of misdemeanor; (VIII.) recapture: (a) generally; (b) of escaped convicts; (IX.) limitation as to force which may be used: (a) general rules; (b) self-defense as a test; (c) when use of deadly weapon is justified; (d) appearance as a test of the right of self-defense; (e) necessity a question for the jury; (X.) effect of question of legality or propriety of officer's action: (a) general rule as to illegal action; (b) action without a warrant; (c) action outside of territorial jurisdiction; (d) negligent ac-

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Resulting from injuries by different persons acting independently:—(I.) Scope; (II.) responsibility when joint; (III.) individual responsibility: (a) the general rule; (b) for act nearest to time of death; (c) for first or prior act: (1) generally; (2) when act contributes to death; (IV.) proof; (V.) summary. 426

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HUSBAND AND WIFE.

Wife's Conveyance of Property by Separate Deed as Depriving Husband of Property without Due Process of Law, see CONSTITUTIONAL LAW, 11.

Wife as Witness, see WITNESSES.

1. A parol gift of a note is not within the meaning of a constitutional provision requiring a man's written consent to make valid his wife's "conveyance" of her property, since the word "conveyance" has reference to the transfer of such property as must be transferred by written instruments. *Vann v. Edwards* (N. C.) 461

2. The right to free alienation by a married woman of her property, except as expressly restricted, is conferred by a constitutional provision vesting in her a sole and separate estate in her property with power to devise and bequeath it, and, "with the written consent of her husband," convey it as if she were unmarried; so that the restriction must be limited to technical conveyances such as are required to be in writing. Id.

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Husband and wife; effect of marrying witness in order to prevent her from testifying. 499

Right of legislature to empower court to authorize married woman to convey her real estate by separate deed; in jurisdiction where common law is in force. 969

ILLEGALITY.

NOTES AND BRIEFS.

Illegality; interference with person's right to carry on lawful business; as basis of right of action for damages. 190

INCOMPETENT PERSONS.

See also INSANE PERSONS.

NOTES AND BRIEFS.

Incompetent persons; responsibility for crime committed. 323

Right to commit to asylum without judicial inquiry into sanity and notice; no right to detain person not actually insane; habeas corpus to obtain release from asylum; statute permitting commitment to asylum without right to institute proceedings for release. 972

INDICTMENT, INFORMATION, AND COMPLAINT.

See also GRAND JURY.

1. A joinder in one indictment of several counts charging distinct offenses will not prevent the rendition of accused as a fugitive from justice,—at least if, under the laws of the state where the indictment was found, it was sufficient to support a conviction under one of the counts. *State ex rel. Munsey v. Clough* (N. H.) 946

2. The omission from an indictment for rape of the words "against her will," or their equivalent, renders the indictment factually defective. *State v. Marsh* (N. C.) 179

3. The ownership of money in a cash drawer, of which a clerk has possession with the right to make change therefrom and place receipts from sales therein, may be laid in such clerk as against one who, in the absence of the proprietor, by exhibiting a deadly weapon, compels the clerk to permit him to take the money from the drawer, although the clerk claims no personal interest in the money, and is not held accountable for its loss, where the statutes permit an indictment for robbery for taking money from the clerk or agent. *State v. Montgomery* (Mo.) 343

4. Failure to verify an information for robbery is waived if no objection is made on that ground. Id.

NOTES AND BRIEFS.

Indictment; containing accusations of several felonies; sufficiency in extradition proceedings. 948

INFANTS.

As to Liability for Furnishing Liquor to Minors, see INTOXICATING LIQUORS.

See also GUARDIAN AND WARD.

1. Religious belief will not, in the absence of statutory requirement, be taken into consideration in determining the proper custodian for an infant. *Jones v. Bowman* (Wyo.) 860

2. In determining the question of the proper custody of an infant, that disposal should be made, if possible, which will keep the family together. *Id.*

NOTES AND BRIEFS.

Infants; habeas corpus decree as to custody of, as *res judicata*. 783, 787

Custody of; how determined; jurisdiction of probate court over; right of guardian appointed in one state to recover custody of infant taken to another state. 860

INJUNCTION.

Parties to Suit, see ACTION OR SUIT, 3, 4.

1. Persons against whom an unlawful exaction in the form of a tax is sought to be made may unite in an application for an injunction to restrain the collection of the tax, and are not compelled to pay the same and bring separate suits against the tax officer for damages. *Hewin v. Atlanta* (Ga.) 795

2. Equity will not enjoin the blowing of a whistle at a factory, where it is not satisfied that it amounts to a nuisance, until the fact of nuisance has been established by action at law. *Read v. Edna Cotton Mills* (N. C.) 983

3. Equity may enjoin proceedings at law under statutes giving a summary remedy for obtaining possession of property under lease, where the lessee has an equitable right to a continuance of possession, and where the remedy at law is not adequate to determine the rights of the parties. *Kaufmann v. Liggett* (Pa.) 353

4. Injunction will not lie, under a constitutional provision requiring compensation in case property is damaged for public use, to stay the improvement of a public street, according to a grade lawfully adopted by the municipal corporation, until the damages are paid to the complaining property owner, whether the property abuts upon the street or not, where none of it is taken, 67 L. R. A.

but it is merely subjected to consequential injuries; his sole remedy being at law to recover the damages, after the improvement is completed and they can be ascertained. *Clemens v. Connecticut Mut. L. Ins. Co.* (Mo.) 362

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Injunction; to restrain proceedings under the landlord and tenant acts. 353

To restrain change of grade of highway until damages therefor are paid. 363

To restrain enforcement of municipal ordinance. 798

To restrain noises. 983

INSANE PERSONS.

Deprivation of Liberty without Due Process of Law, see CONSTITUTIONAL LAW, 12.

Burden of Proving Insanity as a Defense, see EVIDENCE, 11.

If the evidence indicates that one committed to an asylum for the insane under an invalid statute is actually insane, the court should not order his discharge, but should direct his detention for a reasonable time until proceedings can be taken for his commitment in a proper manner. *Re Boyett* (N. C.) 972

INSTRUCTIONS.

See TRIAL.

INSURANCE.

Nature of Action by Insurer and Property Owner against Person Negligently causing Fire, see ACTION OR SUIT, 2.

Validity of Statutory Provision for Recovery of Attorneys' Fees, see ATTORNEYS' FEES.

Right of Railroad Company to Benefit of Insurance on Property Destroyed by its Negligence, see DAMAGES, 1.

Estoppel to Question Validity of Assignment of Policy, see ESTOPPEL.

1. A statute requiring an insurer to fix the insurable value of the property insured and to state such value in the policy, the measure of damages in case of total loss to be the amount so fixed, and in case of partial loss, such proportion of the amount upon which premiums are paid as the damage sustained is of the insurable value as fixed by the agent, and providing that the insurer shall be estopped to deny that the property insured was worth at the time of insuring the amount so fixed, and that the agent soliciting the insurance shall be held the agent of the insurer,—is not repugnant to either the state or Federal Constitution. *Hartford F. Ins. Co. v. Redding* (Fla.) 518

2. A statute requiring an insurer to state on the policy the insurable value of the property insured, which shall be the measure of damages in case of loss, and providing that the insurer shall be estopped to deny that the property was worth at the time of insuring the amount so fixed and that the agent soliciting the insurance shall be held to be the agent of the insurer,—does not deprive the insurer of the right to plead that the fire was caused by the criminal conduct of insured or that the insured by fraud procured the insurable value to be fixed at an excessive amount. *Id.*

3. Other concurrent insurance to the amount of \$2,500 is permitted by an indorsement slip containing a description of the property insured, with the amount of insurance thereon and the clause: "Two thousand five hundred total concurrent insurance permitted," bearing the same date as, and attached to, a policy of insurance for \$2,500 on two buildings, which contained a clause providing that the entire policy unless otherwise provided by agreement indorsed on the policy or added thereto, should be void if the insured had or thereafter procured any other contract of insurance, whether valid or not, on the property covered by the policy; notwithstanding another indorsement slip stating the insurable value of the property to be \$2,500, this being attached in compliance with Fla. act May 31, 1899, chap. 4677, p. 33, requiring the insurable value to be fixed by the insurer and written in the policy, as the measure of damages in case of loss. *L'Engle v. Scottish Union & N. Ins. Co. (Fla.)* 581

Insurable interest.

4. A creditor has an insurable interest in the life of his debtor, and the issue or pledge of a policy upon his life as collateral security for the payment of his debt is valid. *Gordon v. Ware Nat. Bank (C. C. A. 8th C.)* 550

5. The issue of a policy of life insurance to one who has no interest as a relative, dependent, creditor, or otherwise, in the life of the insured, and who pays the premiums for the chance of recovering upon the policy, is against public policy, and the contract is void, because the interest of the holder is to shorten, rather than to lengthen, the life of the insured, and his maintenance of the policy is of the nature of a wager. *Id.*

Construction of policy.

6. In construing the different provisions of a contract of insurance all must be so construed, if it can reasonably be done, as to give effect to each. *L'Engle v. Scottish Union & N. Ins. Co. (Fla.)* 581

7. That interpretation which will give the greater indemnity will prevail in conflict.

8. A statute requiring an insurer to state on the policy the insurable value of the property insured, which shall be the measure of damages in case of loss, and providing that the insurer shall be estopped to deny that the property was worth at the time of insuring the amount so fixed and that the agent soliciting the insurance shall be held to be the agent of the insurer,—does not deprive the insurer of the right to plead that the fire was caused by the criminal conduct of insured or that the insured by fraud procured the insurable value to be fixed at an excessive amount. *Id.*

9. If one interpretation of a contract of insurance capable of two interpretations would lead to an absurd conclusion, looking to the other provisions of the contract and its general scope and object, such interpretation must be abandoned and that adopted which will be more consistent with reason and probability. *Id.*

Assignment of policy.

9. The pledgee of a policy of life insurance has the right and power to sell the policy to the highest bidder for the purpose of realizing money to pay the debt which it secures, and both immediate and remote assignees under such a sale take good title to the policy and to its proceeds, although they have no insurable interest in the life insured by the policy. *Gordon v. Ware Nat. Bank (C. C. A. 8th C.)* 550

10. An assignment of a policy of life insurance immediately upon its issue to evade the rule that the issue of a policy to one without an insurable interest renders it void avoids the assignment. *Id.*

11. An insurable interest in the assignee is not requisite to the validity of an assignment of a policy of life insurance which was lawfully issued to one who had such an interest, unless the assignment was made in bad faith as a cover for the issue of a wager policy. *Id.*

Estoppel of insured.

12. Acceptance of the policy tendered, and waiver of the fraud in tendering one not in accord with the expectation of the applicant and representations of the agent, are effected by receiving a policy and retaining it for several months without complaint, in ignorance of the fraud because of failure to examine the policy, where the substitution is plainly apparent on its face. *Bostwick v. Mutual L. Ins. Co. (Wis.)* 705

13. If a person receives a policy of insurance ostensibly in response to an application therefor, which he signed and parted with in the belief, induced by the fraud of the agent taking the same, that it called for a policy different from that which it called for in fact, he is bound, as a matter of law, to examine the policy within a reasonable time after it comes to his hand, and to discover obvious departures therein from the one which he supposed he was to get, and promptly, upon discovering the same, to rescind the transaction, give the company due notice thereof, and do all on his part which justice requires to restore

the former situation, or he will be held to have accepted the policy as satisfying his application, so as to be precluded from rescinding the same. *Id.*

14. The reasonable time for discovering that a policy of insurance received ostensibly in response to an application therefor, signed in the belief, induced by the fraud of the agent, that it called for a policy different from that actually called for, differs from the one supposed to have been applied for, commences to run immediately upon the receipt of the paper, nothing occurring then reasonably to excuse the applicant from omitting to examine his contract. *Id.*

15. Four and one half months delay in discovering that a policy of insurance differs from the one that the applicant supposed he had applied for, the agent having procured his signature to the application by misrepresenting its contents, is, as a matter of law, unreasonable, and defeats the right of the insured to rescind the contract, where there was nothing to prevent his examining his policy as soon as it was delivered to him. *Id.*

16. The acceptance, retention, and renewal, for successive terms, of an accident insurance policy, preclude the personal representatives of the insured from claiming that there were provisions in it to which the insured had not agreed. *Blunt v. Fidelity & C. Co. (Cal.)* 793

Warranties; representations; forfeitures.

17. A condition in an insurance policy is not void because not referred to in the application. *Id.*

18. A policy of insurance on the furniture of a house is void *in toto* if a large part of the furniture has been purchased on the instalment plan and is not paid for, and the policy provides that it shall be void if the interest of the assured is other than unconditional and sole ownership. *Dow v. National Ins. Co. (R. I.)* 479

19. A provision of an insurance policy requiring written consent, indorsed on the policy, for other insurance, is waived where, at the time a policy of insurance is written, other insurance exists upon the same property, and the fact is known to the agent, who communicates it to the company, and the company accepts the premium, and does not deny the validity of its policy on account of such other insurance until after a loss occurs, and the waiver will apply, not only to the other insurance as it existed when its policy was written, but to any policy subsequently issued in lieu or renewal of such other insurance. *Hartford F. Ins. Co. v. Redding (Fla.)* 518
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Cause of death or injury.

20. Recovery on an accident insurance policy upon a person whose occupation is stated as "cattle dealer or broker visiting yards," the duties of which require him to ride on trains of cattle cars from place to place in the freight yards, is not prevented by the fact that a clause in the policy provides that it shall not cover accidents received while being in any part of a car not provided for occupation by passengers. *Richards v. Travelers' Ins. Co. (S. D.)* 175

21. Injuries to an insane person need not be intentionally inflicted to relieve the insurer from full liability under a policy providing that in case of injuries intentionally inflicted upon himself by the assured, or inflicted upon himself or received by him while insane, the measure of liability shall be a sum equal to the premiums paid. *Blunt v. Fidelity & C. Co. (Cal.)* 793

22. A Pott's fracture, consisting of the breaking of one bone of the lower leg between the knee and ankle joint, and a severance of the malleolus process of the other one so as to effect a complete solution of the continuity of both bones, is not covered by a policy providing indemnity in case of the breaking of the shafts of both bones between the knee and ankle joints. *Peterson v. Modern Brotherhood of America (Iowa)* 631

23. A clause in an insurance policy relieving the insurer from liability in case death is caused by violation of any criminal law is not applicable where insured was shot while attempting in good faith to escape from a personal difficulty, although he had begun it by assaulting his opponent with a weapon capable of producing great bodily harm, if not death. *Supreme Lodge K. of P. v. Bradley (Ark.)* 770

24. The right of an insurer to plead that a fire was caused by the criminal conduct of the insured, or that the insured by fraud procured the insurable value to be fixed at an excessive amount, is not taken away by a statute requiring an insurer to state in the policy the insurable value of the property insured, which shall be the measure of damages in case of loss, and providing that the insurer shall be estopped to deny that the property was worth at the time of insuring the amount so fixed and that the agent soliciting the insurance shall be held to be the agent of the insurer. *Hartford F. Ins. Co. v. Redding (Fla.)* 518

25. One issuing an accident insurance policy may stipulate that it shall not cover injuries received while assured is insane. *Blunt v. Fidelity & C. Co. (Cal.)* 793

Notice and proofs of loss.

26. Want of knowledge of the policy by

one of two mine operators for whose benefit an insurance against liability for accidents to employees has been effected by the other, and want of knowledge of the accident by the latter, will not excuse failure to comply with a requirement in the policy that immediate notice of an accident be given to the insurer. *Deer Trail Consol. Min. Co. v. Maryland Casualty Co.* (Wash.)

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27. Notice to the insurer, given eight months after the occurrence, of an accident to an employee, is not within a reasonable time, so as to establish the liability of the insurer upon a policy insuring against liability for accidents to employees which requires immediate notice of the accident to be given to the insurer. *Id.*

28. The statement of a general agent of a corporation which has insured employers against liability for accidents to their employees by a policy requiring immediate notice of accidents to be given to the company, upon receiving notice of an accident eight months after it occurred, that formal notice would be soon enough if given six or seven days later, does not waive the provision of the policy requiring immediate notice, since liability on the policy had terminated when the accident was first brought to his attention. *Id.*

29. The requirements in the standard insurance policy, that the insured shall give notice of loss and make proofs of loss, are conditions precedent to the right to sue; but a failure to give the notice or to make the proofs within the time stipulated will not invalidate the policy, or work a forfeiture of the rights of the insured, in the absence of a stipulation to that effect, but will merely postpone the day of payment, where such notice is given and proofs of loss made within such time as will enable the insured to bring his suit within the time limited by the policy. *Hartford F. Ins. Co. v. Redding* (Fla.)

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30. Proofs of loss served upon an insurance company, signed and sworn to by the insured, stating that the fire occurred at a stated hour on a day named; that it originated in the roof or attic of the building, but how it originated, or the cause thereof, was to the insured entirely unknown; that the fire did not originate by any act, design, or procurement on the part of the insured, or in consequence of any fraud or evil practice done or suffered by the insured; and that any other information required by the company would be furnished on request, —substantially comply with a provision in the policy requiring the proofs of loss to state the knowledge and belief of the insured as to the time and origin of the fire, particu-

larly as the company requested no further information from the insured. *Id.*

31. Where proofs of loss required to be made and served upon the company by an insurance policy are sufficiently full to give the company notice of the loss required by another provision in the policy, the same document will be sufficient as a notice of the loss, as well as proofs of loss. *Id.*

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What constitutes death by external, violent, and accidental means; effect of usage or custom to modify contract; provision excepting death or injury while in state of intoxication; effect of intoxication which does not contribute to injury; provision against liability for accident received while in car not provided for passengers; effect where policy shows that insured's business necessitates his riding on freight cars; voluntary exposure to unnecessary danger; contributory negligence of insured; no presumption of suicide. 175

What constitutes death by external, violent, and accidental means; provision against liability for injuries received while insane; validity; renewal of policy as acceptance of conditions. 793

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of accident; lack of knowledge by insured of accident. 276

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Retention of policy as waiver of mistake or fraud of insurer or its agent:—(I.) Introduction; (II.) time of misrepresentation; (III.) mistake or fraud as to terms of policy; (a) character of policy; (b) various provisions of policy; (1) risks insured against; (2) duration of insurance; (3) limitation of time for action on policy; (4) existence of options at maturity; (5) liability to assessment; (6) right to cancel; (7) obligation to keep books in safe; (8) obligation to keep watchman on premises; (9) signature to application; (10) agency clause; (11) date of policy; (12) value of policy; (c) variation of terms on renewal of policy; (IV.) mistake or fraud as to facts disclosed by the insured: (a) appearing in the policy: (1) subject-matter of insurance: (a) property covered; (b) voyage covered by marine policy; (c) misdescription of property; (d) location of property: (2) interest protected; (3) facts affecting the hazard: (a) other insurance; (b) occupancy of premises; (c) state of title; (d) encumbrances; (b) appearing only in the application: (1) copy attached to policy: (a) physical condition of insured; (b) prior insurance; (c) occupation; (d) encumbrances; (2) copy not attached; (V.) mistake or fraud as to matters outside of the policy and application; (VI.) effect of retention by other than insured; (VII.) effect of insured's illiteracy; (VIII.) retention with knowledge of defect: (a) generally; (b) effect of attempted rescission; (c) effect of agent's reassurances; (IX.) distinction between action at law and suit in equity. 705

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INTOXICATING LIQUORS.

Discrimination between Individuals in Regulating Sale of, see CONSTITUTIONAL LAW, 15.

Mandamus to Compel Granting of License, see MANDAMUS.

Validity of Statute Requiring License for Sale of, within Prescribed Distances from Corporate Limits, see CONSTITUTIONAL LAW, 10.

1. An ordinance providing that it shall be unlawful for any person maintaining any saloon, bar-room, or drinking shop, or any apartment thereto attached, to permit females to enter their places of business, is unconstitutional. *State v. Nelson* (Idaho) 808

2. Furnishing liquor to a minor as an act of hospitality in one's home is not a violation of a provision, making it unlawful for any person to give such liquor to a minor, which is embraced within a statute the title to which states that it is to provide for the taxation and regulation of the business of selling, furnishing, and giving liquors. *People v. Bird* (Mich.) 424

3. An applicant for a barroom license, to whose character no objection is found, ought not to be refused permission to engage in that business, in a neighborhood where others are so engaged, on the objection of a minority of the property holders, or on the ground that no more barrooms are needed. *State ex rel. Galle v. New Orleans* (La.) 70

4. The business of selling intoxicating liquors is made lawful by the Constitution and statutes of Louisiana, and the right of any citizen to engage in it is one the enjoyment of which is subject to such conditions only as may be imposed or authorized by the general assembly in the legitimate exercise of the police power of the state. *Id.*

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Ordinance forbidding person selling, to permit females to enter place of business; inherent right to engage in business of selling. 808

Statute forbidding giving of liquor to minor; validity; scope of; sale for medicinal purposes; liability of person procuring liquor as agent for buyer. 424

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JUDGMENT.

On Appeal, see APPEAL AND ERROR.

1. Plaintiff in an action for personal injuries is entitled to recover for lost time such an amount as the evidence authorizes, when the petition contains allegations which in a general way show that the plaintiff has lost time, and evidence which fixes the time lost and the value of such time with certainty is admitted without objection, though there is in the petition no distinct claim for damages on account of lost time. *Nashville, C. & St. L. R. Co. v. Miller* (Ga.) 87

2. Canal commissioners who have contracted for the right to take water from a river to supply the canal in consideration of permitting the riparian owner to take a certain quantity of water from the feeder, and who have subsequently leased to another person all the surplus after the rights of the riparian owner are satisfied, may take steps to enforce a judgment in an action between its lessee and the riparian owner or his representatives for the determination of the respective rights of the parties under a contract, by placing weirs so as to limit the amount which can be taken from the feeder by the riparian owner to the amount awarded him by the judgment. *Merrifield v. Canal Commissioners* (Ill.) 369

Conclusiveness and bar.

3. In an action between the same parties or between those in privity with them, a prior judgment on the merits upon the same claim or demand by a court which had jurisdiction, is conclusive, whether right or wrong, not only of every matter offered, but of every admissible matter which might have been offered to sustain or defeat the claim or demand. *Gordon v. Ware Nat. Bank* (C. C. A. 8th C.) 550

4. A judgment cannot be collaterally impeached, except for fraud, where the court

had jurisdiction of the parties and the subject-matter. *Schmitt v. Dahl* (Minn.) 590

5. The alleged fraudulent grantee is estopped from setting up, in an action by a judgment creditor to set aside the conveyance as fraudulent, any defense that might have been interposed by his grantor in the original action. Id.

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Judgment; amendment of record to cure defect for which motion in arrest of judgment has been made:—(I.) Amendment in the trial court: (a) amendment of pleading: (1) in general; (2) to supply omitted averments; (3) to cure insufficient or erroneous allegations; (4) by striking out; (b) amendments concerning indictments, informations, or complaints: (1) as to verification; (2) as to organization of grand jury; (3) as to finding, return, or filing of indictment; (4) to cure omissions; (5) to cure errors or insufficiency; (c) amendments concerning verdict or judgment: (1) general verdict rendered on declaration containing several counts; (2) misjoinder of counts; (3) verdict in criminal case; (4) amendment of judgment; (d) amendment of record; (II.) amendment in the appellate court: (a) to cure errors or omissions; (b) on certiorari or certificate. 179

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judgment must be made; (VI.) the sufficiency of the judgment pleaded, to support the action: (a) generally; (b) tort claims. 590

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JUDICIAL NOTICE.

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Attachment of Proceeds by Creditors, see ATTACHMENT, 1.

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Removal of Fixtures, see FIXTURES.

Lease as Sufficient Consideration for Option to Purchase, see CONTRACTS, 5.

1. Demand for compliance with a condition precedent to the taking effect of a lease is not necessary to put the lessee in default for failure to comply, and thereby defeat the operation of the instrument. *Frank v. Stratford-Handcock* (Wyo.) 571

2. A clause requiring the lessee to deposit money with the lessor to secure the faithful performance by the lessee of the covenants of the lease is not a covenant, but a condition, failure to perform which will prevent the lease from taking effect, although the terms of the contract indicate a present demise, where the covenants to be secured relate to the payment of taxes, the operation and use of the property, and the delivery of a portion of the crops as rent. *Id.*

3. A lease which does not become operative because of failure to comply with a condition precedent does not constitute a consideration for an agreement contained in it, giving the lessee an option to purchase the property. *Id.*

4. The fact that the lessee is in possession of the leased property at the time of the execution of the lease, with nothing to

show that possession was delivered to him by the lessor, is not sufficient to give validity to the lease, which would otherwise be of no effect because of failure to comply with a condition precedent. *Id.*

5. A lessee who has not entitled himself to possession under the lease because of failure to comply with a condition precedent is not entitled to damages for being evicted from and kept out of possession of the property. *Id.*

6. Statutes providing a summary remedy for a landlord to obtain possession of the leased premises do not deprive equity of jurisdiction of a suit to determine the rights of the parties under a clause in the lease giving a right to renewal at a rental to be fixed by arbitrators, since the remedy provided by them is not adequate. *Kaufmann v. Liggett* (Pa.) 353

7. Failure of the arbitrators to fix the rental to be paid during the extended term, as the contract for renewal of the lease provided they should do, does not deprive the lessee of the privilege of renewal, where he has given the agreed notice of his desire to do so, and where, from the provisions of the contract, it is evident that the right of renewal, and not the rent to be paid, was regarded as the essence of the contract. *Id.*

8. Equity has jurisdiction to fix the rent to be paid during the renewed term of a lease, if the arbitrators provided by the contract failed to do so, where the lessee has taken the required steps to preserve his right to renewal, and such right, and not the amount of rent to be paid, is the essence of the contract. *Id.*

9. The fixing of the rental is not of the essence of a contract to renew a lease upon receipt of notice to that effect, upon a rent to be fixed by arbitrators to be appointed by the parties. *Id.*

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Landlord and tenant; injunction to restrain proceedings under the landlord and tenant acts; provision for arbitrators to fix rent for renewal term; right of equity to fix, when arbitrators fail to do so. 353

Right of tenant to remove trade fixtures; when it may be exercised; necessity of removing during term; effect of making renewal lease without reserving right to remove; what determines title to fixtures in absence of express agreement; sale by tenant of fixtures to incoming tenant. 359

Agreement in lease giving tenant right to remove fixtures; right to remove after termination of lease for nonpayment of rental. 694

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Conflict of Laws as to Right to Exemption from Execution, see CONFLICT OF LAWS.

1. A statute exempting wages from the reach of creditors in supplementary proceedings will operate in favor of nonresidents, and will be construed to include property sought to be reached by mesne process, such as writs of attachment and garnishment issued to place the property in the custody of the court to preserve it for application to plaintiff's claim. *Goodwin v. Claytor* (N. C.) 209

2. By the common law, shares of stock in a corporation being in the nature of choses in action, intangible property incapable of manual seizure, are not subject to execution or attachment. *Lipscomb v. Condon* (W. Va.) 670

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LIENS.

Waiver of, by Taking Personal Judgment against Debtor, see ATTACHMENT, 9.

1. Explosives consumed in grading a roadbed or driving a tunnel for a railroad company are within the provisions of a statute giving a lien to contractors and material men for materials "furnished for grading the roadway, constructing culverts, laying tracks, or erecting buildings." *Hercules Powder Co. v. Knoxville, L. & J. R. Co.* (Tenn.) 487

2. In case of an entire contract to furnish materials for construction of a railroad, under which shipments are made as material is ordered, a lien for the entire amount will be effected by giving notice within the time required by statute after the date of the last shipment. *Id.*

3. The consideration of the date of the last shipment in determining whether or not notice has been given in time to perfect a lien for material furnished for the construction of a railroad is not prevented by the 67 L. R. A.

fact that the shipment is stopped *in transitu* because of the insolvency of the contractor who had ordered it. *Id.*

4. If material is delivered in good faith to a subcontractor for use in the construction of a railroad the material man is entitled to his lien therefor in the absence of definite proof that it was not used for that purpose. *Id.*

NOTES AND BRIEFS.

Liens; grant of, to person furnishing material for "grading" of railroad right of way; explosives as material within meaning of; tunnel as structure on which lien may be claimed; when notice of lien must be given. 488

LIMITATION OF ACTIONS.

Constitutionality of Statute Taking Away Right to Plead Statute of Limitations, see CONSTITUTIONAL LAW, 5.

Enforcement of Provisions of Foreign Contract Contrary to Provisions of Local Statute of Limitations, see CONFLICT OF LAWS, 5.

1. A nonsuit should not be granted in an action for breach of contract correctly to transmit a telegram, upon the ground that the action was not brought within the time limited by the conditions of the blank on which the message was written, since plaintiff has a right to prove waiver of such condition or estoppel to rely on it. *Hays v. Western U. Teleg. Co.* (S. C.) 481

2. The re-enactment of a statute of limitations with a shortened limitation period applicable to judgments rendered without the state applies to actions upon judgments existing at the time of its passage, where, if not made so applicable, it would operate as a repeal of all limitation periods as to existing causes of action not barred at the time of its passage. *Lamb v. Powder River Live Stock Co.* (C. C. A. 8th C.) 558

3. A period of three months within which to bring an action upon a judgment rendered in another state, against a bona fide resident of the state establishing such period, upon a cause of action which accrued more than six years before the action upon the judgment is brought, is unreasonably short, and renders the statute providing it invalid. *Id.*

4. In cases where a creditor levies upon and sells property transferred in fraud of his rights on execution, the statute of limitations commences to run from the date of sale, unless it be made to appear that the creditor did not discover the fraud until some later time. *Brasie v. Minneapolis Brewing Co.* (Minn.) 865

5. An action of ejectment to recover possession of land fraudulently transferred, brought by a creditor who has caused the property to be sold on execution against the fraudulent grantor and become the purchaser thereof, must be brought within six years of the discovery of the fraud. *Id.*

6. The one-year statute of limitations does not apply to a cause of action for breaking one up in business, and driving him therefrom by the use of false and malicious statements. *Brown v. American F. L. M. Co. (Tex.)* 195

NOTES AND BRIEFS.

See also JUDGMENT.

Limitation of actions; right of nonresident to plead; validity of statute shortening period of; prospective construction of. 559

LIMITATION OF LIABILITY.

Conflict of Laws as to Validity of Contract Limiting Liability, see CONFLICT OF LAWS, 6.

Validity of Contract, see CARRIERS, 14.

LOGS.

NOTES AND BRIEFS.

Logs; right to erect booms in river for sorting logs. 839

MANDAMUS.

1. Mandamus will not lie to compel the arrest without warrant of certain designated persons for the alleged commission of a misdemeanor. *State ex rel. Livingstone v. Williams (Or.)* 166

2. The supreme court has jurisdiction to control by mandamus the action of the county auditor in determining the names to be placed on an official ballot, where there is not sufficient time to enable the county judge to whom the statute gives jurisdiction to act, and have his action reviewed on appeal prior to the election. *State ex rel. Howells v. Metcalf (S. D.)* 331

3. Mandamus will not lie to compel a judge to issue bench warrants, where the pleadings do not show it to be his duty to do so, and the statute imposes the duty upon the clerk of the court. *Id.*

4. Where the statute imposes the duty upon a police officer to prosecute gamblers, a writ of mandamus to compel him to do so should not join the mayor and common council for the purpose of compelling them to direct him to perform his duty, since their co-operation is not necessary to secure the end sought. *Id.*

5. That municipal officers have entered into a conspiracy to license gambling houses under the guise of periodical fines does not 67 *L. R. A.*

require the joining of anyone but the chief of police in a writ of mandamus to compel him to perform his statutory duty to prosecute gamblers, since in such case he cannot claim to have been directed to neglect his duty by any lawful command of a superior officer. *Id.*

6. When a demurrer is sustained to an alternative writ of mandamus because several causes of action were improperly united, the plaintiff can proceed only by filing an amended complaint containing the cause of action which he elects to pursue. *Id.*

7. Mandamus will issue to compel the granting of a barroom license, where the refusal to grant such license is arbitrary and discriminatory and in excess of the discretion vested in the city as to regulating the sale of intoxicating liquors. *State ex rel. Galle v. New Orleans (La.)* 70

8. Writs of mandamus in the exercise of and in aid of its appellate jurisdiction may be issued by a court of appeal without a prior invocation of that jurisdiction by appeal or writ of error, the test of the right to issue such writs being the existence of jurisdiction to review, and not its prior invocation. *Re Barber Asphalt Pav. Co. (C. C. A. 8th C.)* 761

9. Mandamus may be issued by the circuit court of appeals to compel the judge of a circuit court to vacate a stay of proceedings and to proceed to try and adjudicate the controversy and enforce the judgment upon it, where, upon allowance by a city council of the claims of a citizen of another state, the city appealed therefrom to a certain state court in accordance with the provisions of its charter, which prohibited its officers from paying claims against the city thus challenged except upon the order of that court, and the claimant thereupon sued the city upon its claims in the Federal circuit court, the judge of which court stayed all proceedings in the case until the final determination of the appeals of the state court. *Id.*

10. The United States circuit courts of appeals have jurisdiction to issue writs of mandamus in the exercise of, and in aid of, their appellate jurisdiction. *Id.*

NOTES AND BRIEFS.

Mandamus; when writ will issue; to compel discretionary act. 71

As writ of discretion, and not right; discretion not arbitrary; right will not lie where law provides other adequate remedy; what is adequate remedy; issue of, to compel officers to arrest and prosecute alleged offenders; to compel arrest without warrant or complaint; to compel a series of acts or general course of conduct; not issued in 66

doubtful cases; to compel judge to issue warrant of arrest; necessity of demand where duty is of public nature; right to control abuse of discretion of officer by mandamus; to compel enforcement of liquor law; necessity that relators have special interest. 167

When granted; to compel furnishing of telephone service; to compel unlawful acts. 252

To compel county auditor to file certificates of nomination of county officers; who may maintain action for. 331

To compel inferior Federal court to hear and determine action; from United States circuit court of appeals; where action of lower court cannot be reviewed on appeal or writ of error; to compel lower court to reverse or revise decision; to control conduct of judge in proceedings taking place before trial; to compel judge to proceed according to certain rules of practice; grant of, in anticipation of omission; not granted in case of doubt. 762

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

Attachment of Wages, see ATTACHMENT. 7.

Common Law of England as Constituting Part of American Law Relating to Master's Liability for Injuries. see COMMON LAW.

Constitutionality of Statute Forbidding Breaking of Contract by Employee. see CONSTITUTIONAL LAW, 9.

Evidence in Action for Personal Injury, see EVIDENCE, 4.

1. One who employs a person in ignorance of the fact that he was under a time contract to work for another, in violation of which he had left the latter's service, is not liable in damages to the former employer because, when informed of the servant's breach of contract, he fails to discharge him, where the servant, though offering to release his new employer, expresses his determination not to return to the one whose service he has abandoned. *Wolf v. New Orleans Tailor-Made Pants Co. (La.)* 65

Duty of master.

2. It is one of the duties of an employer to exercise reasonable care that the place in which he sets his servant to work and the system or method adopted by the employer for the doing of the work shall be reasonably safe for the servant, and free from latent dangers known to the master, or discernible by an ordinarily prudent master in the circumstances. *Burns v. Delaware & A. Teleg. & Teleph. Co. (N. J. Err. & App.)* 956
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3. The rule that the duty of a master with respect to care as to the tools and appliances furnished for his servant's work is limited to such as are in fact supplied by the master has no application to the failure of the master to supply appliances needed, not for the work itself, but solely to protect the servant against latent dangers arising out of the work. Id.

4. Failure of a master to take precautions to prevent electric wires in process of being strung on telephone poles from reels from coming in contact with a trolley-feed wire charged with a powerful current, or to supply his employees with rubber gloves or other devices to prevent the communication to them of a serious shock in case the wires become charged, renders him liable for injury to employees attending the reels who receive a severe shock by reason of one or more of the telephone wires coming in contact with the trolley-feed wire because of their sagging or breaking. Id.

Injury to volunteers.

5. To create the relation of master and servant there must be some contract or some act on the part of one person which expressly or impliedly recognizes another as his servant. *Atlanta & W. P. R. Co. v. West (Ga.)* 701

6. One into whose service another volunteers without his assent, express or implied, is not under the duties of a master toward a servant, or required to anticipate or discover the peril of such volunteer, but is only bound, relatively to such volunteer, to use care not to injure him after notice of his peril. Id.

7. A person in whose service a volunteer engages in compliance with an unauthorized request of an employee owes such volunteer none of the obligations of a master toward a servant, but is only bound to use care not to injure him after notice of his peril. Id.

8. The fact that one who voluntarily engages in the service of another at the unauthorized request of a servant of the latter is of tender years, and without sufficient mental capacity to appreciate the danger, while it might be an element of notice to the person into whose service he has volunteered of the peril of the volunteer, cannot change the relations of the parties, or impose upon such person any duty not ordinarily imposed by law relatively to volunteers. Id.

9. If a person into whose service an infant has volunteered had been negligent, and relied upon the concurrent negligence of the plaintiff to defeat or diminish the recovery, then the infancy of the volunteer would be material to the determination of his dilli-

gence; but his infancy cannot change the relations of the parties, or supply the place of negligence on the part of the person whose service he has entered. Id.

Assumption of risks.

10. It is not merely the physical surroundings of the servant that must be obvious to him in order that he may be held to have assumed the risks arising therefrom, but it must be obvious to him, or at least to an ordinarily prudent servant under the circumstances, that there is danger to him in such a situation. *Burns v. Delaware & A. Teleg. & Teleph. Co.* (N. J. Err. & App.) 956

Fellow servants.

11. A railroad conductor in signaling the engineer to back the engine for the purpose of effecting a coupling acts in his capacity as representative of the master, and not as a fellow servant of the brakeman, who is attempting to prepare the cars for the coupling; so that the master will be liable in case he acts negligently to the injury of the brakeman, although the engineer would have obeyed the signal had it been given by the brakeman himself. *Alabama G. S. R. Co. v. Baldwin* (Tenn.) 340

12. If rails, loaded under the supervision of a foreman, to be sent down an incline into a mine, are negligently loaded so that one falls from the car and injures an employee, the negligence is that of the foreman, and not of the servant working under him, and the master will be liable for the resulting injury. *Johnson v. Union P. Coal Co.* (Utah) 506

13. Persons engaged in the service of a master, who are intrusted by him with the management or direction of his general work, or with some particular part thereof, are not fellow servants with the subordinate employees, but are vice principals, for whose negligence, resulting in the injury of employees, the master is liable. Id.

14. The duty of the master to exercise care for the safety of the servant cannot be evaded by the employment of others for its performance; and the persons so employed are not fellow servants engaged in common employment with the servant for whose safety the care is to be exercised. *Burns v. Delaware & A. Teleg. & Teleph. Co.* (N. J. Err. & App.) 956

Injuries to third persons.

15. A railroad company is not liable for injuries to a boy from a torpedo which he picks up near the track merely upon evidence that a brakeman tossed it to a flagman, who threw it back, and, upon the brakeman's failure to catch it and letting it fall to the ground, no attempt was made to recover and remove it to a safe place; 67 L. R. A.

since there is nothing to show that the employees were acting within the scope of their employment. *Oberton v. Boston & M. R.* (Mass.) 422

16. The appointment of one as cashier at a railway station, with power to collect money, give receipts, sell tickets, take care of the money received, and forward it to the treasurer of the company, does not empower him to arrest persons whom he suspects of having stolen money which has come into his possession, so as to render the railroad company liable in case he causes the arrest of an innocent person. *Daniel v. Atlanta C. L. R. Co.* (N. C.) 455

NOTES AND BRIEFS.

Master and servant; employing servant violating contract; after notice of servant's wrong: inducing or encouraging servant to break contract; who is a "laborer." 66

Liability for acts of servant in excess of powers; for wilful or malicious act of servant: while acting within general scope of employment; liability for unlawful arrest. 456

Assumption of risk of injury by fellow servants; liability for negligence of superintendent when acting as fellow servant; conductor as coservant of other railway employees. 340

Duty of master toward volunteer; who is volunteer; effect of minority of volunteer. 701

Injury to servant by fall of rail from car; sufficiency of care used in loading; when done in usual and customary way; failure to adopt rules as proof of negligence; assumption of risks by servant; men lowering rails into mine as fellow servants of employee in mine; right of servant to rely on master's diligence to protect him; duty to keep place of work safe. 506

Negligence of servant in throwing torpedo on track. 422

MAXIMS.

1. Caveat emptor. *Bostwick v. Mutual L. Ins. Co.* (Wis.) 705

2. He who remains silent when, in conscience, he ought to speak, will be debarred from speaking when, in conscience, he ought to remain silent." *Cornerstone Bank v. Rhodes* (Ind. Terr.) 812

3. He who seeks equity must do equity. *Tripp v. Nobles* (N. C.) 449

4. It is to the interest of the state that there should be an end to litigation. *State v. Marsh* (N. C.) 179

5. Reason is the soul of the law, and, when the reason of any particular law

ceases, so does the law itself. *Tripp v. Nobles* (N. C.) 449

6. *Vigilantibus, et non dormientibus servat lex.* *Bostwick v. Mutual L. Ins. Co.* (Wis.) 705

7. *Volenti non fit injuria.* *People v. Mills* (N. Y.) 131

NOTES AND BRIEFS.

Res ipsa loquitur. 476

Volenti non fit injuria. 134

MECHANICS' LIENS.

See LIENS.

MISDEMEANOR.

NOTES AND BRIEFS.

Misdemeanor; homicide in attempting to prevent. 536

MISTAKE.

NOTES AND BRIEFS.

Mistake; waiver of. 705

Right to recover money paid by; negligence in making payment. 718

MONOPOLY.

Validity of Contract Not to Engage Services from Rival Company, see CONTRACTS, 8.

Constitutionality of Anti-Trust Law, see CONSTITUTIONAL LAW.

1. The making of anti-competitive trade agreements as to products and merchandise bought or sold on the general market is contrary to public policy, and it is competent for the legislature to enact penal measures to prevent the making and carrying out of such agreements. *State v. Smiley* (Kan.) 903

2. An agreement entered into by all the dealers on a certain market, limiting their right, severally, under stipulated forfeitures or penalties to buy all the grain they otherwise might on such market, is an agreement in restraint of trade, and falls within the penal terms of the Kansas anti-trust act of 1897. *Id.*

NOTES AND BRIEFS.

Monopolies; anti-trust law; what contracts in restraint of trade violate. 63

Validity of statute to restrain. 905

MORTGAGE.

Recording of, as Constituting Notice. see NOTICE.

An affidavit of a renewal of a chattel mortgage in favor of a corporation after it is received and filed by the register of deeds of the county is not void, so as not to 67 L. R. A.

impart constructive notice of the lien of the mortgage, by reason of the fact that the affidavit is sworn to before a notary public who is an officer and stockholder in said corporation. *Fair v. Citizens' State Bank* (Kan.) 851

NOTES AND BRIEFS.

Mortgage; of burial lot. 122

Taxation of. 202

Affidavit of renewal; effect on validity of verifying before interested person. 851

MUNICIPAL CORPORATIONS.

Judicial Notice that Lights Cannot be Located in Street without Authority of Municipality, see EVIDENCE, 5.

Validity of Statute Requiring License for Sale of Intoxicating Liquors within Prescribed Distance from Corporate Limits, see CONSTITUTIONAL LAW, 10.

Constitutionality of Ordinance Forbidding Public Meetings in Streets, see CONSTITUTIONAL LAW, 2.

See also PUBLIC IMPROVEMENTS; PUBLIC MONIES; WATERS.

A city may, by ordinance, prohibit females from entering places where intoxicating liquors are sold, for immoral purposes. *State v. Nelson* (Idaho) 808

NOTES AND BRIEFS.

See also HIGHWAYS; INTOXICATING LIQUORS.

Municipal corporations; liability for injury to abutting land by operations on highway; duties and liabilities as to surface waters. 643

Delegation to, of power to regulate use of street; right to declare void ordinance expressly authorized by statute. 803

Necessity that ordinance be reasonable; reasonableness of, as question for court; ordinance must be tested by its own terms; reasonableness of penalty for violation of; prohibiting presence of females in saloons. 808

Liability for injury caused by performance of governmental duty; for injury from defect in plan of drainage; right to drain surface water into streams; liability for injury caused by; failure to keep sewer and cesspool in repair; flooding of cellar thereby; insufficiency of drain in times of floods; surface water in streets overflowing on land of adjoining proprietor; liability for failure to enact or enforce ordinances; injury from obstruction of culvert under highway; liability for damages resulting from torts of officers; right to invade private property. 932

NAVIGABLE WATERS.

See **WATERS.**

NEGLIGENCE.

Presumption of Negligence, see **EVIDENCE.**

See also **CARRIERS; PROXIMATE CAUSE; TELEGRAPHS.**

1. A street railroad company is not liable in damages for the killing of a dog by one of its cars in motion, unless the killing is done either wilfully, wantonly, or recklessly. *Moore v. Charlotte E. R. L. & P. Co. (N. C.)* 470

2. The rule that contributory negligence is not a defense to an intentional wrong does not apply to a situation where negligence is so inexcusable as not to be really a contributing cause, but to be really a cause intervening between the wrong and the injury as the real producing cause thereof. *Bostwick v. Mutual L. Ins. Co. (Wis.)* 705

NOTES AND BRIEFS.

Negligence; effect of intervening agency; in placing electric light in close proximity to trolley wire at curve. 116

Presumption of, from happening of accident; in handling of electricity. 475

In doing act in ordinary and customary way. 506

In presuming that other person will perform his duty. 715

NEGOTIABLE INSTRUMENTS.

See **BILLS AND NOTES.**

NEW TRIAL.

A new trial cannot be granted in a criminal case for newly discovered evidence to rebut the testimony of one of the state's medical witnesses, who testified that he vaccinated accused and observed his condition on a certain day, by showing that the witness was mistaken, where the accused and his counsel knew before the trial ended that there was no evidence of recent vaccination of the accused, and had access to the prison records to determine the medical treatment of him. *State v. Quigley (R. I.)* 322

NONRESIDENTS.

Discrimination against, as a Denial of Equal Protection of the Laws, see **CONSTITUTIONAL LAW, 7.**

NOTICE.

To Consignee of Arrival of Consignment of Freight, see **CARRIERS.**

Sufficiency of Notice Sent by Mail, see **CARRIERS, 12.**

Of Loss, see **INSURANCE.**

A chattel mortgage regular upon its face, duly filed for record, and accompanied by an affidavit of renewal, filed in proper time, and regular upon its face, and regular in fact, except for the latent defect that the

notary public who administered the oath was a stockholder in the mortgagee corporation, imparts notice as fully as if such defect did not exist. *Fair v. Citizens' State Bank (Kan.)* 851

NOTES AND BRIEFS.

Notice; to agent of insurance company as notice to company. 518

Of assignment of chose in action to person from whom debt is owing. 619

Failure of statute to prescribe; fact of actual notice not sufficient to cure defect. 625

By record of instrument verified or acknowledged before person disqualified by interest. 851

NUISANCE.

Restraining Blowing of Factory Whistle, see **INJUNCTION, 2.**

The blowing of whistles at factories to regulate and direct the order of work is not a nuisance *per se*. *Redd v. Edna Cotton Mills (N. C.)* 983

NOTES AND BRIEFS.

Nuisance; blowing of whistle and other noises as; necessity that individual suffer special injury in order to maintain action; injunction to restrain. 983

OFFICERS.

NOTES AND BRIEFS.

See also **ARREST.**

Officers; homicide by. 292

Functions of county auditor ministerial, and not judicial. 331

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See **EVIDENCE.**

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NOTES AND BRIEFS.

Option; specific performance of option contract; withdrawal of option. 572

What constitutes unconditional acceptance of; expressing dissatisfaction with terms; affixing condition to acceptance. 853

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See **ACTION OR SUIT, 3, 4.**

PASSENGERS.

See **CARRIERS.**

PASSES.

Giving of, as Constituting an Unjust Discrimination, see **CARRIERS, 2.**

PATENTS.

NOTES AND BRIEFS.

Patents; no right to royalties earned be-

fore issuance of patent; inventor's interest in invention before issue of patent; what originality necessary to entitle one to patent; effect of selling article to others before issuance of patent; right of vendees to continue to sell to others after patent is issued.

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PAYMENT.

See JUDGMENT, NOTES AND BRIEFS.

PERPETUITIES.

1. A clause in a will forbidding the sale of testator's real estate during the lifetime of the life tenant is void, as against public policy. *Wool v. Fleetwood* (N. C.)

444

2. A codicil directing trustees, who, under the will, are to hold the residue of the estate during the lifetime of the testator's two youngest children paying annuities to all the children during such lives, and dividing the property at their termination, to hold the share of another child during her lifetime upon the happening of a certain contingency, paying her an annuity during her life, and dividing the principal among her children at her death, is void as suspending the period of alienation beyond two lives in being at the testator's death. *Hertzog v. Title Guarantee & T. Co.* (N. Y.)

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PERSONAL INJURIES.

To Passengers, see CARRIERS.

See also HIGHWAYS; MASTER AND SERVANT.

PLEADING.

Admissibility of Evidence under, see EVIDENCE.

1. A plaintiff who, where an exception of no cause of action is sustained, with leave to amend, amends his petition in obedience to the order of the court, thereby waives his right to question the correctness of the ruling on the exception. *Wolf v. New Orleans Tailor-Made Pants Co.* (La.)

65

2. Plaintiff may file more than one replication or subsequent pleading to any pleading of the defendant, if he so desires, under Fla. Rev. Stat. 1892, § 1059, providing that plaintiff may file as many replications or subsequent pleadings to any pleading of defendant as he may desire. *Hartford F. Ins. Co. v. Redding* (Fla.)

518

3. Leave to amend a pleading may be granted during a term of court without notice to the opposite party of the application therefor, even though the cause has been submitted upon demurrer by brief at such term.

Id.

4. A defect in a declaration in claiming damages by an incorrect measure cannot be tested by a general demurrer. *Beidler v. Sanitary District* (Ill.)

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5. An amendment of the declaration having been permitted pending the hearing of a demurrer thereto, the court should permit the defendant to plead or demur to the amended declaration, and it is error to apply the demurrer on file to the amended declaration without defendant's consent. *Hartford F. Ins. Co. v. Redding* (Fla.)

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6. A demurrer admits the truth of a plea that the provision for limitation of defendant's liability was valid according to the law of the state where the contract was made, in an action to recover the value of the property lost while in possession of a carrier for transportation. *Adams Exp. Co. v. Walker* (Ky.)

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NOTES AND BRIEFS.

Pleading; amendment of, to cure defect for which motion in arrest of judgment has been made.

179

Proof of note not stating consideration; sufficiency of statement that consideration was goods sold and delivered, without setting forth date, items, and kind of goods.

595

Discretion as to pleading title in general terms, or alleging specific links constituting chain of.

866

Necessity of alleging intent where statute makes intent an element of crime.

904

PLEDGE.

Attachment of Property by Creditors of Pledgeor, see ATTACHMENT.

POLICE POWER.

See CONSTITUTIONAL LAW.

POLL TAX.

See TAXES.

PRESCRIPTION.

Rights Acquired by, see CANALS.

NOTES AND BRIEFS.

Prescription; acquirement of riparian rights by; right of private individuals to acquire prescriptive rights against public.

829

PRESUMPTIONS.

See EVIDENCE.

PRINCIPAL AND AGENT.

1. An agent who signs a contract to convey his principal's land thereby warrants his authority to make the contract, and is liable in damages to the other contracting party in case the authority does not in fact exist. *Le Roy v. Jacobosky* (N. C.)

977

2. A local agent of a telegraph company, intrusted with the duty and responsibility of getting up all possible information with respect to claims for damages because of

breach of contract to transmit messages, has power to bind the company by a waiver of a condition as to time within which the claim must be presented. *Hays v. Western U. Teleg. Co.* (S. C.) 481

3. One contracting with an agent knowing that he has no authority to bind his principal upon the contract cannot hold him liable for the damages in case the principal refuses to carry out the contract. *Le Roy v. Jacobosky* (N. C.) 977

4. In order to constitute a ratification, there must be acceptance of the results of the act with an intent to ratify, and with full knowledge of all the material circumstances. *Russell v. Erie R. Co.* (N. J. Err. & App.) 433

5. One who accepts an agency to take charge of a house and lot belonging to his principal, collects the rents, pays taxes, and sees to repairs, and gives advice as to the value of the principal's unimproved farm lands, thereby assumes a fiduciary and confidential relation, and cannot purchase such farm lands for himself and in his own name without making full disclosure of all facts bearing on the value of such lands material for the principal to know in order to act intelligently, and if the agent conceals such facts the conveyance is voidable at the principal's election. *Van Dusen v. Bigelow* (N. D.) 288

NOTES AND BRIEFS.

Principal and agent; agency as question of fact; what sufficient to constitute agency to sell real estate; necessity that appointment as agent be accepted; agent's duty toward principal. 288

Duty of person dealing with agent to ascertain extent of powers. 435

PRINCIPAL AND SURETY.

Ratification of an unauthorized signing of their names to a renewal note by the maker will be effected in case sureties on a note, which is past due, upon receiving notice from the payee that a new note has been substituted for the old one with their names attached to sureties, neglect to repudiate the transaction, and fail to notify the payee of their nonliability until after the insolvency and death of the maker. *Cornerstone Bank v. Rhodes* (Ind. Terr.) 812

PRIVILEGED COMMUNICATIONS.

See WITNESSES.

PROCESS.

See WRIT AND PROCESS.

PROMISSORY NOTES.

See BILLS AND NOTES.

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PROPERTY.

The rights of the maker of a note, to whom it had been indorsed and delivered by the payee as a gift, are not affected by the fact that it is found among the effects of another person after the latter's death, and his administrator takes possession of and attempts to enforce it as part of the estate. *Vann v. Edwards* (N. C.) 461

PROXIMATE CAUSE.

Placing an electric light in close proximity to a trolley wire at a curve is not the proximate cause of an injury to one struck by glass falling from the globe when shattered by a trolley leaving the wire, since failure to keep the trolley on the wire is *prima facie* negligence, and is the act of a responsible person intervening between the placing of the light and the injury. *Nelson v. Narragansett Electric Light Co.* (R. I.) 116

NOTES AND BRIEFS.

Proximate cause; what constitutes. 506

PUBLIC IMPROVEMENTS.

Assessment for Local Improvements as a Denial of Due Process of Law, see CONSTITUTIONAL LAW, 14.

Equitable Relief from Invalid Assessment, see EQUITY.

1. A provision in a contract for a municipal improvement that the contractor shall receive assessment certificates against the abutting property in full compensation for his labor without recourse to the municipal corporation does not relieve the city from liability in case it makes an assessment which is invalid and unenforceable. *Iowa Pipe & Tile Co. v. Callanan* (Iowa) 408

2. Notice of an assessment for a sewer improvement is not insufficient because the same document notices other and different improvements. *Id.*

NOTES AND BRIEFS.

Public improvements; assessments for; necessity of notice; front-foot rule; necessity of benefits. 408

PUBLIC MONEY.

1. The appropriation of money for the care of destitute children is for a public purpose. *Hager v. Kentucky Children's Home Soc.* (Ky.) 815

2. The appropriation of public money for use by a private corporation organized to care for destitute children is not prevented by a constitutional provision forbidding the giving or loaning of the state's credit to any corporation. *Id.*

3. That a public charity is to be admin-

istered by a private corporation will not prevent the state from appropriating the public funds to it. Id.

4. That a state has no power to remove the officers of a corporation organized to administer a public charity to which the state has made an appropriation will not invalidate the appropriation, where the state takes a bond conditioned upon the proper use of the funds, and requires a report of such use to the proper state officials. Id.

5. A charter giving a corporation organized to secure homes for destitute children power to adopt by-laws in harmony with those of a national association does not show that an appropriation of public funds for its use may be diverted to objects in which the state has no interest, where the statute provides that the by-laws must not be in conflict with the laws of the state, and the appropriation act requires the money to be applied for the benefit of the children of the state. Id.

6. An appropriation of public funds for a public charity to be administered by a private corporation does not create an indebtedness against the state if it may be discontinued, reduced, or changed at the pleasure of the legislature. Id.

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See also CARRIERS.

1. The burning of buildings near a railroad right of way may be found to have been caused by sparks from an engine where no fire existed before the passage of the engine, which was emitting a large quantity of

smoke and fire, and shortly after its passage fire was discovered in the grass, which communicated to and consumed the buildings. *Dyer v. Maine C. R. Co. (Me.)* 416

2. The engineer in charge of a moving locomotive is not bound either to keep as vigilant lookout for dogs on the track, or to exercise as great care in the management of his engine to prevent their injury, as in the case of cattle or live stock. *Moore v. Charlotte E. R. L. & P. Co. (N. C.)* 470

3. One in charge of a locomotive or motor car, seeing a dog near the track, is entitled to act upon the presumption that it will get out of the way in time to avoid danger, in the absence of anything to indicate that it is helpless or totally indifferent to its surroundings. Id.

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See also CARRIERS; LIENS.

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Injury to boy by torpedo picked up near track; liability of company. 422

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REAL PROPERTY.

See also PERPETUITIES.

A fee in the first taker is not created by the rule in *Shelley's Case* by a conveyance to one for her natural life with provisions for forfeiture in case of attempt to encumber, or nonpayment of taxes, "and at her death to her children or to their lineal descendants;" and it is immaterial that, under the forfeiture clause, in case of compliance with the conditions the land was to pass to the lineal descendants of the life tenant. *Brown v. Brown (Iowa)* 629

NOTES AND BRIEFS.

See also FRAUD.

Real property; rule in *Shelley's Case*; not law in Iowa, life estate, with remainder in fee. 629

RECORDS.

On Appeal, see APPEAL AND ERROR.

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1. A district attorney, even when acting by permission of a judge of the court, has no authority to consent to the removal of indictments from the court records, so as to relieve one who removes them from his consent with intent to destroy them from liability to prosecution under the provisions of the statute which make their wilful and unlawful removal criminal, and their unlawful appropriation grand larceny. *People v. Mills (N. Y.)* 131

2. Taking up court records from the place where they have been laid, and walking away with them with intent to destroy them, are overt acts which render one guilty under a statute making the unlawful removal of such records a crime, although they were taken from a place where they had been placed by authority of the district attorney for the purpose of detecting defendant in the commission of the crime. *Id.*

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A sale of goods to be delivered "F. O. B. cars" imposes on the seller the duty of procuring the cars to carry out the contract, in the absence of clear and satisfactory evidence of a custom to the contrary, known to both parties to the transaction at the time of making the contract. *Vogt v. Shienebeck* (Wis.) 756

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SET-OFF AND COUNTERCLAIM.

Damages accruing to a telephone company for breach of contract by a patron not to make use of rival lines may be set up as a counterclaim, in an action to hold it liable for withdrawing its service from him, under a statute permitting to be filed as a counterclaim a cause of action connected with the subject of the principal action. *Gwynn v. Citizens' Teleph. Co.* (S. C.) 111

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Of Contract to Sell Property Devised by Will, see EXECUTORS AND ADMINISTRATORS.

In a suit to compel specific performance of a contract to convey land which, subsequently to the execution of the contract, has been conveyed by the vendor to, and paid for by, a third person, the decree should require a conveyance by the latter, and entitle him to the purchase money, and not declare his deed void, and direct payment of the purchase money to the original vendor. *Frank v. Stratford-Handcock* (Wyo.) 571

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Specific performance; necessity of mutuality of obligation; of option contract; acceptance of offer and tender as entitling party to specific performance. 571

Of contract to convey real estate; action as one *in personam*; provision in decree that, on failure of defendant to execute conveyance, commissioner appointed by court should execute it; service by publication in case of. 940

STATUTES.

1. A bill which is introduced into the legislature within the time designated by the Constitution may properly become a law, although the constitutional authority for such legislation is not granted until after the expiration of the time when bills might constitutionally be introduced for passage at the pending session of the legislature. *Morrison v. Kent* (Mich.) 965

2. The constitutional prohibition against the passage of any statute containing matter different from that expressed in the title thereof is not violated by an act entitled "An Act to Amend the Charter of the City of Atlanta; to wit, The Act Incorporating the City of Atlanta, Approved February 28, 1874," etc., and empowering the mayor and general-council of the city to provide by ordinance for the regulation of public meetings and public speaking in its streets by

preventing the obstruction thereof or the gathering of disorderly crowds thereon. *Fitts v. Atlanta* (Ga.) 803

3. An appropriation of public funds to be expended by a private corporation organized to provide homes for destitute children is not void as local or special legislation when it is for the benefit of all children of the class within the state generally. *Hager v. Kentucky Children's Home Soc.* (Ky.) 815

4. Objections to the constitutional validity of statutes can be made only by those to whom the enactment applies, and against whom attempts to enforce it are made. *State v. Smiley* (Kan.) 903

5. That the language of an anti-trust law is broad enough to include classes of persons who cannot rightfully be included therein does not render it invalid as to one who does not come within any of such classes. *Id.*

Construction.

6. The general language of statutes will be limited to such persons and subjects as it is reasonable to presume the legislature intended it should apply. *Id.*

7. An act providing that if, at any time after the incurring of an indebtedness or the accrual of a cause of action against him or the entry of judgment against him, a debtor "shall have been" or shall be absent from the territory, the time during which he "may have been" or may be absent shall not be included in computing the period of limitations (*N. M. Laws 1903, chap. 62, p. 121*), must be construed to be retrospective in operation. *Orman v. Van Arsdell* (N. M.) 438

8. A statute making the injury or killing of cattle or other live stock by a railroad company *prima facie* evidence of negligence does not apply in case of the killing of a dog. *Moore v. Charlotte E. R. L. & P. Co.* (N. C.) 470

Repeal or annulment.

9. Florida act approved June 2, 1893, chap. 4173, p. 101, providing for the recovery of attorneys' fees in certain actions against insurance companies, was not repealed by act approved May 31, 1899, chap. 4677, p. 33. *L'Engle v. Scottish Union & N. Ins. Co.* (Fla.) 581

Hartford F. Ins. Co. v. Redding (Fla.) 518

10. A statute, authorizing superintendents of the poor to draw from time to time on the county treasury for expenses incurred in the discharge of their duties is annulled by a subsequent statute providing that all bills against the county shall be audited or allowed by the board of auditors except 67 L. R. A.

those of the drain commissioners and board of supervisors. *Morrison v. Kent* (Mich.) 965

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An interurban electric railroad is classed as a street railroad by the statutes of this state. *Cincinnati, L. & A. Electric Street R. Co. v. Lohe* (Ohio) 637

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Assessment for Local Improvements as a Denial of Due Process of Law, see **CONSTITUTIONAL LAW**, 14.

Injunction to Restrain Collection of, see **INJUNCTION**.

1. Taxes imposed as a deterrent against the transaction of a certain business need not be collected through judicial proceedings, but may be enforced by distraint or tax sale. *Hodge v. Muscatine County* (Iowa) 624

2. Provisions of a mulct tax law relating to the remission of the tax as well as the provisions for its enforcement are incorporated in a statute imposing a tax upon property devoted to a business different from that to which the law is primarily applicable, by a provision that the new tax shall be assessed and collected in the same manner as in the former law, although the sections relating to the remission are not specifically mentioned in the later statute. *Id.*

3. Mortgages and notes of solvent debtors are property at the residence of their owner, within the meaning of a constitutional provision permitting the legislature to levy taxes upon such property as it shall prescribe. *Kingsley v. Merrill* (Wis.) 200

4. The furnishing of trading stamps by merchants to their customers at the time of making purchases, in consideration of a cash payment, is not a business which may be separated from the business of selling the merchandise and taxed under a municipal charter authorizing the classification and taxation of business, trades, and professions carried on within the city. *Hewin v. Atlanta* (Ga.) 795

Equality and uniformity.

5. A poll tax for street purposes upon male inhabitants between the ages of twenty-one and fifty, except members of voluntary fire departments, contravenes a constitutional provision authorizing the legislature to empower municipal corporations to levy taxes which shall be equal and uniform in respect to persons within the jurisdiction of the body levying them. *State v. Ide* (Wash.) 280

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6. A taxation of solvent credits does not present a case of double taxation, forbidden by the constitutional requirements of uniformity, although a tax may also be levied on the debtor. *Kingsley v. Merrill* (Wis.) 200

7. The constitutional requirement of uniformity in taxation is not violated with respect to a tax upon credits by imposing it upon those which are solvent only, leaving debts due by insolvent persons untaxed. *Id.*

Franchise tax.

8. The amount of capital employed by a corporation, and not its share stock, is to be considered under a statute imposing a franchise tax upon corporations, to be computed upon the basis of the amount of capital stock employed within the state. *People ex rel. Commercial Cable Co. v. Morgan* (N. Y.) 980

9. Government bonds and those of other corporations held by a corporation whose capital stock is subject to a franchise tax cannot be presumed to have been purchased with surplus so as to bring them within the rule withdrawing them from consideration in ascertaining the capital employed within the state, if so purchased, against the finding of the comptroller that they were purchased with capital as distinguished from surplus. *Id.*

10. The value of stock of another corporation purchased by a corporation against which a franchise tax is to be enforced and paid for with its bonds, to secure which the stock is deposited with a trustee, is to be regarded as part of the capital employed within the state, where the identity of the former corporation is preserved, although the stock was purchased for the purpose of securing the assets and privileges of the other corporation. *Id.*

Levy and assessment.

11. Popular acquiescence in a particular mode of levying taxes for a long period of time cannot make it legal if it clearly contravenes the provisions of the Constitution. *State v. Ide* (Wash.) 280

12. No notice of the assessment or levy need be given to the one engaged in the business in case of the imposition of a specific tax upon the business of selling cigarettes. *Hodge v. Muscatine County* (Iowa) 624

13. For the purpose of determining whether or not the maker of notes is solvent within the meaning of a statute taxing solvent credits, he must be considered solvent if, although indebted to others, he has business or income and pays his debts, or has property out of which collection can be made. *Kingsley v. Merrill* (Wis.) 200

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Taxes; extent of power to tax; taxation of choses in action; what necessary to make property subject to tax; imposing tax upon debts of solvent persons only; validity of tax on mortgage; where land is also taxed for full value to mortgagor; effect of inequality of tax. 201

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On franchise of corporation; how computed; how amount of capital determined for purpose of; including government bonds and those of other corporations. 961

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Measure of Damages for Failure to Advise Sendee of Inability to Deliver Message, see DAMAGES, 3.

Presumption of Negligence in Failing to Deliver Telegram, see EVIDENCE, 16.

Waiver of Defense, see WAIVER.

1. Change of the stated price in a telegram intended to notify a purchaser of the market price of mules so as apparently to quote them at \$10 a head less than their market price, which results in the sendee's directing the purchase of a certain number on his account, will render the telegraph company liable for the difference in the price paid and that stated in the telegram as delivered. *Hays v. Western U. Teleg. Co.* (S. C.) 481

2. Negligence in the transmission of a telegram is shown by the making of such a change in the name of the sendee that a person answering to the substituted name cannot be found. *Green v. Western U. Teleg. Co.* (N. C.) 985

3. A telegraph company may be held liable for damages for mental anguish where, by reason of its failure to deliver a telegram, friends fail to meet a sixteen-year-old girl who arrives after midnight in a strange city and is compelled to drive two miles in company with a strange driver in search of their residence. *Id.*

4. To entitle the sendee to sue for failure promptly to transmit and deliver a telegram, the telegraph company must know, or 67 L. R. A.

be chargeable with notice, that the message is for his benefit. *Frazier v. Western U. Teleg. Co.* (Or.) 319

5. A message addressed to a firm who are not known by the telegraph company to be brokers, directing them to see a certain person and take his last offer, does not disclose that it is for the benefit of the addressees, so as to give them a right of action for failure promptly to deliver it, where the telegraph company is not otherwise notified that it is intended for their benefit. *Id.*

6. A telegraph company receiving a message for transmission is bound to notify the sender, in case the line is obstructed so that the message cannot be sent within a reasonable time, so as to give him an opportunity to avail himself of other modes of conveying the desired information to the sendee; and it is liable to the sendee for any damages which may be caused to him because of non-performance of this obligation. *Swan v. Western U. Teleg. Co.* (C. C. A. 7th C.) 153

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Punitive Damages for Refusal to Furnish Service, see DAMAGES, 12.

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See also SET-OFF AND COUNTERCLAIM.

1. A telephone company is bound to furnish service on equal terms to all applying for it. *Gwynn v. Citizens' Teleph. Co.* (S. C.) 111

2. That a patron of a telephone company has broken his agreement not to make use of the lines of a rival company gives the former no right to refuse to grant him further service. Id.

3. A telephone company will not be required to furnish service to a bawdy house. *Godwin v. Carolina Teleph. & Teleg. Co.* (N. C.) 251

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A tender made for the purpose of exercising an option to purchase real estate which has been conveyed by the vendor to a third person after the execution of the contract is properly made to the original vendor. *Frank v. Stratford-Handcock* (Wyo.) 571

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TRIAL.

Cure of Error in Excluding Evidence by Subsequent Admission of Similar Evidence, see APPEAL AND ERROR, 9.
See also AGREED CASE.

1. The liability of one, who, being tenant in common with his wards, contracts to sell the common property without authority to bind them for breach of his contract to convey his own interest and for breach of his warranty of authority to sign the contract on their behalf, cannot be tried upon one issue. *Le Roy v. Jacobosky* (N. C.) 977

2. When, under the provisions of W. Va. Code 1899, chap. 106, § 23, a petition is filed in a suit in equity founded upon an attachment, setting up title by purchase, and the plaintiff in the cause relies upon fraud in the alleged purchase to defeat the claim of title so set up, the trial of the issue must be upon the petition without any other pleading, and by jury, unless trial by jury is waived; and it is reversible error to hear and determine the issue upon the petition, and answer thereto, and depositions of witnesses, according to the rules and principles governing courts of equity. *Lipscomb v. Condon* (W. Va.) 670

3. Waiver of the right of trial by jury must be by consent entered of record; it cannot be merely inferred from the fact that the court tried the case without objection. Id.

4. The suspension of a trial for a short time, against the protest of the defendant, for the purpose of procuring the evidence of an important witness, is a matter within the discretion of the trial judge, and is not error. *Walker v. State* (Ga.) 426

Instructions.

5. A charge in relation to the law of conspiracy was proper in a murder trial, where accused was jointly indicted with another for the murder, and there was evidence that tended, to some extent at least, to show that accused and such other had entered into a conspiracy to commit the murder. Id.

6. In the absence of any evidence of threats against a deceased person, by one on trial for his murder, the trial judge should not charge the jury in relation to threats. Id.

7. One on trial for the commission of a crime cannot require the judge to single out for particular comment in its instructions to the jury certain facts or evidence to which his attention is called. *State v. Quigley* (R. I.) 322

Questions for jury.

8. Whether or not a city is negligent in permitting an electric light to be placed in such a manner that the shadow cast by the

supporting pole conceals an opening in a cross walk, which may cause injury to pedestrians, is a question for the jury. *Stone v. Seattle* (Wash.) 253

9. The question of what is a reasonable time in which freight is to be removed from the cars by the consignee so as to relieve the carrier from risk of loss is one of law for the court, where there is no dispute about the material facts. *Normile v. Northern P. R. Co.* (Wash.) 271

10. The jury must decide whether, under all the circumstances, an officer attempting to arrest for misdemeanor a drunken person who resists the arrest at a time when bystanders are present, who presumably would render assistance, is justified in striking him on the head with a billy, and, if so, whether or not he exerts more force than is permissible, where the blows result in death. *State v. Phillips* (Iowa) 292

11. When the evidence, as to whether or not a master has promulgated suitable rules for the government of his employees, is such that reasonable men might differ as to whether or not the duty has been performed, the question must be determined by the jury. *Johnson v. Union P. Coal Co.* (Utah) 506

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Reasonableness of tax, or of ordinance imposing, as question for court. 798

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See also **MONOPOLY.**

The court cannot take a portion of the fund out of the hands of trustees for the purpose of giving validity to a codicil by permitting a construction of its provisions independently from those of the will where a fund is left to trustees to pay annuities to testator's children during the lifetime of two of them, and to devise the residue at their decease, and the codicil attempts to create a further restriction on the alienation of the share of one of the children under certain contingencies. *Hertzog v. Title Guarantee & T. Co.* (N. Y.) 146

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Consideration of Option Contract, see **CONTRACTS**, 5. 6.

Measure of Damages for Breach of Contract, see **DAMAGES**, 7. 8.

See also **SPECIFIC PERFORMANCE.**

1. Absence of obligation, on the part of one who has an option to purchase land, to make the purchase, will not bar his right to have the contract enforced against the vendor, when he elects to exercise the option, and tenders the purchase price. *Frank v. Stratford-Handcock* (Wyo.) 571

2. An agreement, without consideration, giving an option to purchase real estate, may be revoked at any time before it is accepted, and a revocation is effected by a sale and conveyance of the property to a stranger. *Id.*

3. An acceptance in writing of a formal and carefully prepared option of sale of land, within the time allowed by it for acceptance, using the formal words, "according to terms of the option given me," to which there is added, by the conjunction "and," a request for a departure from its terms as to the time and place of performance, is unconditional, and converts the option into an executory contract of sale. *Turner v. McCormick* (W. Va.) 853

VOTERS AND ELECTIONS.

See also **MANDAMUS.**

1. The claim of a candidate for office to have his name printed in the regular party column where all the candidates in the column can be voted for at once by a mark at the head of the column, presents a question of substantial right. *State ex rel. Howells v. Metcalf* (S. D.) 331

2. An organized political party cannot have at the same time on the official ballot more than one candidate for the same county office. *Id.*

3. That faction of a county convention which assembles at the place designated by the chairman and a majority of the county

committee, organizes, and proceeds to nominate candidates, must be regarded as the regular representative of the party, in the absence of anything which justifies delegates in refusing to attend at the place selected. Id.

4. The desire to prevent bloodshed is not a sufficient excuse to justify delegates to a convention of a prominent political party in refusing to attend the meeting organized by the central committee. Id.

5. Delegates are not justified in refusing to attend the convention organized by the central committee of a political party because there are contesting delegations, and the central committee is favorable to the opposing faction. Id.

6. The names of candidates nominated by a convention erroneously claiming to represent a political party, in opposition to the regular convention, of that party, should be excluded from the official ballot. Id.

7. That the law does not require the official ballots to be printed and in possession of the proper officer until ten days before election does not, prior to that time, deprive the court of jurisdiction of a controversy to settle the names which shall be placed upon the ballot. Id.

8. An act which prohibits the printing of the name of a candidate for office in more than one column of the official ballot is, as to a candidate who is the nominee of a single political party and the nominee of electors by petition, a reasonable regulation of the manner of exercising the right of suffrage, and is valid and constitutional. *State ex rel. Fisk v. Porter* (N. D.) 473

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WAIVER.

Seeking further information as to the merits of a claim against a telegraph company for damages for breach of a contract to transmit a message, long after receipt of verbal notice of it, and eight or ten days after receiving written notice, without disclosing any intention to rely on the fact that the claim was not presented in time, constitutes a waiver of that defense. *Hays v. Western U. Teleg. Co.* (S. C.) 481
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Measure of Damages for Injury to Riparian Property, see DAMAGES.

Lowering of Water of Navigable Stream as Constituting a Taking of Property, see EMINENT DOMAIN.

See also CANALS.

Public; navigable.

1. The right of the public to improve navigation without liability for consequential injuries to riparian rights does not include the right to take the water of a navigable stream to supply an artificial channel or canal. *Beidler v. Sanitary District* (Ill.) 820

2. A public corporation organized to provide a drainage system cannot contest its liability to make compensation for injuries done to riparian owners by taking water from a navigable stream to supply its ditch, upon the ground that incidentally it has created a navigable channel, and that the public is not liable for injuries to riparian owners in consequence of the improvement of navigation. Id.

Obstruction.

3. A municipal corporation which has utilized a stream to carry off the surface water falling within its watershed, and, for the maintenance of the public health, has cleaned its bed, is not liable to a riparian owner for failure to remove obstructions placed in the stream by another riparian owner so that the water is dammed back to the injury of the former. *A. L. Lakey Co. v. Kalamazoo* (Mich.) 931

4. A municipal corporation which turns into a stream flowing through it storm sewers from streets within the watershed of the stream is not bound to remove the sand and debris carried into the stream by the water for the purpose of protecting riparian owners from injury by overflow of the stream. Id.

Surface water.

5. The owner of lands through which a natural watercourse flows may accumulate surface waters falling upon lands adjacent thereto, and cast the same into such stream, without becoming liable to a lower riparian owner for damages, so long as the natural capacity of the stream is not exceeded. *Baldwin v. Ohio Twp.* (Kan.) 642

6. An upper proprietor of lands is not

liable to a lower proprietor for damages caused by diverting surface water and casting it into a natural watercourse passing through both estates, where such diversion is occasioned by the improvement of the upper estate in good faith, and where the injury is incidental, small, or not occasioned by the natural carrying capacity of the stream being exceeded. *Id.*

7. A lower riparian proprietor who is injured by the act of a road overseer who in good faith made a substantial improvement to a highway by grading it up and by cutting a ditch along its side, whereby surface waters were gathered and cast into a natural watercourse flowing across such highway, to the damage of such lower proprietor, cannot recover damages or enjoin the maintenance of such ditch; it not appearing that such damages were occasioned by the overflow of the stream by reason of the increased flow of water therein. *Id.*

NOTES AND BRIEFS.

Waters; grant of water power:—(I.) Form; estate created; (II.) successive and conflicting grants; (III.) what rights conveyed: (a) by general grants: (1) in general; (2) construction of grant; (3) exceptions and reservations; (4) sufficiency of conveyance; (b) grant of flow of stream; (c) grant of dam; (d) head and flow; (e) races, channels, and flumes; (f) right to convey; rescission; (g) other matters; (IV.) limitation of rights: (a) as to use: (1) general rules; (2) illustrations; (b) as to premises; (c) as to quantity; (d) improved machinery; (e) as to time; (V.) protecting rights: (a) by repairing works; (b) by action; (VI.) measurement; (VII.) loss of rights; (VIII.) compensation; (IX.) covenants: (a) in general; (b) runs with the land; (c) breach; (d) damages. 369

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damages for diversion of water; where damage to property is caused by legal acts; who are riparian owners; acquirement of riparian rights by prescription; respective rights of several riparian owners; injury by exercise of state's right to improve navigation; necessity of proving actual damage from diversion. 825

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WHISTLE.

Restraining Blowing of, see INJUNCTION, 2.

Blowing of, as Constituting a Nuisance. see NUISANCES.

WILLS.

Sale of Property Devised by Will, see EXECUTORS AND ADMINISTRATORS.

See also TRUSTS.

1. Creditors of a widow, who become such after the death of her husband, cannot complain of her election to claim under the will of her husband, which devises to her her own real estate with remainder to her children, and an additional sum of money. *Tripp v. Nobles* (N. C.) 449

2. A widow who offers for probate, and undertakes to carry out as administratrix with the will annexed, the will of her husband, which devises to her her own land for life, with remainder to their children, and an additional sum of money, is estopped to assert her absolute title to the real estate; and it is immaterial that the money is only a small portion of the value of the estate, and no more than she would be entitled to claim under the law for support. *Id.*

After-acquired property.

3. The intention of the testator, as gathered from the four corners of the will, in the light of the circumstances under which it was written, will determine whether or not he has disposed of after-acquired real estate. *Mueller v. Buenger* (Mo.) 648

4. A will may pass title in after-acquired real estate under a statute providing that every person may by last will devise "all his estate, real, personal, and mixed." *Id.* **Devise and legacy.**

5. The use of the word "heirs" in conveying an interest by will after the statute has made the use of such word unnecessary to convey a fee-simple estate does not cast a doubt upon the intention of the deviser to devise a fee simple. *Gannon v. Albright* (Mo.) 97

6. The use of the word "bequeath" in making a devise of real estate does not indicate an intention to convey less than the fee-simple estate when used in connection with the word "devise." *Id.*

7. Following a devise of real estate in terms broad enough to convey a fee simple, with a provision that the land shall not be sold, "at least not before" the devisee becomes of age, gives a power of alienation, at least by implication, and renders a subsequent limitation over of the estate void. *Id.*

8. A devise to certain persons named, "and unto their heirs and assigns forever," is not cut down, either expressly or by implication, from a fee simple to a fee tail by a subsequent declaration that, if either should die without "issue," his share should go over to others. *Id.*

9. A fee-simple estate devised to one with contingent limitation over in case he should die without issue becomes absolute and incontestable in his assignee upon his death leaving children surviving him. *Id.*

10. If the devise of a fee tail is to be implied from the limitation over of the estate in the event that the devisee should "die without leaving any issue" the words must be taken as referring to an indefinite failure of issue, which will render the limitation over void for remoteness. *Id.*

11. Under a statute providing that, in case of a limitation over in a devise upon the death of the first taker without issue, the word "issue" must be taken to mean issue living at the death of the person named; an estate tail by implication cannot be created by a limitation over after such failure of issue, but, in case the first taker has issue living at his death, his estate in fee is absolute. *Id.*

12. Where, because of a statutory provision that a limitation over in a devise in case of the death of the first taker without issue shall be referred to the time of the first taker's death, no estate tail can be implied from such a provision in the devise, the right of the first taker to the fee simple in case he dies leaving issue is not affected by further statutory provisions abolishing fee tails, and providing that, in cases where by the common law such estate would exist under the terms of the instrument, the first taker should have a life estate, and the next in succession a fee simple. *Id.*

13. If a will making a limitation over after the death of the first taker without issue is susceptible of a construction that will make it apply to a definite failure of issue at the time of his death, such construction will be adopted in preference to one requiring an indefinite failure of issue. *Id.*

14. The word "remainder" in a statute providing that, in case of the limitation of a remainder upon failure of issue, the word "issue" must be construed as issue living

at the death of the life tenant, is broad enough to include an executory devise which is to take effect upon such failure of issue. *Id.*

15. The one half of a tract of land acquired by a testator after the execution of his will will pass under the residuary clause, and not under the clause disposing of the half which he owned at the time the will was made, where by the latter clause he gave to his niece "my interest" in the tract, and by the residuary clause gave to his wife "all the remainder of my property, both real and personal, I may possess at my death, . . . excepting that property which I have mentioned" in the former clause of the will. *Mueller v. Buenger (Mo.)* 648

16. A residuary devise to testator's widow will not, as against his children, pass title to a burial lot upon which members of the testator's family are buried. *Waldron's Petition (R. I.)* 118

17. A direction that testator's real estate remain in the name of his estate for a period of five years after the death of his wife, who is given a life estate in the property, and that at the expiration of that period his children appoint commissioners who shall partition the property between them, does not prevent the immediate vesting of the remainder in them, so that with the co-operation of the life tenant they can convey a good title to the property immediately after the death of the testator. *Wool v. Fleetwood (N. C.)* 444

18. The meaning of the words "lawful heirs" cannot be restricted as including only children. *Id.*

19. A provision in a will that, five years after the death of a life tenant, testator's children shall procure the property to be divided between them, and that they shall own and occupy during their natural lives, and directing that at their death the property shall go to their lawful heirs, vests in them a fee simple, under the rule in *Shelley's Case*, so that an attempt to make a further limitation of the estate in case of their death without lawful heirs is void. *Id.*

20. A limitation over to the heirs of testator in case of failure of lawful heirs of the persons to whom and their lawful heirs an estate is given, is defeated, and does not make the first estate a conditional or defeasible fee if the heirs of testator and of such persons must of necessity be the same persons. *Id.*

21. No estate vests in the children until the widow's death, under a will giving real estate to testator's wife for life, and providing that at the expiration of the life

estate "that which is given to her for life shall be equally divided between all my children, share and share alike, the representatives of such as may have died to stand in the place of their ancestors," and therefore a child dying before the widow has no interest which will pass by its will. *Bowen v. Hackney* (N. C.) 440

22. The word "representatives" in a devise of a remainder to be equally divided, at the expiration of the life estate, among testator's children, "the representatives of such as may die to stand in the place of their ancestors," is not broad enough to include a devisee of the interest of a child. *Id.*

23. A revocation, as to one of the testator's children, of a provision in a will that the remainder of his property shall be divided among his children, will leave the portion of that child to be distributed as interstate property. *Herzog v. Title Guarantee & T. Co.* (N. Y.) 146

24. A partial disinheritance of a child, who, by the terms of a will, is to share equally in the distribution of testator's estate, does not, in the absence of express words, constitute a devise to the other children; but, as to the portion taken from such legatee, there will be an intestacy. *Id.*

25. A bequest is not a gift to a class within the rule that it shall be divided among the survivors, where at the time of making it the number of the donees is certain, and the share each is to receive is also certain, and in no way dependent for its amount upon the members who shall survive. *Id.*

Revocation.

26. Wills may be revoked, not only by a written instrument, as provided in N. M. Comp. Laws 1897, § 1953, but also in certain causes by operation of law. *Re Teopfer's Estate* (N. M.) 315

27. The marriage of a testator or testatrix, whether or not it is followed by the birth of a child, revokes an antenuptial will. *Id.*

Codicils.

28. The provisions of a will will be affected by those of a codicil only so far as the latter is valid. *Herzog v. Title Guarantee & T. Co.* (N. Y.) 146

29. A provision in a will giving a child an annuity and an equal share in the residue when distributed is modified by a codicil providing that, in case of her marriage to a person named, her annuity shall be a specified amount, and upon her death a certain sum shall be divided among her children, so far as the matter of definiteness and certainty of language is concerned. *Id.*

NOTES AND BRIEFS.

Wills; devise of fee simple, with absolute power of alienation; validity of subsequent devise over; devise to certain persons and to their heirs and assigns forever, with limitation over in case of failure of issue. 98

Invalid suspension of power of alienation; effect of invalid codicil on provisions of will; construction of, causing intestacy, not favored; provision that remainder of property shall be divided among testator's children; effect of revocation as to one child, on distribution of his share; effect of annuities to suspend power of alienation. 147

Of woman; revocation by marriage; effect of statutes prescribing method of express revocation. 316

Tendency of court to regard devise as vested; what circumstances will overcome. 441

Meaning of "lawful heirs;" rule in *Shelley's Case*; clause forbidding sale of real estate during lifetime of life tenant; effect of deed by remainderman and life tenant to convey title. 445

Effect to pass title to after-acquired property. 648

WITNESSES.

Review of Findings as to Qualifications of Expert Witness, see *APPEAL AND ERROR*, 4.

1. Defendant in a criminal case may be required to testify that he had married the state's main witness just prior to the trial, even though he married her for the purpose of suppressing her testimony. *Moore v. State* (Tex. Crim. App.) 499

2. The state cannot place on the stand the wife of one on trial for a crime, and ask her questions as to the commission of the crime, for the purpose of forcing defendant to object to her testimony against him in order to prejudice his case, by supporting a theory that he married her to suppress her testimony under a statute making her incompetent to testify against him. *Id.*

3. The judge who convened a grand jury which is investigating a crime cannot be permitted to give in evidence a confession made to him by a witness called before such jury, who is subsequently indicted and placed on trial, where the witness, being unable to obtain advice from a lawyer in whom he had confidence, went to the judge, and, upon stating his difficulty, was told by the judge that he could give him no advice, but that he should tell the truth, whereupon the witness made the confession: such evidence is excluded upon the grounds that it is in the nature of a confidential communication from client to counsel, and that it was received by the judge in his official capacity, as having charge of the grand jury

and being required to determine what testimony the witnesses before it might be required to give. *People v. Pratt* (Mich.) 923

4. In making a statement an accused person is not subject to cross-examination without his consent, and he cannot be subjected thereto because he incorporates in his statement the answer to a question that his counsel asked permission to suggest to him, after the judge had refused such permission and had notified accused that, if he answered that question, he would subject himself to cross-examination. *Walker v. State* (Ga.) 426

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Witnesses; effect of marrying a witness in order to prevent her from testifying:— (I.) Competency at common law; (II.) competency under statutory provisions. 499

WOMEN.

Constitutionality of Statute Excluding Women from Saloons, see INTOXICATING LIQUORS.

NOTES AND BRIEFS.

Women; ordinance prohibiting person 67 L. R. A.

selling liquor from permitting females to enter place of business. 808

WRIT AND PROCESS.

1. Service of summons by publication will not confer jurisdiction to compel a nonresident to perform his contract to convey real estate located within the state *Silver Camp Min. Co. v. Dickert* (Mont.) 940

2. A statute providing for service of process on nonresident defendants by publication will be construed to apply to cases where, under recognized principles of law, suits may be instituted against such defendants, and will not be held to confer jurisdiction in case of service of process in that manner in a suit merely *in personam*. Id.

NOTES AND BRIEFS.

Writ and process; sufficiency of service by publication in action for specific performance. 941

WRITS.

See CERTIORARI; HABEAS CORPUS; MANDAMUS.

Ex. * 6 P.
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